Filed 1/4/17 Kairn v. Tesoro Refining & Marketing Co. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JONNICA KAIRN, Plaintiff and Appellant, v. TESORO REFINING & MARKETING CO., Defendant and Respondent.	B267179 (Los Angeles County Super. Ct. No. BC541967)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven J. Kleifield, Judge. Affirmed in part, reversed in part, and remanded for further proceedings.

Irving Meyer for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Sandra R. King and Benjamin G. Shatz, for Defendant and Respondent.

Plaintiff and appellant Jonnica Kairn appeals from a judgment of dismissal following an order granting summary judgment in favor of defendant and respondent Tesoro Refining & Marketing Company in this action for discrimination based on gender and disability. Kairn contends: 1) the trial court abused its discretion by excluding certain statements in her declaration, 2) Tesoro's failure to provide toilet facilities despite repeated requests was an adverse employment action for the purposes of a prima facie case of intentional discrimination based on gender, 3) triable issues of fact exist on her hostile work environment claim, and 4) triable issues of fact exist as to whether Tesoro failed to accommodate her urinary tract condition or engage in the interactive process. We conclude no abuse of discretion or prejudice has been shown as to the evidentiary rulings. Triable issues of fact exist as to whether Tesoro's failure to provide access to toilet facilities, despite the requirements of the Labor Code and Kairn's repeated requests, constituted an adverse employment action. A reasonable trier of fact could find Kairn has established a prima facie case of gender discrimination sufficient to shift the burden to Tesoro to present a nondiscriminatory reason for its failure to provide toilet facilities. The failure to provide toilet facilities does not support a harassment claim in this case, however, and there are no triable issues of fact as to accommodation or the interactive process. We reverse and remand for further proceedings on the gender discrimination cause of action, but otherwise affirm.

FACTS AND PROCEDURAL BACKGROUND

Undisputed Facts

Tesoro hired Kairn in May 2007. The area manager was Mike DePasquale, and Kairn's supervisor was Mark Fernandez. From May 2008 through May 2012, Kairn rotated through three positions, working a week at a time in each position. One of the positions was railcar operator in the railcar area. Although a building with a bathroom and sink was located a few hundred feet from the railcar area, the door to the bathroom was locked at all times and a sign said the bathroom was out of order. In response to Kairn's complaints about the lack of toilet facilities, Tesoro placed a portable toilet in the area on two occasions, but each time, Tesoro removed the portable after a few months.

When Kairn worked alone in the railcar area with five or more railcars assigned to her, she could not leave the railcar area to use the bathroom. On these occasions, Kairn would call to ask a coworker to take over for her so that she could take a bathroom break, but her coworker did not always respond. In that case, Kairn had to hold her urine or relieve herself in the railcar area. She soiled her clothing twice when she had to wait and could not undress quickly enough.

In 2012, Kairn began experiencing persistent urinary tract infections. She did not miss any work, and was able to perform the key functions of her job. Kairn was transferred to a different department in May 2012, as part of the regular rotation of employees around the refinery. In December 2012, she was assigned to help out at the railcar rack for two weeks. She sent an e-mail to Fernandez seeking to decline the temporary

assignment, but he scheduled her to work anyway.

On December 11, 2013, Kairn filed a complaint with the Department of Fair Employment and Housing (DFEH) and received an immediate right-to-sue notice.

Allegations of the Complaint

On April 8, 2014, Kairn filed a complaint against Tesoro for several causes of action, including discrimination on the basis of gender and disability, failure to accommodate, and failure to engage in the interactive process. Kairn alleged that up until December 28, 2012, she worked for Tesoro at a location where no toilets were provided and she was forced to relieve herself, like the male employees, in the surrounding fields. Kairn complained to Tesoro's management about the treatment, including telling Tesoro that she had developed a urinary tract infection from being forced to hold her urine, but she was not accommodated.

Under the heading "Gender Discrimination in Violation of [the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900, et seq.)]," Kairn incorporated her prior allegations by reference. She added, "Government Code Section 12940 makes it an unlawful employment practice for any employer to discriminate against an employee, or any person providing services thereto on the basis of their gender, or to create a hostile work environment based thereon. [¶] . . . Defendants violated this prohibition of discrimination based on gender, by among other things, not providing the only woman in the crew with toilet and other [sanitary] facilities, and having the only woman in the crew have to urinate in the fields surrounding the working location, as Tesoro did with the men in the crew." As a result of

Tesoro's conduct, Kairn suffered damages. Tesoro acted in a willful, oppressive and malicious manner towards Kairn and with the intent to vex, annoy, injure and harass her in complete disregard to the harm the conduct would cause her, and therefore, Kairn was entitled to punitive damages.

