Filed 1/28/15 Lewellen v. Molina Healthcare CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DIXIE LEWELLEN, Plaintiff and Appellant, v. MOLINA HEALTHCARE, INC., Defendant and Respondent.	B250557 (Los Angeles County Super. Ct. No. NC056924)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael P. Vicencia, Judge. Affirmed.

Lieber & Lieber Law Group and Mark Lieber for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Rachel Lee, John Haubrich; Snell & Wilmer, Mary-Christine Sungaila and Jenny Hua for Defendant and Respondent.

* * * * * *

In this employment discrimination and retaliation case, plaintiff Dixie Lewellen claims her employer Molina Healthcare, Inc. (Molina), engaged in national origin discrimination by replacing its American workforce with Indian nationals holding H1B visas brought into the United States by Molina. Plaintiff maintains she was subject to discrimination, a hostile work environment, and retaliation when she questioned the practice, which led to her discharge. She appeals the trial court's grant of summary judgment to Molina and the trial court's denial of her request to continue the hearing on the motion in order to conduct further discovery. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff began her employment with Molina in August 2004 as an accounts payable clerk in Molina's accounting/finance department. She was recruited by Helga Gergens, whom she had worked with at another company, because Gergens knew plaintiff was a "hard worker." Based on that prior experience, plaintiff knew Gergens would "scowl" and could be "a little moody," but plaintiff had no reservations about taking the job because she would not be working directly for Gergens.

In July 2006, Gergens promoted plaintiff to payroll administrator, which came with an increase in pay. Plaintiff was happy with the promotion, viewing it as "an opportunity to make a little bit more money, to advance in the company, learn something new." In this role with Gergens as her supervisor, plaintiff was in charge of payroll for nine Molina companies in multiple states with over 1,500 employees. Gergens remained her direct supervisor until June 2010, when payroll manager Ingrid Martinez began to directly supervise her. Plaintiff worked at Molina until September 2010. During that time she received all favorable evaluations and she was never disciplined.

Plaintiff claims she was subject to a hostile work environment beginning in 2007 over Molina's use of Indian nationals. She became aware of Molina's hiring of Indian nationals because, as part of her position, she would see various forms for employees and while those forms did not list ethnicity or race, plaintiff felt she could determine employees' ethnicities from other information. She also called the information

technology (IT) help desk once and spoke with a technician in India. She also heard general "buzz" in the office about the use of Indian nationals.

Plaintiff became aware of yearly layoffs, including a large layoff of IT workers in 2010, which she was told was due to "downsizing." When she expressed concerns about the 2010 layoff to Gergens, Gergens told her she might be affected, but plaintiff did not press the issue for fear of angering Gergens. Plaintiff mentioned the layoffs to Michael Greer in the human resources information systems (HRIS) department, and he commented Molina often claimed to be downsizing but then never actually downsized. When plaintiff mentioned the hiring of Indian nationals to Gergens, Gergens said, "Well, you need to get on board. This is the direction we're going in and you need to be on board with it." Another employee told her to "[g]et used to it" because that was the direction Molina was going.

Plaintiff raised questions with HRIS and some members of other departments about the hiring of Indian nationals because she was concerned it would affect her own job, although there were no Indian nationals in either accounting or payroll while plaintiff worked there. She claimed Gergens seemed to know when she talked to human resources about Indian nationals and made her life "hell" as a result. Gergens made her cry. Plaintiff felt like she was the "odd man out" because she was not included in lunches and general conversations and Gergens would roll her eyes at plaintiff and "turn her back" on plaintiff when she was talking to others. She was excluded from decisionmaking processes. On a dozen occasions Gergens "dumped" more work on her and was more critical of her job performance. Gergens called her "stupid" and implied she was a liar. Gergens stated or implied four or five times her job could be taken by an Indian national, and at some point Gergens told her Molina would be outsourcing jobs in finance and payroll. Plaintiff stated she was denied a raise in her last year at Molina when no one in the payroll department got a raise and the only employees who did had an increased workload due to a changeover in the payroll system. She also "felt the amount of the raises did not reflect [her] workload," explaining that when another employee went on maternity leave, plaintiff was required to take on extra work. When she complained to

Gergens about her workload, Gergens lightened it as plaintiff requested. Plaintiff felt human resources was powerless to help her because they were afraid of Gergens.

