Not Reported in Cal.Rptr.3d, 2008 WL 257457 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2008 WL 257457 (Cal.App. 4 Dist.))

Court of Appeal, Fourth District, Division 2, California.
Cheryl A. MIRAGLIA et al., Plaintiffs and Appellants,
v.
CALIFORNIA DEPARTMENT OF CORRECTIONS, Defendant and Respondent.

No. E041637.
(Super.Ct.No. RIC400034).
Jan. 31, 2008.

APPEAL from the Superior Court of Riverside County. Craig Riemer, Judge. Affirmed.
Dunn **Koes**, Pamela E. Dunn, Daniel J. **Koes** and Mayo L. Makarczyk for Plaintiffs and Appellants.

Edmund G. Brown, Jr., Attorney General, Jacob A. Appelsmith, Senior Assistant Attorney General, and Chris A. Knudsen, Supervising Deputy Attorney General, for Defendant and Respondent.

OPINION

GAUT, J.

1. *Introduction*

***1** Plaintiffs Cheryl A. Miraglia and Dorothy E. Gonzalez appeal from an order granting defendant's separate motions for summary judgment because plaintiffs admitted they had not suffered an adverse personnel action. The court also denied plaintiffs' motion to set aside the judgment (Code Civ. Proc., § 473), made on the grounds plaintiffs' attorney erred in preparing plaintiffs' responses to defendant's requests for admission.

An order granting summary judgment is reviewed de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) An order denying a motion to set aside a judgment is reviewed for abuse of discretion. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610; *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118; see *Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1266, 1268.)

We uphold both rulings of the trial court and affirm the judgment.

2. *Factual and Procedural Background*

Plaintiffs' third amended complaint asserts a single cause of action for retaliation under the California Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq.

Both plaintiffs were employed by the California Department of Corrections (Department) and the California Rehabilitation Center (Center). According to their version of events, at a meeting in November 2001, plaintiffs complained to the Department about what they perceived to be discrimination at the Center favoring African-American employees. Plaintiffs contend they were then subjected to a campaign of harassment from coworkers and supervisors until they were forced to stop working in July 2002 (Gonzalez) and August 2002 (Miraglia). The harassment included "overt hostility ... humiliating plaintiffs in front of their peers, micromanaging plaintiffs' work, and denying legitimate vacation requests."

Defendant describes the events differently. As set forth in an exhaustively detailed summary in its respondent's brief, defendant contends the November 2001 meeting was mainly about plaintiffs cooking in their shared office. Defendant acknowledges plaintiffs had complaints about their treatment by other employees but defendant characterizes these incidents as a trivial "disparate collection of mainly one-time events involving different employees" that did not constitute an adverse employment action.

Not Reported in Cal.Rptr.3d, 2008 WL 257457 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2008 WL 257457 (Cal.App. 4 Dist.))

In May 2004, in response to defendant's requests for admission propounded in February 2004, both plaintiffs admitted without qualification the following statement: "You never received an adverse personnel action during the time you worked for the California Department of Corrections."

Defendant filed its motions for summary judgment in September 2005. Each motion set forth plaintiffs' previous admissions as part of defendant's separate statements of undisputed material facts.

Plaintiffs filed their oppositions in March 2006. In their responses to defendant's separate statements, plaintiffs' lawyer attempted to dispute (or qualify) plaintiffs' previous admissions with the following statement: "My understanding was that the inquiry applied to verbal and or written personnel actions, however, re-thinking, I suppose you could classify the April 2002 work increase as a 'Adverse Personnel Action.' " Plaintiffs' memorandum of points and authorities did not discuss the admissions or their effect upon plaintiffs' case.

***2** Based on plaintiffs' admissions, the trial court granted defendant's motions for summary judgment.

In July 2006, plaintiffs then filed their motion to set aside the judgment based on their attorney's mistake. (Code Civ. Proc., § 473 .) In his supporting declaration, plaintiffs' lawyer finally explained he interpreted the phrase "adverse personnel action," as used in defendant's requests for admission, to mean " 'formal' adverse actions such as demotions, suspensions, reduction in pay, days off, etc.," rather than "continuous adverse conduct by fellow employees and supervisors that created a ' *adverse employment environment* ' " or "informal acts of harassment and retaliation that created a hostile work environment."

The court denied plaintiffs' motion to set aside the judgment.

3. *Discussion*

As the foregoing demonstrates, plaintiffs made their admissions in May 2004. When confronted in defendant's summary judgment motions with the potential extinguishing effect of the admissions, plaintiffs did little to correct any error when they filed their oppositions in March 2006-except for a slight effort to qualify the admissions. Instead, they continued to argue the merits of their case. It was not until they filed their motion to set aside the judgment that they squarely addressed the damaging impact of the admissions.

Now plaintiffs argue the trial court abused its discretion by denying equitable, discretionary, or mandatory relief. We disagree because we conclude plaintiffs should not have made unqualified admissions in May 2004 and should have tried to correct their error before July 2006. Most of plaintiffs' arguments depend on their assertion that a distinction exists between "adverse employment action" and "adverse personnel action." But, even if such a distinction exists, plaintiffs should have formulated an admission that made that distinction explicitly. (Code Civ. Proc., § 2033.220; *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271-1274.) Because their lawyer's private opinion about the meaning of the two phrases was not revealed in plaintiffs' responses to the requests for admission and he did not try to fix any error until the hearing on defendant's summary judgment motions, the court did not err in granting defendant's motions or abuse its discretion in denying plaintiffs' motion to set aside the judgment. We consider plaintiffs' several arguments in turn.