Motion for Summary Judgment and Supporting Evidence

On May 5, 2015, Tesoro filed a motion for summary judgment, or in the alternative, summary adjudication. Tesoro argued that Kairn's claims are subject to the one year statute of limitations set forth in Government Code section 12960, subdivision (d), and therefore limited to two weeks in December 2012 when she worked in the railcar area on a temporary assignment. Kairn could not establish she was disabled. She could not establish intentional discrimination on the basis of disability or gender, because she had not suffered an adverse employment action and could not show any causal connection between any adverse action and her gender or disability. She never informed Tesoro of any disability, and she never requested any accommodation.

In support of the motion for summary judgment, Tesoro submitted portions of Kairn's deposition testimony. In the summer of 2008, Kairn asked Fernandez to come to the railcar area and she spoke to him in person about her inability to use a bathroom when she was working alone in the area. Fernandez said he would get her a portable toilet, which Kairn considered an appropriate solution. Fernandez had a portable toilet delivered to the area later that month and placed near the railcars. Kairn and her male coworkers used it. After a few

months, the portable toilet was removed. Her male coworkers relieved themselves in the railcar area after the portable toilet was removed.

Kairn notified Fernandez again in 2009 about the lack of a bathroom, but he did not respond. Kairn sent an e-mail to DePasquale about the need for a toilet in the railcar area. Shortly thereafter, a second portable toilet was delivered. The portable toilet had a woman's silhouette on it and was placed in a parking area along the road. Kairn's male co-workers used the portable toilet too. After approximately three months, in July 2009, the portable toilet was removed.

In 2009, Kairn was working alone on six railcars and had to relieve herself in the environs of the railcar area. Only an employee trained to do her work could cover for her, and one coworker always claimed to be too busy to come to the railcar area to cover for her. She spoke to Dan Moody, who was one of her supervisors, and showed him the spot where she had to relieve herself.

In 2010, Kairn had to relieve herself in the environs around the railcar area when she worked alone on five or six railcars and none of her coworkers responded to her request to cover her duties. When Tesoro's attorney asked Kairn in deposition how many times this situation occurred in 2010, Kairn said she could calculate the number of incidents more precisely by looking at certain paperwork, but without looking at the paperwork, she estimated it happened approximately five times. Kairn told Fernandez in his office in 2010 that she was still having to use the bushes and she needed someone to provide cover for her, because she was being affected. She asked to have a coworker come over to the area to give her a break to use a restroom. She

had begun experiencing burning during urination.

From 2008 to 2011, Kairn did not tell anyone at Tesoro that she had a medical condition that made it difficult to work at the railcar area. Kairn experienced urinary tract problems throughout 2011. There was no portable toilet at the railcar location in 2011, and Kairn estimated that she had to relieve herself in the bushes approximately six times.

Kairn filed a grievance about another issue. During a meeting on October 25, 2011, with Tony Smith and a representative from human resources, Kairn did not say anything about the problems with bathrooms at the railcar area.

In December 2011, Fernandez told Kairn that she would be transferred to another department as part of the company's regular cross-training of employees. Kairn did not have any discussions in 2011 with anyone from Tesoro about the need to urinate in the railcar area. The medical condition became worse in 2012. Kairn transferred out of the railcar position at the end of May 2012.

In the fall of 2012, Fernandez sent an e-mail to Kairn alerting her that he would be scheduling her to work in the railcar area for two weeks in December 2012. Kairn respectfully declined the assignment, but Fernandez scheduled her for it anyway. She did not tell Fernandez that she had a urinary tract infection and did not tell anyone in human resources that she could not work at the railcar location because she had a medical condition or infection. Kairn had to work on six railcars every day of the December 2012 assignment and was not able to use a restroom during any of her shifts. She had to urinate in the environs of the railcar area, and lost control of her bladder twice, soiling her clothing. She did not mention the incidents to anyone

except a truck driver who let her use his truck to get to a shower.