Plaintiff spoke with chief financial officer Joseph White about transferring out of the payroll department two months before she separated from Molina. He told her, "I know [Gergens] is a bitch, and I know she's hard to get along with, especially if she focuses on someone, and I know she's been focusing on you, but you do do a good job and, you know, you don't want to lose your job, so let me talk to [Gergens] and, and see how it goes."

Plaintiff never heard derogatory comments directed at her about being American, never witnessed anyone receiving preferential treatment based on their national origin, and believed her department had a "pretty diverse workforce."

Plaintiff's employment ended following a meeting with Josephine Wittenberg, the head of the human resources department, in connection with a complaint lodged against Gergens by another payroll employee. Wittenberg asked about plaintiff's experiences with Gergens because the complaining employee had claimed she was being singled out by Gergens based on her race. Plaintiff said Gergens called her a racist,[1] and Gergens's behavior toward her seemed to worsen whenever plaintiff talked to human resources about the hiring of Indian nationals. Plaintiff also told Wittenberg Gergens threatened her with losing her job to an Indian national.

When plaintiff returned from the meeting with Wittenberg, Gergens called her and reportedly said she believed plaintiff had lodged the complaint against her with human resources. According to plaintiff, Gergens screamed and threatened she would "get [her] for this" and "make [her] pay." After the conversation, plaintiff "felt [she] was fired," so she gathered her personal items and left the office without speaking to anyone. Wittenberg later wrote in an email to plaintiff's manager Martinez, another employee

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[1] Although plaintiff claims she told Wittenberg Gergens called her a racist, plaintiff explained at her deposition Gergens merely told her others said plaintiff was a racist, but Gergens did not believe them.

Ruth Anatalio, and chief financial officer White that she "received notice from [plaintiff] that she resigned effective Wednesday, September 29, 2010. [¶] She took her personal items with her when she left on Wednesday, September 29, 2010."

In the operative second amended complaint, plaintiff alleged claims of national origin discrimination in violation of the California Fair Employment and Housing Act (the FEHA) (Gov. Code, § 12940, subds. (a), (c), (d), (h), (j), (k)); intentional infliction of emotional distress; wrongful termination in violation of public policy; failure to take all reasonable steps to prevent discrimination and retaliation (Gov. Code, § 12940, subd. (k)); retaliation (Gov. Code, § 12940, subd. (h)); and a violation of Labor Code section 1102.5.[2] Molina moved for summary judgment, arguing plaintiff's national origin discrimination claim failed because plaintiff could not show discriminatory treatment or discriminatory animus; plaintiff's intentional infliction of emotional distress claim failed because the alleged conduct was not extreme or outrageous and because there was no underlying discrimination; plaintiff's wrongful termination claim failed because there was no causal link between her discharge and national origin and because her underlying claims failed; plaintiff's failure to prevent discrimination claim failed because her predicate discrimination claims failed; and plaintiff's retaliation claim failed because there was no causal connection between plaintiff's statements and any adverse employment action and there was no evidence plaintiff took any action to oppose discrimination.

In support of the motion, Molina submitted a declaration from Gergens, who confirmed she directly supervised plaintiff from July 2006 to June 2010, during which time she gave plaintiff generally positive performance reviews, gave plaintiff raises, and approved plaintiff's promotion to payroll administrator. She also confirmed plaintiff reported to Martinez when she separated from Molina in September 2010. When she left,

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[2] A demurrer to the Labor Code section 1102.5 claim was sustained without leave to amend, and plaintiff has not challenged that ruling on appeal.

her duties were assigned to two employees in the payroll department, neither of whom was an Indian national.

In opposition, plaintiff submitted a declaration from Wittenberg, who had conducted an internal investigation "under the pressure of mounting complaints of illegal discrimination and harassment coming from employees in the [IT] department, accounting, claims, and payroll departments." The investigation established ". . . Molina had discriminated against past employees and present employees by taking part in national origin discrimination, by terminating its American workers, U.S. citizens or those holding a green card, for the purpose of replacing them with Indian nationals, and by creating a hostile work environment which favored its Indian national employees."

