Filed 3/28/17 Vincent v. Ralphs Grocery Co. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DIANE VINCENT, Plaintiff and Appellant, v. RALPHS GROCERY COMPANY, Defendant and Respondent.	B266244 (Los Angeles County Super. Ct. No. KC066539)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert A. Dukes, Judge. Affirmed.

Amezcua-Moll & Associates, Rosemary Amezcua-Moll and Sarah J. Nowels for Plaintiff and Appellant.

Burkhalter Kessler Clement & George, Daniel J. Kessler and Ros M. Lockwood for Defendant and Respondent.

Plaintiff and appellant Diane Vincent appeals from a judgment following the trial court's ruling granting the summary judgment motion of defendants Ralphs Grocery Company, The Kroger Co., and Food 4 Less of California, Inc.[1] Vincent brought a variety of employment claims against Ralphs, where she worked before her employment was terminated in March 2012. The claims included allegations that Ralphs discharged her because of her sexual orientation (i.e., heterosexual) and in retaliation for her assertion of her right to medical leave. She also alleged that Ralphs had improperly treated her as a management employee who was exempt from statutory and administrative rules governing overtime pay and breaks.

The trial court granted summary judgment, finding that the termination was supported by good cause and that Vincent failed to provide substantial evidence that the stated reason for the termination was pretextual. The court also found that there were no material disputed facts concerning Vincent's exempt status. We agree and affirm.

BACKGROUND

1. *Vincent's Employment and Discharge*

Vincent began working at Hughes Family Markets in 1995. Ralphs acquired Hughes in 1998. From 2010 until 2012 when she was discharged, Vincent worked as a store "co-manager," which is a salaried, management-level position.

In February 2011, Vincent was transferred to a Ralphs store in Downey. While there, she was the subject of a review

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[1] Although Vincent named all of these entities as defendants in her complaint, she appeals the judgment only with respect to Ralphs Grocery Company, her former employer. We therefore refer to the respondent as "Ralphs."

that Ralphs calls a "climate survey." Ralphs typically conducts such a survey in response to employee complaints. In this case, the survey was conducted by Bonnie Franco, Ralphs's manager of employee relations, in response to information that Franco had received from Brigitte Andersen, the district manager. After a number of employee interviews, including an interview of Vincent, the climate survey resulted in a warning and additional management training for Vincent. Soon after the warning, Andersen transferred Vincent to a smaller volume store (store 626).

On January 6, 2012, the manager of store 626, David Giddens, learned from a cashier, Christina Torres, about a refund transaction that had occurred the previous day involving Vincent. According to Torres, Vincent had requested a refund for a bottle of Jim Beam liquor without a receipt. When Torres scanned the item to obtain a current shelf price (which is the policy when a customer returns an item without a receipt), the price appeared as $17.99. However, Vincent told Torres that she had purchased the item for $19.99. She instructed Torres on how to perform an "override" to refund Vincent the $19.99. Giddens reported the incident to the loss prevention department.

In response to an e-mail inquiry on February 8, 2012, about how to proceed, Ralphs's manager of labor relations, Leroy Westmoreland, stated, "I wouldn't suspend but she should be told the matter remains under investigation and to not discuss it with anyone. I've issued two written warnings in the last several years for poor performance and treating her employees badly."

The district loss prevention manager, William Larriva, conducted an investigation and prepared a memorandum concerning the results. Larriva determined that the price for the

bottle of Jim Beam during the previous month (December) was never higher than $14.99. When Larriva interviewed Vincent on February 24, 2012, Vincent said that her boyfriend had purchased the bottle of Jim Beam and that she had decided to return it to get cash that her boyfriend owed her. She said that her boyfriend had told her that he paid $19.99 for the bottle. Vincent later e-mailed Larriva a copy of the receipt for the bottle of Jim Beam reflecting a purchase price on January 2, 2012, of $14.99.

A Ralphs's policy precludes employees from ringing up their own transactions. Another policy requires refunds to be limited to the current shelf price of the product when a customer does not have a receipt.