Kairn experiences leakage, a constant urinary tract infection, and a weak bladder. She asked for a two piece uniform several times, but her request was denied. She received a note from her doctor in May 2014, stating that she is being treated for urinary tract issues, including infection and incontinence, and her need for a two-piece uniform to assist with management of these issues. Tesoro agreed to provide her with a two-piece uniform. Tesoro submitted the declaration of human resources manager Doreen Bartels, stating that Tesoro provided Kairn with a two-piece uniform in August 2014.

Opposition to Motion for Summary Judgment and Supporting Evidence

On May 14, 2015, Kairn filed an ex parte application to shorten time for a motion for leave to file an amended complaint, because after reviewing the evidence, her attorney had realized Tesoro's conduct was outrageous and supported a cause of action for intentional infliction of emotional distress, as well as a cause of action for violation of Labor Code section 2350, which requires employers to provide toilet facilities. Tesoro opposed the application.

On July 6, 2015, Kairn filed an opposition to the motion for summary judgment on the grounds that Tesoro's failure to provide bathroom facilities was a violation of Labor Code section 2350 and a violation of the FEHA, because it was disparate treatment based on gender and had a disparate impact based on gender. She argued that under the continuing violation doctrine, her damages included Tesoro's discrimination and harassment

from 2008 forward. She also argued that her disability never reached permanence, and therefore, the continuing violation doctrine applied to her disability claims beginning in 2010 when the urinary tract infection was diagnosed and treated by Tesoro's medical staff.

Kairn submitted her declaration as to the following. Tesoro workers could not leave the railcar loading department during their working time based on company and federal regulations. The area was a mile from the nearest bathroom facilities. Eight men worked in the railcar department and urinated next to the rail cars. Kairn was the only woman working in the department. She had to relieve herself and attend to her menstrual cycle in the bushes.

Kairn asked Fernandez several times to install a portable toilet, beginning in July 2009, until October 27, 2011, when Kairn asked to be transferred from the railcar area. Each time, he said that he would look into it. He did not refuse, but no portable toilet was installed. Kairn asked the maintenance supervisor Rob Boothroy to get a portable toilet, and he said he would try, but he was not able to do so.

Kairn believed Tesoro would assist her and provide facilities, but none were installed, so she requested a transfer to another location in October 2011. Although she was not transferred immediately, she was aware that she would be transferred as part of the company's restructuring. Fernandez was aware that Kairn had problems with the lack of toilet facilities in the railcar area, but ordered her to work there in the end of December 2012.

Kairn has suffered from painful and frequent urination from 2010 to the present. Because of the urinary tract problems,

there are certain work activities that she cannot do as quickly and efficiently, she sometimes experienced pain, and bathroom breaks are necessary more than before the urinary tract issues. Kairn told Fernandez in August 2010 that she was having bladder problems and not able to hold her urine, because coworkers were not filling in for her in order to allow her to make use of a bathroom. Kairn described conduct that she experienced in retaliation for asking for a portable toilet and filing the instant action. She suffered severe emotional distress as a result of being forced to use the fields to take care of bodily functions.

Kairn declared that two or three times during most weeks of the month, from 2008 to 2012, she had to find a place in the bushes to relieve herself. Tesoro's objected to this evidence, because the frequency directly contradicted Kairn's deposition testimony. The trial court sustained the objection. Kairn also declared Tesoro's doctors at an onsite clinic treated her for the urinary tract infection. Tesoro objected to this evidence on the ground that it drew improper legal conclusions about Tesoro's relationship to the clinic, because Kairn had testified in deposition that she did not know the clinic's relationship to Tesoro, and in fact, it is an independently operated facility and Tesoro does not have access to their medical records. The trial court sustained Tesoro's objection to evidence about the clinic's relationship to Tesoro.

Reply and Trial Court Ruling

Tesoro filed a reply. In a footnote, Tesoro argued that Kairn raised a disparate impact theory of discrimination for the first time in opposition to summary judgment. Disparate

treatment and disparate impact claims are not interchangeable, because they are different theories of liability, rely on different elements, and must be separately pled. Failure to plead a cause of action for disparate impact precluded consideration of the disparate impact theory in connection with a motion for summary judgment. For this proposition, Tesoro relied on *Rosenfeld v. Abraham Joshua Heschel Day School, Inc.* (2014) 226 Cal.App.4th 886, 894–895 (*Rosenfeld*), which held that a plaintiff who had alleged only intentional discrimination in the complaint was properly precluded from pursuing a disparate impact theory at trial.