Wittenberg also determined Gergens harassed and threatened her employees that they could easily be replaced, causing them to fear retaliation if they opposed her conduct. She had a "violent temper that resulted in uncontrolled rants and rages against other employees. She would yell at the top of her lungs, her face would turn red, and she would literally pull out her hair." With respect to plaintiff, Gergens harassed her when she complained to human resources and plaintiff's work environment became so hostile it prompted her to "leave voluntarily."

A report was prepared with these findings and presented to management, but ". . . Molina refused to take any steps to prevent future discrimination or to protect the rights and safety of its employees." The report itself was apparently lost or destroyed.

Wittenberg's conclusions were corroborated by Supriya Sood, vice-president of human resources at Molina when plaintiff left her employment, although she clarified the complaints were mostly coming from the IT department.

As part of plaintiff's opposition to the motion for summary judgment, plaintiff's counsel sought a continuance of the motion because plaintiff had been unable to depose chief information officer Amir Desai and Wittenberg, which would "provide plaintiff with additional evidence in which to oppose defendant's motion for summary judgment" and because a motion to compel further production of documents remained outstanding and was set for hearing on the same date as the summary judgment motion. The parties

had previously stipulated to continue the hearing on the summary judgment motion for three months to allow for additional discovery.

In reply, Molina argued plaintiff's claims of a hostile work environment should be disregarded because her sole theory of liability was national origin *discrimination*, not harassment. Molina also submitted additional deposition testimony from Sood, who testified the investigation conducted by Wittenberg must have been limited to the IT department, no similar investigation was done in other departments, and her belief that there was disparate treatment of Indian nationals was limited to the IT department.

Molina also opposed plaintiff's request for a continuance, arguing she failed to show that the additional evidence she sought would impact her claims, she had independent access to Wittenberg, and she had five months to depose Desai but did not.

The trial court granted summary judgment to Molina. On plaintiff's national origin discrimination and retaliation claims, the court found plaintiff suffered no adverse employment action because she was neither actually nor constructively discharged by Molina. On plaintiff's intentional infliction of emotional distress claim, the court found Molina's conduct was not extreme or outrageous as a matter of law. Plaintiff's wrongful termination claim failed because plaintiff was not fired, she was not replaced by an Indian national, and she made no complaints outside the workplace resulting in her termination in violation of a well-established public policy. Plaintiff's failure to prevent discrimination claim failed because plaintiff's predicate discrimination claim failed. The court denied plaintiff's request for a continuance because plaintiff "tacitly abandoned" it by not asserting it at the summary judgment hearing and by arguing the merits of the summary judgment motion, and alternatively, because plaintiff failed to specify "what pending discovery was necessary to oppose the motion and its relevance to the issues."

The court summarily overruled all evidentiary objections and vacated the discovery orders as moot.[3]

DISCUSSION[4]

1. Legal Standard

"Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) On appeal, 'we take the facts from the record that was before the trial court . . . . "'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" . . . We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.' [Citation.] '"We accept as true the facts . . . in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them."'" (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 863-864.)

2. Evidentiary Rulings

At the outset, plaintiff briefly argues the trial court abused its discretion by overruling her evidentiary objections without explanation. However, plaintiff has made no effort to show how the trial court's rulings were incorrect or if they were, how she was prejudiced, so she has forfeited this argument. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074.) Plaintiff also contends the trial court "completely disregarded the testimony of Sood, Wittenberg, and plaintiff in granting Molina's motion for summary judgment." We reject this contention because we find no indication in the record the trial court disregarded this evidence.

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3 Plaintiff filed her notice of appeal after the trial court issued its order granting summary judgment but before the court entered judgment. Although plaintiff's notice of appeal was premature, we will treat it as timely. (Cal. Rules of Court, rule 8.104(d)(2).)

4 Molina argues plaintiff waived her arguments on appeal by failing to properly cite authority and the record in her opening brief. We reject these contentions and proceed to the merits.