After her interview with Larriva, Vincent called in sick and requested a leave of absence, which Ralphs granted. Vincent later sent doctor notes excusing her from work. Andersen passed on the notes to Franco in an e-mail on February 29, 2012. Andersen concluded the e-mail with a question, "I'm hoping we have enough to support a termination or demotion at this point?" Franco responded that Ralphs's senior labor relations representative "gave me a heads up on the situation. It does not look good, but I need to review it internally."

On March 8, 2012, Franco sent an e-mail to Andersen as part of the same chain, stating, "We reviewed the case with Schroeder and the rest of the group here," and the "recommendation is termination." She asked whether Andersen needed to "discuss that recommendation with Servold, or are you comfortable having us proceed with the termination now?" Andersen responded, "Oh please proceed with the termination, I will inform [S]ervold."

John Schroeder is the vice-president of human resources for Ralphs. He first learned of the investigation involving Vincent's refund incident in February 2012 from Ralphs's senior labor relations representative. He discussed Larriva's investigation of the incident with Ralphs's human resources and legal management team, including Franco. They reviewed documents from Larriva's investigation and concluded that Vincent had violated company policy. Schroeder made the decision to terminate Vincent's employment based upon these violations. Franco prepared a letter notifying Vincent of the termination, which Andersen sent under her name.

2. *Ralphs's Summary Judgment Motion*

After a continuance, trial was set for July 14, 2015. Ralphs filed its summary judgment motion on March 26, 2015. Vincent took Andersen's deposition a month later, on April 24, 2015.

At the deposition, Ralphs's counsel allowed Vincent's counsel to inquire into Andersen's sexual orientation, and Vincent elicited testimony that Andersen is a lesbian involved in a committed relationship. However, Ralphs's counsel did not permit inquiry into Andersen's knowledge about the sexual orientations of other Ralphs's employees.

On May 15, 2015, Vincent served a notice of deposition of Ralphs's person most knowledgeable and written discovery requests directed in part to the theory that Vincent was discharged as a result of her sexual orientation (i.e., heterosexual). Ralphs would not agree to continue the summary judgment hearing or the trial date to permit the discovery. Vincent therefore filed an ex parte application for a continuance.

The trial court denied the ex parte application, ruling that "the lack of diligence in pursuing needed discovery does not give

good cause to extend the discovery cutoff or continue trial and the Motion for Summary Judgment." However, the court's denial was without prejudice to raising the continuance request in Vincent's summary judgment opposition.

The trial court heard the summary judgment motion on June 9, 2015. On June 23, 2015, the court issued a 10-page written order granting the motion in its entirety. With respect to Vincent's sexual orientation discrimination claim, the court found that Vincent "failed to produce any substantial evidence of discriminatory animus." The court also concluded that a continuance for further discovery was not warranted, as Vincent had had an opportunity to inquire into Andersen's sexual orientation and into Andersen's "involvement socially with individuals Vincent claims are homosexual as well as her role in promoting individuals Vincent claims are homosexual." The court found that Vincent had "failed to elicit and produce any evidence" supporting her allegation of sexual orientation discrimination and that she "failed to establish that a further deposition would elicit different testimony."

With respect to Vincent's retaliation claim, the trial court found that Vincent's proffered evidence created only " 'suspicions of improper motives . . . based primarily on her own conjecture and speculation' [citation] because of the leave being near the time of the termination." And, with respect to Vincent's claims for alleged violations of statutory and administrative employment rules, the court found that Ralphs had produced evidence showing that Vincent was "an exempt employee engaged in exempt duties of a "Co-Manager." In response, Vincent "presents no evidence that the majority of her time was spent doing hourly

tasks." Accordingly, the court found that there was no triable issue "as to Plaintiff's exemption status."

DISCUSSION

Vincent's complaint contained a variety of claims, including: (1) age discrimination; (2) sexual orientation discrimination; (3) retaliation for exercising medical leave rights; (4) breach of implied covenant not to discharge without good cause; (5) breach of implied covenant of good faith and fair dealing; (6) intentional infliction of emotional distress; (7) wrongful discharge in violation of public policy; and (8) various alleged Labor Code violations predicated upon the claim that Vincent was misclassified as an exempt employee. On appeal, Vincent argues only three categories of claims: (1) sexual orientation discrimination; (2) retaliation for exercising medical leave rights; and (3) misclassification. We therefore treat the other claims as abandoned. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) We address the three remaining claims below.