In support of Tesoro's reply and objections to Kairn's evidence, Tesoro submitted a second declaration from Bartels explaining Tesoro's relationship to the occupational health clinic located at the Tesoro facility. The clinic is operated by an independent third party company. The medical practitioners at the clinic are not Tesoro employees. Tesoro also submitted excerpts from Kairn's deposition testimony in which she stated that she did not know the relationship between the clinic and Tesoro.

A hearing was held on July 20, 2015. The trial court took the matter under submission. Later that day, the court granted the motion for summary judgment and denied the motion for leave to amend the complaint. Among other findings, the trial court found no triable issues of material fact that Kairn suffered an adverse employment action, no causal connection between her gender and any employment action, and no evidence she was treated differently than male coworkers. The trial court concluded that Kairn had not pled a disparate impact theory of gender discrimination and had not cited any authority at oral

argument contrary to *Rosenfeld*. On August 18, 2015, the trial court entered judgment in favor of Tesoro. Kairn filed a timely notice of appeal from the judgment.

DISCUSSION

Evidentiary Rulings

A. Standard of Review

"According to the weight of authority, appellate courts 'review the trial court's evidentiary rulings on summary judgment for abuse of discretion. [Citations.] As the part[y] challenging the court's decision, it is [the appellant's] burden to establish such an abuse, which we will find only if the trial court's order exceeds the bounds of reason.' [Citations.]" (*Serri v. Santa Clara University* (2004) 226 Cal.App.4th 830, 852 (*Serri*).) Errors in evidentiary rulings in connection with motions for summary judgment do not require reversal when "the error in the trial court's evidentiary rulings would not change the outcome on the summary judgment motion. . . ." (*Twenty-Nine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, 1449 (*Bardos*).)

B. Federal Class Action

The trial court excluded a statement in Kairn's declaration about a federal class action against Tesoro concerning breaks and lunch periods. Kairn has not shown that the trial court abused its discretion by excluding this evidence. The class action lawsuit

is a separate matter with different issues. Kairn fails to show how the unrelated federal case is relevant to any of the issues under consideration in the summary judgment motion. (Evid. Code, § 350 ["No evidence is admissible except relevant evidence"]; see *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761 ["The same rules of evidence that apply at trial also apply to the declarations submitted in support of and in opposition to motions for summary judgment"].)

C. Frequency

Kairn contends the trial court abused its discretion by excluding the statement in her declaration opposing summary judgment that "[t]wo or three times most weeks of the month, from 2008 to 2012, I had to find a place in the bushes where no one would see me . . . ." Kairn qualified her deposition testimony when she said the number of occurrences could be determined more accurately from her paperwork, but the statement in her declaration substantially increases the frequency of the occurrences without any explanation. The trial court could reasonably conclude that the frequency described in the declaration contradicts Kairn's statements in deposition to such a significant extent that the trial court did not abuse its discretion in excluding the statement in the declaration. (*Whitmire v. Ingersoll-Rand. Co.* (2010) 184 Cal.App.4th 1078, 1087 (*Whitmire*) [trial court may disregard declaration in opposition to summary judgment that clearly contradicts deposition testimony].)

We note that any error from excluding the statement from the declaration was nonprejudicial. (*Bardos*, *supra*, 210

Cal.App.4th at p. 1449.) Kairn contends the declaration does not contradict her deposition testimony. If the statement is consistent with her deposition testimony, it is simply cumulative of the testimony in connection with summary judgment. The number of times that Kairn was required to relieve herself in the bushes, whether five times or 63 times, has no impact on the issues being decided in the summary judgment proceedings. Therefore, any error in excluding the evidence would be harmless.

D. Complaints Reported to Moody

The trial court excluded a statement in Kairn's declaration that she requested a portable toilet from Moody several times and he promised he was working on it, because it contradicted her deposition statements. Kairn contends there is no contradiction, because the page of her deposition reflecting that she did not discuss toilet facilities with Moody was not included in Tesoro's evidence supporting summary judgment. Kairn's briefing does not explain what the record shows that she said to Moody. Accordingly, she has not shown an abuse of discretion, but in any event, the evidence is not relevant to any issue on appeal in connection with the motion for summary judgment.

E. Current Facilities

The trial court excluded Kairn's statement that there are no toilet facilities in the railcar area currently. On appeal, Kairn asserts there is no evidence that she has not been in the railcar area recently. She failed to provide evidence that she has been in

the railcar area. No abuse of discretion has been shown. (*People v. Cortez* (2016) 63 Cal.4th 101, 124 [appellate court reviews ruling that witness lacked personal knowledge for abuse of discretion].) In addition, the excluded evidence does not affect the issues on appeal. (*Bardos*, *supra*, 210 Cal.App.4th at p. 1449.)