The trial court possesses the inherent equitable power to grant relief from judgment when there has been extrinsic fraud or mistake. (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854-855.) Extrinsic mistake involves excusable neglect and means a reasonably prudent person could have made the same error. (*In re Marriage of Melton* (1994) 28 Cal.App.4th 931, 937, citing *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471; *Bettencourt v. Los Rios Community Col-*

lege Dist. (1986) 42 Cal.3d 270, 276, citing *Ebersol v. Cowan* (1983) 35 Cal.3d 427, 435.) Plaintiffs argue they were entitled to equitable relief because their unintended admission was caused by their lawyer's reasonable mistake about the meaning of "adverse personnel action."

***3** Plaintiffs rely primarily on two cases. *Fredericks v. Kontos Industries, Inc.* (1987) 189 Cal.App.3d 272, 276-278, and *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028. *Fredericks* involves the trial court's discretion to interpret an admission. The appellate court recognized "the [trial] court must use its discretion to determine the scope and effect of the admission so that it accurately reflects what facts are admitted in the light of other evidence. [¶] ... [¶] The court must have discretion to admit evidence to elucidate and explain an admission, because the admission of a fact does not always reflect the party's reasonable understanding of that fact." (*Fredricks, supra,* at pp. 277-278.)

Plaintiffs' single cause of action for retaliation was brought under Government Code section 12940 , subdivision (h), making it actionable for "any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

Plaintiffs use *Yanowitz* to support their position that the phrase "adverse personnel action" as used in defendant's request for admissions has a different, more limited meaning under California law than the phrase "adverse employment action." Under *Yanowitz,* unlawful discrimination broadly encompasses "not only the so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), [fn. omitted] the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide. [Fn. omitted.]" (*Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at p. 1054.)

Yanowitz further explained, "Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of [Government Code] sections 12940(a) and 12940(h). [Fn. omitted.]" (*Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at pp. 1054-1055.)

***4** *Yanowitz* mentioned two illustrative cases: " *Wyatt v. City of Boston* (1st Cir.1994) 35 F.3d 13, 15-16 (stating that actions other than discharge are covered by title VII's antiretaliation provision and listing, as examples, 'employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees'); *Wideman v. Wal-Mart Stores, Inc.* [(11th Cir.1998)] 141 F.3d 1453, 1456 (finding that written reprimands, an employer's solicitation of negative comments by coworkers, and a one-day suspension constituted adverse employment actions)." (*Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at p. 1055, fn. 15.)

In contrast to the broad definitions used in *Yanowitz,* plaintiffs contend the phrase "adverse

personnel action" has a more particularized meaning. (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 61-65.) While an "adverse employment action" may be either formal or informal, the latter including acts of harassment and retaliation that create a hostile work environment, an "adverse personnel action" is only an action taken as part of personnel management. (*Janken, supra,* at pp. 64-65.)

We are not much persuaded by plaintiffs' lengthy discourse on this purported distinction. But, notwithstanding our skepticism, the chief problem with plaintiffs' line of argument on this point is that, whether or not it is true that California law interprets the two phrases differently, plaintiffs failed to include the distinction in their admissions. Code of Civil Procedure section 2033.220 provides: "(a) Each answer in a response to requests for admission shall be as complete and straightforward as the information reasonably available to the responding party permits. [¶] (b) Each answer shall: [¶] (1) Admit so much of the matter involved in the request as is true, either as expressed in the request itself or as reasonably and clearly qualified by the responding party." Plaintiffs did not make the necessary qualifications. They simply responded, "Admit."

Additionally, plaintiff's lawyer acknowledged some ambiguity and confusion about plaintiffs' admissions when he prepared his responses to defendant's separate statements. Nevertheless, he did not seek relief from the mistaken admissions until after the court granted defendant's summary judgment motions. As such, plaintiffs each "filed a mistaken response that [she] never later moved to amend or withdraw." (*Valerio v. Andrew Youngquist Construction, supra,* 103 Cal.App.4th at p. 1273.)

Under these circumstances, the trial court certainly did not abuse its discretion by deciding the admissions were fatal to plaintiffs' claims and granting defendant's summary judgment motions. For similar reasons, the trial court did not abuse its discretion by denying plaintiffs' motion to set aside the judgment on equitable grounds. It was not a reasonable or excusable mistake for a lawyer to recognize an error but fail to correct it until after his clients suffered the adverse consequences.

***5** Nor are plaintiffs entitled to mandatory or discretionary relief under Code of Civil Procedure section 473, subdivision (b). The proper avenue for relief was a timely motion brought under Code of Civil Procedure section 2033.300,[FN1] not section 473. (*St. Paul Fire & Marine Ins. Co. v. Superior Court* (1992) 2 Cal.App.4th 843, 852, disapproved on another ground in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983, fn. 12; *Janetsky v. Avis* (1986) 176 Cal.App.3d 799, 810.)

> FN1. Code of Civil Procedure section 2033.300 provides: "(a) A party may withdraw or amend an admission made in response to a request for admission only on leave of court granted after notice to all parties. [¶] (b) The court may permit withdrawal or amendment of an admission only if it determines that the admission was the result of mistake, inadvertence, or excusable neglect, and that the party who obtained the admission will not be substantially prejudiced in maintaining that party's action or defense on the merits."

4. *Disposition*

The parties' extensive briefing does not convince us this appeal is more complicated than we have deemed it here. We affirm the judgment. Defendant shall recover its costs on appeal.

We concur: HOLLENHORST, Acting P.J., and McKINSTER, J.

Cal.App. 4 Dist.,2008.
Miraglia v. California Dept. of Corrections
Not Reported in Cal.Rptr.3d, 2008 WL 257457 (Cal.App. 4 Dist.)

END OF DOCUMENT