1. *Standard of Review*

a. Summary judgment

We apply a de novo standard of review to the trial court's summary judgment ruling. We interpret the evidence in the light most favorable to Vincent as the nonmoving party and resolve all doubts about the propriety of granting the motion in her favor. (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206.) In doing so, we consider only those facts that were before the trial court. (*American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1281 (*American Continental*).) We consider all the evidence before the trial court except that to which objections were made and properly sustained. (*Pipitone v.*

Williams (2016) 244 Cal.App.4th 1437, 1451–1452.) Although we independently review Ralphs's motion, Vincent has the responsibility as the appellant to demonstrate that the trial court's ruling was erroneous. (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 372.)

In exercising our independent review, we apply the standards applicable to summary judgment motions. A defendant moving for summary judgment has an initial burden of production to make a prima facie showing that there are no triable issues of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850–851.)[2] Once the moving party does so, the burden of production shifts to the opposing party to show the existence of material disputed facts. (*Ibid.*) The opposing party must make that showing with admissible evidence. (§ 437c, subd. (d); *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 846.) Thus, the opposing party may not simply rely upon its own pleadings to demonstrate the existence of a material triable issue. (§ 437c, subd. (p)(2); *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1054 (*Roman*).)

Particular summary judgment rules apply in employment cases, which often involve consideration of issues of intent and the reasons for an employer's conduct. An employer may meet its initial burden by showing a legitimate reason for the challenged employment action. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–356 (*Guz*).) If the employer makes such a showing, the employee must provide "substantial" evidence that

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[2] Subsequent undesignated statutory references are to the Code of Civil Procedure.

the employer's stated reasons were pretextual or that the employer acted with discriminatory animus, thereby raising at least an inference of discrimination. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004–1005 (*Hersant*).) The employee need not show that a discriminatory motive was the only reason for the employer's action. However, it must have been a "*substantial* motivating factor" in the employer's decision to take the challenged action. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 (*Harris*).) Summary judgment should be granted if, "given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Guz, supra*, 24 Cal.4th at p. 362.)

b. *The motion for a continuance*

Under section 437c, subdivision (h), a party opposing a motion for summary judgment is entitled to a continuance if it appears from the affidavits that "facts essential to justify opposition may exist but cannot, for reasons stated, be presented." To meet this requirement, the party requesting the continuance must " 'provide supporting affidavits or declarations detailing facts that would establish the existence of controverting evidence.' " (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 715 (*Lerma*), quoting *American Continental, supra,* 195 Cal.App.3d at p. 1280.) If a party fails to make the showing required under section 437c, a trial court nevertheless has the discretion to order a continuance, and the court's decision not to do so is reviewed under the abuse of discretion standard. (*Lerma*, at pp. 716–718.)

Although Vincent argues that she made the showing required under section 437c, subdivision (h), she agrees with Ralphs that the abuse of discretion standard applies to our review of the trial court's denial of her continuance request.

2. *Vincent's Sexual Orientation Discrimination Claim*

Ralphs provided evidence of a permissible, nondiscriminatory reason for Vincent's discharge. Ralphs submitted declarations from several employees, including Schroeder, explaining that, consistent with Ralphs's protocols, Schroeder made the decision to terminate Vincent's employment following an investigation and consultation with the human resources and legal management team. Schroeder testified that he made the decision to discharge Vincent based upon her violation of company policy in: (1) ringing up her own refund transaction; (2) refunding more than the current "shelf" price for a product when there is no receipt; and (3) refunding cash for a purchase above $5 rather than a Ralphs gift card. Ralphs also presented evidence that each of these rules was in fact part of Ralphs's policies, and that Ralphs identified the violations as grounds for discharge.