Kairn also contends the court abused its discretion by excluding her declaration that Tesoro did not provide the toilets required under Labor Code section 2350, but the statement contains a legal conclusion and no abuse of discretion has been shown. (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1445 [the manner in which the law should apply is a legal question not subject to lay opinion].)

F. Relationship to Medical Facility

Kairn contends the trial court abused its discretion by excluding evidence that Tesoro's onsite nurse diagnosed her urinary tract infection and advised her to seek treatment from a medical professional. The trial court excluded her statement, because it directly contradicted her deposition testimony that she does not know the relationship between the onsite clinic and Tesoro. No abuse of discretion has been shown. (*Whitmire*, *supra*, 184 Cal.App.4th at p. 1087.)

Discrimination

A. Statutory Scheme and Standard of Review

Under the FEHA, it is an unlawful employment practice to

discriminate against a person in the terms, conditions, or privileges of employment, because of sex or gender. (Gov. Code, § 12940, subd. (a).) The FEHA prohibits two types of discrimination by an employer: (1) an intentionally discriminatory act because of an employee's protected class (disparate treatment discrimination), and (2) a facially neutral practice or policy that has a disproportionate effect on employees in a protected class (disparate impact discrimination). (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1002 (*Scotch*).)

Kairn alleged a single cause of action in her complaint for discrimination based on gender. In the summary judgment proceedings, Tesoro addressed disparate treatment discrimination and asserted that Kairn had not pled disparate impact discrimination. The trial court agreed Kairn had not pled disparate impact discrimination, and Kairn has not challenged this finding on appeal. Instead, Kairn contends triable issues of fact exist as to her claim for disparate treatment discrimination.

"We review summary judgment de novo. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) We independently determine whether the record supports the trial court's conclusion that the plaintiff's discrimination claims failed as a matter of law. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 951.)" (*Scotch, supra,* 173 Cal.App.4th at p. 1003.)

"California uses the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination based on a theory of disparate treatment. (*Guz, supra,* 24 Cal.4th 317, 354; see *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*).) 'This so-called

McDonnell Douglas test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.' (*Guz, supra,* 24 Cal.4th at p. 354.)" (*Scotch, supra,* 173 Cal.App.4th at p. 1004.)

"Under the *McDonnell Douglas* test, the plaintiff has the initial burden of establishing a prima facie case of discrimination. (*Guz, supra,* 24 Cal.4th at p. 354.) To meet this burden, the plaintiff must, at a minimum, show the employer took actions from which, if unexplained, it can be inferred that it is more likely than not that such actions were based on a prohibited discriminatory criterion. (*Id.* at p. 355.) A prima facie case generally means the plaintiff must provide evidence that (1) the plaintiff was a member of a protected class, (2) the plaintiff was qualified for the position he or she sought or was performing competently in the position held, (3) the plaintiff suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests a discriminatory motive. (*Ibid.*)" (*Scotch, supra,* 173 Cal.App.4th at p. 1004.) "The burden in this stage is "'not onerous'" [citation], and the evidence necessary to satisfy it is minimal [citation]." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 159.)

"If the plaintiff establishes a prima facie case, then a presumption of discrimination arises, and the burden shifts to the employer to rebut the presumption by producing admissible evidence sufficient to raise a genuine issue of material fact the employer took its actions for a legitimate, nondiscriminatory

reason. (*Guz, supra,* 24 Cal.4th at pp. 355–356.)" (*Scotch, supra,* 173 Cal.App.4th at p. 1004.) The employer's reason does not need to have been sound, as long as the motive was not based on a prohibited bias. (*Serri*, *supra*, 226 Cal.App.4th at p. 861.)

"If the employer meets that burden, the presumption of discrimination disappears, and the plaintiff must challenge the employer's proffered reasons as pretexts for discrimination or offer other evidence of a discriminatory motive. (*Id.* at p. 356.)" (*Scotch, supra,* 173 Cal.App.4th at p. 1004.) "'[A] n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory.' (*Guz, supra,* 24 Cal.4th at p. 361, fn. omitted.) It is not sufficient for an employee to make a bare prima facie showing or to simply deny the credibility of the employer's witnesses or to speculate as to discriminatory motive. [Citations.] Rather it is incumbent upon the employee to produce 'substantial responsive evidence' demonstrating the existence of a material triable controversy as to pretext or discriminatory animus on the part of the employer. [Citations.]" (*Serri, supra,* 226 Cal.App.4th at pp. 861–862.)