3. National Origin Discrimination and Retaliation

As relevant here, the FEHA makes it unlawful for an employer "to discharge" or "to discriminate against the person in compensation or in terms, conditions, or privileges of employment" on the basis of national origin. (Gov. Code, § 12940, subd. (a).) Similarly, the FEHA makes it unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [the FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under" the FEHA. (§ 12940, subd. (h).)

A prima facie case for discrimination and retaliation requires proof of an "adverse employment action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051 (*Yanowitz*).) In order to satisfy that requirement in this case, plaintiff asserts three theories: (1) she was actually discharged; (2) she was constructively discharged; and (3) if she was not discharged, she was subject to actions that "materially affect[ed] the terms, conditions, or privileges" of her employment. (*Id.* at p. 1052.) Plaintiff has failed to raise a triable issue of fact as to any of these theories.[5]

First, plaintiff offered no evidence Molina actually fired her and the undisputed evidence demonstrated she resigned. At her deposition, she never testified she was fired;

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[5] In her opposition to Molina's summary judgment motion, plaintiff argued her actual and constructive discharge theories only for her discrimination claim and argued the *Yanowitz* theory only for her retaliation claim. The trial court addressed only the actual and constructive discharge theories for both claims and did not address plaintiff's argument under *Yanowitz.* In her opening brief on appeal, plaintiff again argues actual or constructive discharge for her discrimination claim and the *Yanowitz* theory for her retaliation claim. Only in her reply brief does plaintiff argue the adverse employment action for her discrimination claim could be sustained under *Yanowitz*. Because the standard for adverse employment action is the same for both discrimination and retaliation claims, we will assume each theory applies to both claims. (See *Yanowitz, supra*, 36 Cal.4th at pp. 1050-1051 [holding the discrimination and retaliation provisions in the FEHA must be "interpreted to refer to and encompass the same forms of adverse employment activity"].) We also reject plaintiff's belated contention raised in her reply brief on appeal that Molina failed to raise the issue of constructive discharge in its motion for summary judgment. Plaintiff herself raised the issue in both her opposition to summary judgment and her opening brief on appeal.

she testified only that, after the conversation with Gergens, she "felt [she] was fired," so she took her personal items and left. Wittenberg's later email regarding plaintiff's separation confirmed plaintiff "resigned." Wittenberg even stated in her declaration *in support of* plaintiff's claims that Gergens' actions toward her prompted her to "leave voluntarily."

Second, plaintiff failed to offer evidence she was constructively discharged. In order to demonstrate a constructive discharge, a plaintiff must show "the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 (*Turner*).) "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Id.* at p. 1246.) Plaintiff claims she left Molina "due to the discrimination, hostile work environment, harassment, and non-responsiveness of [human resources]." But there is no evidence to support this contention. Instead, plaintiff made clear at her deposition she left because she "felt" she was fired after Gergens said she would "get [plaintiff]" and "make [her] pay" following plaintiff's interview with Wittenberg. This single incident did not create the "extraordinary and egregious" conditions necessary to coerce a reasonable employee to resign. (*Turner*, *supra*, 7 Cal.4th at p. 1246; see *id.* at p. 1247 ["'[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim"].) Plaintiff also relies heavily on Wittenberg's conclusion that plaintiff was harassed by Gergens when she complained to human resources and plaintiff's work environment became so hostile she was compelled to "leave voluntarily." But Wittenberg's testimony merely corroborated plaintiff's testimony as to what happened when plaintiff resigned. It did not create an issue of fact whether the conditions of plaintiff's employment were so egregious that a

reasonable employee in plaintiff's position would have felt she had no choice but to resign.

Finally, plaintiff failed to raise a triable issue of material fact that she was subject to adverse treatment short of termination that "materially affect[ed] the terms, conditions, or privileges of employment." (*Yanowitz, supra*, 36 Cal.4th at p. 1052.) "'[T]he determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.' [Citation.] Such a determination 'is not, by its nature, susceptible to a mathematically precise test.' [Citation.] '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 sections 12940(a) and 12940(h).'" (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 298 (*McCoy*).) "Actionable retaliation need not be carried out in 'one swift blow,' but rather may be 'a series of subtle, yet damaging, injuries.' [Citation.] Thus, each alleged retaliatory act need not constitute an adverse employment action in and of itself, and the totality of the circumstances must be considered." (*Ibid.*)