At her deposition, Vincent admitted that she instructed an employee on how to do an "override" to provide her with a refund for the bottle of Jim Beam that was greater than the current shelf price of the product. She admitted that she was aware of the company policy that an employee who rings up his or her own purchase was subject to dismissal and that violation of the policy to refund only the current shelf price of a product for a customer without a receipt could lead to disciplinary action "up to and

including termination." And she admitted that she did not follow the refund policy in returning the bottle of Jim Beam.[3]

It is irrelevant whether a jury or a judge would agree that Ralphs should have discharged Vincent based upon this violation. An employee cannot rebut an employer's evidence of a permissible reason for an adverse employment decision simply by showing that the employer's decision was " 'wrong, mistaken or unwise.' " (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 74–75.) Rather, the employee must provide evidence that the stated ground was merely a pretext for an impermissible reason that amounted to at least a "*substantial* motivating factor" for the adverse decision. (*Harris, supra,* 56 Cal.4th at p. 232; *Hersant, supra*, 57 Cal.App.4th at pp. 1004–1005.)

Vincent failed to provide such evidence. She did not provide any evidence that other Ralphs's employees were not discharged for similar violations. She claims that her discharge was inconsistent with Ralphs's customary procedures, but cites only her complaint in support of that claim. Allegations in her own complaint are not sufficient to raise a triable issue.[4] (*Roman, supra,* 237 Cal.App.4th at p. 1054.)

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[3] Although Vincent denied ringing up her own purchase, she admitted that it was against company policy for a manager to "do their own refund" and that she had authorized the refund to herself as the manager.

[4] Vincent relied below on testimony by a Ralphs's loss prevention employee, Charles Ortloff, whom she proffered as a "non-retained expert." Ortloff opined that Ralphs's policies are vague, that disciplinary decisions are variable, and that Vincent should have been given "progressive discipline" rather than discharged. The trial court sustained an objection to Ortloff's

Vincent also relies on her own testimony about her feelings of discomfort in several interactions with Andersen. She testified that during a store visit, Andersen asked Vincent to call her if she had any complaints about the store manager. Vincent knew that Andersen was a lesbian, and Andersen's request made her feel uncomfortable because she thought Andersen wanted Vincent to "be personal" with her. At another meeting with Andersen at the store to discuss the findings of the climate survey, Vincent testified that she again felt "uncomfortable" with Andersen when Andersen said that " 'we're all family here.' " On a third occasion, when Vincent was walking around the store with Andersen, Vincent also felt uncomfortable and testified that it was "not an easy feeling between us."

Vincent admitted that Andersen never discussed her sexual orientation with her; did not ask her on a date; and never touched her. Vincent could not recall Andersen saying anything sexually explicit. Vincent also did not know whether other co-managers called Andersen to talk about their stores. Thus, the evidence concerning Vincent's encounters with Anderson established no more than Vincent's own subjective discomfort. It did not rise above the level of speculation with respect to Andersen's intent or motives.

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testimony and Vincent has not challenged that evidentiary ruling on appeal. We therefore do not consider it. (See *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139–140 ["Where a plaintiff does not challenge the superior court's ruling sustaining a moving defendant's objections to evidence offered in opposition to the summary judgment motion, 'any issues concerning the correctness of the trial court's evidentiary rulings have been waived' "], quoting *Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014–1015.)

Finally, Vincent cites Andersen's February 29, 2012 e-mail to Franco stating, "I'm hoping we have enough to support a termination or demotion at this point?" Interpreted in the light most favorable to Vincent, this e-mail suggests that Andersen wished to see Vincent discharged or demoted. It says nothing about *why* or whether the reason had anything to do with sexual orientation.

The connection between this e-mail and the motives of the person who actually made the discharge decision is even more attenuated. Ralphs presented evidence that Schroeder was the person responsible for making that decision. Vincent's only response to that evidence is to cite the March 8, 2012 e-mail from Franco to Andersen in which Franco reported that, after reviewing "the case with Schroeder and the rest of the group here," the "recommendation is termination." Vincent argues that Franco's characterization of the decision as a "recommendation" and her question in the e-mail whether Andersen was "comfortable having us proceed with the termination now" suggests that Andersen had a role in the termination decision.