In the context of a summary judgment proceeding, the employer has the initial burden to present evidence that the employee cannot establish one or more prima facie elements, or that the adverse employment action was taken for legitimate, nondiscriminatory reasons. (*Arteaga v. Brink's Inc.* (2008) 163 Cal.App.4th 327, 343–344.) "If the employer meets its initial burden, the burden shifts to the employee to 'demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the

employer acted with a discriminatory *animus,* such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action.' (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038 (*Cucuzza*).)" (*Serri*, *supra*, 226 Cal.App.4th at p. 861.)

In this case, Tesoro contends Kairn cannot establish a prima facie case of discrimination based on gender. Tesoro did not address the second step of the analysis or supply any reason for its actions, and the burden did not shift to the third step requiring Kairn to present substantial evidence of intentional discrimination.

B. Adverse Employment Action

Kairn contends Tesoro's refusal to provide toilet facilities constituted an adverse employment action which supports a prima facie case of discrimination. We agree.

"[A]n adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052, fn. omitted (*Yanowitz*).) "[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." (*Ibid*.)

"Appropriately viewed, this provision protects an employee against unlawful discrimination with respect not only to 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 [, subdivision](a) . . . , 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." (*Yanowitz, supra,* 36 Cal.4th at pp. 1053–1054, fns. omitted.) "[T]he significance of particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee. 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 [, subdivision](a) and 12940[, subdivision] (h)." (*Id.* at pp. 1054–1055, fn. omitted.)

"[I]n the employment context, the 'adverse employment action' threshold is met when the employer's action 'impact[s] the "terms, conditions, or privileges" of the plaintiff's job in a real and demonstrable way.' [Citation.] In other words, a plaintiff must show that a reasonable person in the circumstances would have viewed it as 'a *serious and material* change in the terms,

conditions, or privileges of employment.' [Citations.] Examples include discharge, demotions, refusal to hire, nonrenewal of contracts, and failure to promote. (*Thaddeus–X v. Blatter* (6th Cir.1999) 175 F.3d 378, 396 (*Thaddeus–X*).)" (*Wilson v. Murillo* (2008) 163 Cal.App.4th 1124, 1134–1135 (*Wilson*).)

"At the other extreme, courts have found no adverse employment action where the complained-of conduct had no effect on the plaintiff's employment status. (See, e.g., *Davis* [*v. Town of Lake Park, Fla*. (11th Cir. 2001) 245 F.3d 1232,] 1240 [negative job performance is not an adverse employment action where there was no economic injury]; *Flannery v. Trans World Airlines, Inc.* (8th Cir. 1998) 160 F.3d 425, 428 [shunning is not an adverse employment action where the plaintiff did not allege that the ostracism resulted in a reduced salary, benefits, seniority, or responsibilities].)" (*Wilson, supra,* 163 Cal.App.4th at pp. 1134–1135.)

Access to toilet facilities is a term or condition of employment. For example, Labor Code section 2350 states, "Every factory, workshop, mercantile or other establishment in which one or more persons are employed . . . shall be provided, within reasonable access, with a sufficient number of toilet facilities for the use of the employees. When there are five or more employees who are not all of the same gender, a sufficient number of separate toilet facilities shall be provided for the use of each sex, which shall be plainly so designated."

In this case, no operable toilet facilities were provided for employees in the railcar area. Kairn complained and requested relief. A portable toilet was provided for a few months, but taken away and not replaced until Kairn voiced additional complaints. A second portable was provided for a few months, then removed.

For three years after removing the second portable toilet, Tesoro ignored and refused to respond to Kairn's complaints about the lack of toilet facilities in the railcar area and her requests for access to a bathroom during her shifts. A reasonable trier of fact viewing the evidence in the light most favorable to the plaintiff could find Tesoro's failure to provide toilet facilities or a break to use restrooms in another area, despite Kairn's repeated requests, materially affected the terms and conditions of Kairn's employment in a real and demonstrable way, making it difficult for her to perform her job. (See *DeClue v. Central Illinois Light Co.* (7th Cir. 2000) 223 F.3d 434, 436 [noting that the absence of bathroom facilities would clearly be an intolerable working condition in most workplaces].) There is a triable issue of fact as to whether failure to provide access to a toilet, despite repeated requests for action, constituted an adverse employment action under the circumstances of this case.