Plaintiff does not argue she was demoted, transferred, formally disciplined, or subject to reduced hours, pay, or benefits because she was American or because she complained about Molina's hiring of Indian nationals. To the contrary, during her tenure with Molina she received all favorable evaluations and she was never disciplined. She claims she was denied a raise in her last year of employment, but everyone in the payroll department was denied the same raise. Indeed, the only employees who were given a raise received it for a nondiscriminatory and nonretaliatory reason—they had borne an increased workload due to a changeover in the payroll system. Once Molina offered a legitimate reason for this raise, plaintiff was required to offer evidence the reason was

pretext, which she has not done. (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 397.) Plaintiff also "felt the amount of the raises did not reflect [her] workload" from taking on work when another employee went on maternity leave. But when she complained to Gergens about her workload, Gergens actually lightened it as plaintiff requested.

Perhaps recognizing the lack of tangible adverse employment actions, plaintiff primarily argues Gergens's course of conduct toward her amounted to an adverse employment action. Those actions included the following: when plaintiff mentioned the hiring of Indian nationals to Gergens, Gergens said, "Well, you need to get on board. This is the direction we're going in and you need to get on board with it"; Gergens stated or implied four or five times her job could be taken by an Indian national; Gergens yelled at plaintiff and called her a racist (although, as we noted *ante*, Gergens did not actually call her a racist); Gergens's behavior toward her seemed to worsen whenever plaintiff talked to human resources about the hiring of Indian nationals; on a dozen occasions Gergens "dumped" more work on her and was more critical of her job performance; Gergens called her "stupid" and implied she was a liar; Gergens blamed her for the investigation into allegations against Gergens; Gergens made her cry; plaintiff felt like the "odd man out" because she was not included in lunches and general conversations and Gergens would roll her eyes at plaintiff and "turn her back" on plaintiff when she was talking to others; plaintiff was excluded from decisionmaking processes; and Gergens yelled at her after plaintiff's interview with Wittenberg, saying she would "get [plaintiff]" and "make [her] pay."

Plaintiff offered no evidence Gergens's course of conduct materially adversely affected plaintiff's job performance, working conditions, or any other aspect of her employment. Certainly Gergens's treatment of plaintiff was inappropriate and plaintiff's emotional reaction was understandable, but the evidence shows no more than the "'"[m]inor 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 . . . ."'" (*McCoy, supra*, 216 Cal.App.4th at p. 298.) Indeed,

arguably the most serious act by Gergens was her threat she would "get [plaintiff]" and "make [her] pay" following plaintiff's interview with Wittenberg, but plaintiff no longer reported to Gergens at that time and plaintiff offered no evidence Gergens could have carried through with the threat. Even if Gergens could have, plaintiff resigned before Gergens had the opportunity to take any steps to do so.

Plaintiff attempts to analogize to *Yanowitz*, but the plaintiff in that case was subjected to a far more serious campaign of adverse actions that undermined and jeopardized the plaintiff's job, including "[m]onths of unwarranted and public criticism of a previously honored employee, an implied threat of termination, contacts with subordinates that only could have the effect of undermining a manager's effectiveness, and new regulation of the manner in which the manager oversaw her territory. . . . Such actions, which for purposes of this discussion we must assume were unjustified and were meant to punish Yanowitz for her failure to carry out her supervisor's order, placed her career in jeopardy." (*Yanowitz, supra,* 36 Cal.4th at p. 1060.) Here, while Gergens's course of conduct toward plaintiff was undoubtedly unpleasant and inappropriate, plaintiff offered no evidence it threatened her effectiveness in her position, placed her job in jeopardy, or otherwise "materially affect[ed] the terms, conditions, or privileges of employment." (*Id.* at p. 1052.) Therefore, plaintiff has failed to raise a triable issue of material fact that she was subject to an adverse employment action and summary judgment on her discrimination and retaliation claims was proper.[6]

4. Intentional Infliction of Emotional Distress

To establish a claim of intentional infliction of emotional distress, a plaintiff must prove "'(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff's injuries were actually and proximately caused by the defendant's outrageous conduct.'" (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 533 (*Dowds*).) Plaintiff failed to raise a triable

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6 In light of this conclusion, we need not address the parties' remaining arguments.

issue of fact on at least the first two elements, so summary judgment in Molina's favor was proper.