Andersen denied that she had any role in the termination decision. However, interpreting the e-mail exchange in favor of Vincent, it could suggest that Andersen was given an opportunity to object to the decision. But it does not show that she had any other role in the process, and it does not contradict Ralphs's evidence that Schroeder was the ultimate decision maker. Indeed, Andersen's initial e-mail stating—in the form of a question—that she was "hoping we have enough to support termination or demotion at this point" reflects an expectation that others would be responsible for the decision.

The fact that a final decision maker acts with a proper motive is not necessarily enough to justify summary judgment where the decision maker is merely an "instrumentality or conduit" (or "cat's paw") of a supervisor who materially influences the decision for improper reasons. (See, e.g., *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 113–114 & fn. 14 [evidence supported an inference that a store manager acted with a retaliatory motive in initiating and influencing an investigation that led to the ultimate decision to discharge the plaintiff].) However, an opportunity to object after a decision has been made is far different from influencing an investigation or a deliberation in a way that affects the outcome. There is no evidence suggesting that Andersen had any role in the discharge decision other than expressing her "hope" that there was enough evidence to terminate or demote and agreeing with the decision to discharge Vincent. This is not enough to sustain an inference that Schroeder acted as an "instrumentality" of Andersen in making an employment decision that he based upon the evidence of an admitted violation. The trial court therefore properly concluded that Vincent failed to meet her burden of showing triable issues of fact on her sexual orientation discrimination claim.

3. *Vincent's Retaliation Claim*

Under Government Code section 12945.2, subdivision (l), it is unlawful for an employer to discharge an employee "because of" the employee's "exercise of the right to . . . medical leave." Vincent claims that Ralphs discharged her because she took medical leave after she was interviewed in connection with the Jim Beam refund incident.

As with her discrimination claim, Vincent relies heavily on Andersen's February 29, 2012 e-mail for her retaliation claim. Vincent points out that the e-mail was included in a thread with the subject line " 'Doctors Notes' " and cites Andersen's deposition in which Andersen testified that her expressed hope that there was " 'enough to support termination or demotion at this point' " was due to her concern that Vincent "was out" and she "needed to fill that spot."

Even if a jury could infer that Andersen preferred to replace Vincent to address a staffing concern, Andersen's personal motivation was not relevant if it was not a substantial factor in the termination decision. For the same reasons as those discussed above, Vincent did not provide evidence sufficient to support an inference that Schroeder acted as Andersen's "instrumentality" in making his decision to discharge Vincent.[5]

Vincent also cites her own deposition testimony in which she referred to some documents written by the store manager, David Giddens, stating that "he was bothered by me taking any kind of sick leave." Vincent characterized his statement as a complaint that "he was upset because his vacation got pushed somewhere else, and he didn't feel that I—that I was reasonably taking the time off." It is unclear from her testimony about this unidentified writing whether Giddens's statements referred to Vincent's medical leave following the refund incident or to some other occasion. In any event, Vincent presented no evidence that Giddens had any role in the termination decision.

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[5] Vincent also relied below on the opinion of her proffered expert, Ortloff, that Andersen would have "[h]eavily influenced" the termination decision. For the reasons discussed above, we do not consider that evidence.

Apart from this evidence, Vincent relies on the fact that she was discharged while she was on medical leave. However, "temporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353.) Temporal proximity is particularly unpersuasive here, as Vincent claims that she took the medical leave because she was experiencing "severe anxiety" as a result of her meeting with the loss prevention managers about the incident that led to her termination. Thus, there was no unexplained coincidence between the timing of her leave and the decision to discharge her. (See *ibid.* [temporal proximity was especially inadequate to demonstrate a triable issue where the "employer raised questions about the employee's performance *before* he disclosed his symptoms"].)

We therefore conclude that the evidence was insufficient to raise a triable issue as to whether Vincent was discharged in retaliation for taking medical leave.

4. *Vincent's Misclassification Claim*

Vincent's claims for violations of the Labor Code depend upon the conclusion that the provisions on which she relies are applicable to her position as co-manager. She claimed that her position was not subject to the executive/management exemption from the applicable employment requirements (e.g., overtime pay and meal breaks) because she was required to do the work of "several non-exempt employees." (See Industrial Welfare Commission wage order No. 5-2001 (Cal. Code Regs., tit. 8, § 11050) (Wage Order 5)); Lab. Code, § 515, subd. (e).) Exemption is an affirmative defense for which the employer

carries the burden of proof. (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1010 (*UPS*).) The management exemption applies when an employee "primarily" performs management tasks, which means "more than one-half the employee's work time." (Wage Order 5, §§ 1, subd. (1)(e), 2, subd. (O); *UPS* at p. 1018.)