C. Discriminatory Motive

Tesoro contends Kairn cannot establish that the fourth element of a prima facie case, in which some other circumstance suggests a discriminatory motive. We disagree. By liberally construing the evidence in the light most favorable to Kairn, a reasonable trier of fact could infer a discriminatory motive sufficient to satisfy the minimal evidence necessary for a prima facie case.

Kairn was the only woman working in the railcar area in a team of men. The lack of accessible toilets imposed a greater burden on her than on her male coworkers. One of her male coworkers regularly refused to cover her duties so that she could

use a bathroom. She explained the situation to her male supervisors and requested access to toilet facilities. One of the portable toilets delivered in response to her complaints had a silhouette of a woman, from which it can be inferred that the company was aware of the situation and provided portable toilet facilities to address the needs of the only woman working in the area. Then for three years, despite Kairn's complaints and requests, no action was taken to provide her with access to toilet facilities. A trier of fact could find the company's failure to provide toilet facilities, even though the company was aware of Kairn's repeated requests and the needs of a woman working in the railcar area, at some point became intentional conduct based on her gender sufficient for a prima facie case of gender discrimination.

Summary adjudication should not have been granted as to the cause of action for discrimination based on gender, because triable issues of fact exist as to whether Kairn suffered an adverse employment action under circumstances from which a discriminatory motive can be inferred.

Harassment

Kairn contends that triable issues of fact also exist on her harassment claim. We disagree.

Government Code section 12940, subdivision (j), defines "unlawful employment practice" to include harassment in the workplace based on sex and gender. "'Under the statute "harassment" in the workplace can take the form of "discriminatory intimidation, ridicule and insult" that is '"'sufficiently severe or pervasive to alter the conditions of the

victim's employment and create an abusive working environment.'"' [Citations.] Moreover, harassing conduct takes place "outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives." (*Reno v. Baird* (1998) 18 Cal.4th 640, 646 . . . .) "Thus, harassment focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706 [.])' (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 951, original italics (*Rehmani*).)" (*Serri, supra,* 226 Cal.App.4th at p. 869.)

"Harassment is distinguishable from discrimination under the FEHA. '[D]iscrimination refers to bias in the exercise of official actions on behalf of the employer, and harassment refers to bias that is expressed or communicated through interpersonal relations in the workplace.' (*Roby v. McKesson, Corp., supra,* 47 Cal.4th p. 686, 707.) As our high court explained in *Reno v. Baird,* 'Harassment claims are based on a type of conduct that is avoidable and unnecessary to job performance. No supervisory employee needs to use slurs or derogatory drawings, to physically interfere with freedom of movement, to engage in unwanted sexual advances, etc., in order to carry out the legitimate objectives of personnel management. Every supervisory employee can insulate himself or herself from claims of harassment by refraining from such conduct. An individual supervisory employee cannot, however, refrain from engaging in the type of conduct which could later give rise to a discrimination claim. Making personnel decisions is an inherent and

unavoidable part of the supervisory function. Without making personnel decisions, a supervisory employee simply cannot perform his or her job duties.' (*Reno v. Baird, supra,* 18 Cal.4th at p. 646, quoting *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63–65 (*Janken*).) The court explained further 'that the Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management.' (*Reno v. Baird,* at pp. 646–647.)" (*Serri, supra,* 226 Cal.App.4th at pp. 869–870.)

To prevail on a hostile work environment sexual harassment claim under the FEHA, the plaintiff must prove "she was subjected to sexual advances, conduct, or comments that were (1) unwelcome [citation]; (2) because of sex [citation]; and (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment [citations]. In addition, she must establish the offending conduct was imputable to her employer. [Citation.]" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279 (*Lyle*).)

"In the context of sex discrimination, prohibited harassment includes 'verbal, physical, and visual harassment, as well as unwanted sexual advances.' (Cal. Code Regs., tit. 2, § 7291.1, subd. (f)(1).) In this regard, *verbal* harassment may include epithets, derogatory comments, or slurs on the basis of sex; *physical* harassment may include assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on the basis of sex; and *visual* harassment may include derogatory posters, cartoons, or drawings on the basis of sex. (Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(A), (B) & (C); see *Miller*[*v. Department of Corrections* (2005) 36 Cal.4th 446,] 461.)" (*Lyle, supra,* 38 Cal.4th at pp. 280–281.)