"'In order to meet the first requirement of the tort, the alleged conduct "'. . . must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.'"'" (*Dowds, supra*, 152 Cal.App.4th at p. 533.) "Whether a defendant's conduct can reasonably be found to be outrageous is a question of law that must initially be determined by the court; if reasonable persons may differ, it is for the jury to determine whether the conduct was, in fact, outrageous." (*Id.* at p. 534.) As we have discussed above, Gergens's conduct toward plaintiff was surely unpleasant and inappropriate, but it was not "'"'so extreme as to exceed all bounds of that usually tolerated in a civilized community.'"'" (*Id.* at p. 533; see, e.g., *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 (*Pair*) [liability "'"does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities"'"].)

Nor has plaintiff demonstrated "severe emotional distress," i.e., "'"'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'"'" (*Pair, supra*, 46 Cal.4th at p. 1051 ["discomfort, worry, anxiety, upset stomach, concern, and agitation" insufficient].) Plaintiff claims she suffered depression, emotional distress, humiliation, anxiety, and an upset stomach; she cried at work; and she would stay in her car in the morning and pray to get through the day. These symptoms fall far short of demonstrating severe emotional distress. (*Ibid.*)

5. Wrongful Termination in Violation of Public Policy

Plaintiff argues there was a triable issue of fact over her claim for wrongful termination in violation of public policy. Because she has failed to create a triable issue over whether she was actually or constructively discharged, summary judgment on this claim was proper. (*Turner, supra*, 7 Cal.4th at p. 1251; see *Daly v. Exxon Corp.* (1997)

55 Cal.App.4th 39, 45 [rejecting wrongful termination claim because plaintiff "was not fired, discharged, or terminated"].)[7]

6. Failure to Prevent Discrimination

Plaintiff contends she raised a triable issue of fact over whether Molina "fail[ed] to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940, subd. (k).) In the absence of actionable discrimination, plaintiff cannot prevail on this claim and summary judgment was proper. (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 208; see *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289.)

7. Denial of Continuance

Plaintiff challenges the trial court's denial of a continuance to conduct further discovery pursuant to Code of Civil Procedure section 437c, subdivision (h), which provides, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." "The statute mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under [Code of Civil Procedure] section 437c, subdivision (h). [Citations.] Thus, in the absence of an affidavit that requires a continuance under section 437c,

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[7] At least one court has held that adverse actions short of termination may support a claim for wrongful termination in violation of public policy. (See, e.g., *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1562 [suspension without pay], disapproved on other grounds in *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1093.) Plaintiff does not argue Molina's actions short of termination were sufficient to satisfy this cause of action, so we will not address that issue.

subdivision (h), we review the trial court's denial of appellant's request for a continuance for abuse of discretion." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254.)

"It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show 'facts essential to justify opposition may exist.'" (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548; see *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 715 [Code of Civil Procedure section 437c, subdivision (h) "requires more than a simple recital that 'facts essential to justify opposition may exist.' The affidavit or declaration in support of the continuance request must detail the specific facts that would show the existence of controverting evidence."].) Here, the affidavit from plaintiff's counsel plainly failed to set forth what facts plaintiff might have obtained from the motion to compel or from Desai and Wittenberg at their depositions that would have justified opposition to Molina's summary judgment motion. The affidavit stated only that the depositions "will provide plaintiff with additional evidence in which to oppose defendant's motion for summary judgment." The motion to compel sought documents from Molina, "including the [human resources] investigation report of claims of national origin discrimination and harassment by Helga Gergens," but plaintiff had already collected evidence from Wittenberg and Sood regarding the investigation, so any additional documents would have been largely duplicative. Nor would the request have likely yielded the actual investigation report, given that the report was apparently lost or destroyed. Thus, the trial court did not abuse its discretion in denying the request.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

FLIER, J.

I CONCUR:

GRIMES, J.

RUBIN, Acting P. J. – Concurring

I concur in the judgment.