In support of its summary judgment motion on this issue, Ralphs presented evidence that: (1) the Ralphs's job description for co-manager described management tasks such as supervising "all store personnel," identifying "sales and merchandising opportunities," and enforcing company policies and procedures; (2) Vincent testified that she actually performed the management functions described in the job description; and (3) Vincent was instructed not to spend more than 50 percent of her time performing nonexempt tasks.

In response, Vincent presented her own deposition testimony in which she provided wide ranges of time that she estimated she spent on nonexempt tasks during the day. For example, she claimed to spend between 30 minutes and three hours a day restocking the milk case, one to four hours per day bagging groceries, and one to five hours making price changes. Critically, neither her general estimates at her deposition nor any other evidence that she submitted included any testimony that she actually spent more than 50 percent of her time on nonexempt tasks.[6] In light of the evidence that Ralphs provided

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[6] Vincent also relied below on an e-mail from Andersen that Vincent claimed directed her to devote 25 to 50 percent of her time to nonexempt duties as a cashier. The trial court correctly noted that the e-mail actually stated that Andersen would expect her to "spend 'at a minimum 25-50% of [her] day up front

concerning Vincent's responsibilities and the tasks that she actually performed as a co-manager, we agree with the trial court that this evidence did not create a triable issue concerning her exempt status.

5. *Vincent's Continuance Request*

The trial court concluded that no continuance was necessary because Vincent had an adequate opportunity to obtain evidence that Andersen engaged in preferential treatment of other employees based on sexual orientation and failed to show that further discovery would provide any additional evidence. (§ 437c, subd. (h).) We agree.

Vincent had an opportunity to examine Andersen about her sexual orientation and her role or lack of a role in promotion decisions concerning persons that Vincent believed might be gay. Vincent had no personal knowledge about the reasons for promotion of the persons she believed received preferential treatment and admitted that her own perception was her only basis for concluding that they had received such treatment.

Vincent's counsel also submitted a declaration, but the declaration simply explained that Vincent's *theory* was that "Ms. Andersen shows preferential treatment of homosexual employees because she herself is a homosexual." The declaration claimed that "this preferential treatment is shown by promotion and positive employment actions that are given at a disproportional rate to homosexual employees rather than heterosexual employees." However, the declaration provided no evidence that

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COACHING, *TEACHING* and jumping on as needed.' " (Italics added.)

such preferential treatment occurred or any reason to believe that such evidence existed.

Thus, the only *fact* available to Vincent to support her claim that additional evidence of discrimination "may exist" was Andersen's sexual orientation. (See § 437c, subd. (h).) The fact that Andersen is lesbian is not evidence that she discriminates against heterosexuals, just as evidence that a supervisor is heterosexual does not itself support any inference of bias against someone who is gay. Vincent's claim that evidence *might* exist supporting her discrimination claim was therefore based on speculation rather than evidence. No continuance was mandated under section 437c, subdivision (h), whether the trial court's decision on this issue is reviewed de novo or for abuse of discretion. (See *Lerma, supra,* 120 Cal.App.4th at pp. 715–716 [conclusory affidavit from counsel was insufficient to show specific facts necessary to oppose summary judgment].)

This conclusion is further supported by the lack of evidence that Andersen played a material role in the decision to discharge Vincent. Without such evidence, even if facts existed showing Andersen's alleged personal bias they would not be "essential to justify opposition." (§ 437c, subd. (h).)

We also conclude that the trial court properly declined to exercise its discretion to order a continuance despite Vincent's failure to make the showing required under section 437c, subdivision (h). Given the absence of any evidence of actual bias, the decision not to authorize further discovery into this sensitive issue was reasonable, and certainly was not " 'irrational or arbitrary.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

DISPOSITION

The judgment is affirmed. Ralphs is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.