"'Whether the conduct of the alleged harassers was sufficiently severe or pervasive to create a hostile or abusive working environment depends on the totality of the circumstances. "'These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" [Citations.] "'Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct [that] a reasonable person in the plaintiff's position would find severely hostile or abusive.'" [Citations.] As in sex-based harassment claims, "[t]he plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's [fn. omitted] work performance and would have seriously affected the psychological well-being of a reasonable employee and that [he or she] was actually offended."

[Citations.]' (*Rehmani, supra,* 204 Cal.App.4th at pp. 951–952.)" (*Serri, supra,* 226 Cal.App.4th at p. 870.)

Tesoro's failure to provide access to toilet facilities is not actionable harassment or creation of a hostile work environment. (Cf. *DeClue*, *supra*, 223 F.3d at p. 437 [an employer does not create a hostile work environment by failing to correct a work condition that the employer knows or should know has a disparate impact on a protected class].) Failing to provide toilets is the type of management decision which may support a disparate impact discrimination claim, because the lack of facilities has a greater impact on women, or a disparate treatment discrimination claim if Tesoro intentionally failed to respond to Kairn's requests for access to toilet facilities based on her sex or gender, but it is not harassing conduct. There is no evidence that Kairn was forced to witness any of her coworkers relieving themselves in the fields, was subject to offensive comments or insults because of her sex or gender, or that any other type of conduct that would support a harassment claim. Summary adjudication of Kairn's claim for harassment is proper.

Failure to Accommodate

Kairn contends triable issues of fact exist as to her claim for failure to accommodate her disability. This is also incorrect.

"The FEHA imposes on the employer the obligation to make reasonable accommodation: 'It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: [¶] . . . [¶] (m) For an employer or other entity

covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee.' (§ 12940, subd. (m).)" (*Scotch, supra,* 173 Cal.App.4th at p. 1003.)

There is no evidence that Kairn informed Tesoro that she had a disability. Tesoro was aware that she needed to use toilet facilities, as any employee would, but there is no evidence that they were aware her need differed from other employees. Kairn relies on evidence from her declaration that she was diagnosed with a urinary tract infection at an onsite clinic, but Tesoro presented evidence that Kairn did not know the relationship of the clinic to Tesoro, that the clinic was an independent organization, and Tesoro did not have access to Kairn's medical records and was not told that she suffered from a urinary tract infection. Even in the light most favorable to Kairn, there is no evidence that Tesoro knew or had reason to know that she suffered from urinary tract conditions. Tesoro is entitled to summary adjudication of Kairn's cause of action for failure to accommodate a known physical disability.

Failure to Enter into the Interactive Process

Kairn contends there is a triable issue of fact as to whether Tesoro failed to enter into an interactive process to accommodate her disability. Again, we disagree.

"The FEHA makes it unlawful for an employer 'to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known

physical or mental disability or known medical condition.' (§ 12940, subd. (n).) Section 12940, subdivision (n) imposes separate duties on the employer to engage in the "'interactive process'" and to make "'reasonable accommodations.'" [Citations.]" (*Scotch, supra,* 173 Cal.App.4th at p. 1003.)

"The interactive process imposes burdens on both the employer and employee. The employee must initiate the process unless the disability and resulting limitations are obvious. 'Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, . . . the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.' [Citation.]" (*Scotch, supra,* 173 Cal.App.4th at p. 1013.) "'Although it is the employee's burden to initiate the process, no magic words are necessary, and the obligation arises once the employer becomes aware of the need to consider an accommodation.' [Citation.]" (*Ibid*.)

In this case, Kairn requested access to toilet facilities during her shifts. There is no evidence that Tesoro was aware Kairn had any limitations or was requesting an accommodation above and beyond the needs experienced by every employee. Kairn's disability, her resulting limitations, and accommodations that she required beyond the needs of other female employees were not open, obvious, and apparent to Tesoro. Kairn cannot establish that she made her disability and resulting limitations known to Tesoro. Summary adjudication of the cause of action for failure to engage in the interaction process must be granted.

DISPOSITION

The judgment and the order granting summary judgment are reversed. The trial court is directed to enter a new and different order denying summary adjudication of the cause of action for gender discrimination and granting summary adjudication of all the remaining causes of action. The parties are to bear their own costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P.J.

BAKER, J.