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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANNE E. HOULE, Plaintiff and Appellant, v. ALAN STEINKE et al., Defendants and Respondents.	B233891 (Los Angeles County Super. Ct. No. BC420137)

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

The Aikins Law Firm and Lenton Aikins for Plaintiff and Appellant.

Jeffer Mangels Butler & Marmaro, Louise Ann Fernandez, Barbra A. Arnold and Brett Greving for Defendants and Respondents.

Anne E. Houle appeals from the trial court's summary judgment dismissing her employment discrimination and defamation complaint against respondents Northrop Grumman Corporation and Northrop Grumman employee Alan Steinke. We affirm.

FACTS AND PROCEEDINGS

Respondent Northrop Grumman Corporation (Northrop) hired appellant Anne E. Houle in 1993. Following a series of positive job evaluations and promotions, appellant began working in 2006 in Northrop's Advanced Technology Development Center (ATDC). In 2007, respondent Alan Steinke transferred into ATDC.

Many of Steinke's coworkers, including appellant, did not like Steinke. Appellant repeatedly called Steinke a "mole," "stinking mole," and "stinky" behind his back. Steinke returned his colleagues' dislike for him. He often stood behind appellant's desk breathing hard, and once or twice a week stood behind a male coworker's desk waiting for the coworker to acknowledge him. He often stared at appellant and male coworkers. During a meeting in February 2008, he told appellant she had a "big mouth" and was "ineffective" in her job. The next month in another meeting, he told appellant she was "paranoid." In a meeting in April or May 2008, he repeated his "big mouth" remark and told appellant she had a reputation for speaking her mind. And in an August 2008 meeting, he called appellant a "bitch."

Appellant complained to Northrop's human resources department about Steinke's calling her a bitch. A human resources representative interviewed Steinke, who admitted making the remark and agreed it was inappropriate. The human resources department instructed Steinke's supervisors to "strongly counsel" Steinke about his language. One supervisor reprimanded Steinke, and another supervisor told Steinke his language was "inappropriate" and "instructed him never to speak like that to a coworker."

In November 2008, Northrop transferred appellant to the Master Scheduling Department. The transfer came four months after appellant had requested to transfer out of the ATDC to get away from Steinke, but the center's managers turned her down at the time because they continued to need her services. Appellant's position in the Master

Scheduling Department provided the same title, duties, "job code," "market rate structure," and salary ($85,571.20) as her position in the ATDC. In her new position, appellant spent half her time supporting the ATDC and the other half supporting the Master Scheduling Department.

Nine months later in August 2009, appellant filed her Fair Employment and Housing complaint against respondents Northrop and Steinke. She alleged five causes of action involving gender and sex discrimination, harassment, retaliation, and failure to prevent discrimination, harassment, and retaliation. (Gov. Code, § 12940, subds. (a), (j)(1), (k), (i), & (j)(3).) She also alleged a cause of action for defamation for Steinke's calling her a "big mouth," "paranoid," and not good at her job.[1]

About a month after appellant filed her complaint, she asked in September 2009 that Northrop let her telecommute part time to allow her to stay home to care for her special needs son. Northrop approved her request that month. "Happy" in her new position, appellant's telecommuting schedule worked well for her. But telecommuting was incompatible with her continuing to provide support to the ATDC because the center's work involved a classified military program, and government security rules required that all of the center's work be done on-site. The government further required that employees who worked on the center's classified programs have "special government 'access,' " and that Northrop "de-access" employees when they stopped working on classified programs. Because of the government's rules, Northrop "de-accessed" appellant in December 2009. Appellant complains that Northrop leap-frogged her to the top of the "de-accessing" list ahead of other employees who had been on the list longer. Appellant's de-accessing did not reduce her salary, but she asserts it limited her opportunity for future promotion.

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[1] Appellant also alleged, but has not pursued on appeal, causes of action for discrimination based on marital status (Gov. Code, § 12940, subd. (a)(3)); negligent hiring, supervision, training, discipline, and retention; intentional and negligent infliction of emotional distress; violation of the Unruh Act; and "tort in essence."

Following her de-accessing, appellant attempted to amend her complaint to add allegations about de-accessing, but the court rejected her attempt. In November 2010, appellant filed a separate complaint alleging her de-accessing was retaliatory. Appellant does not raise on appeal any cogent legal argument that the court's refusal to permit her to amend her complaint was error, although in a passing reference she does miscite *Zeinali v. Raytheon Co.* (9th Cir. 2011) 636 F.3d 544 for the proposition that the court's ruling was error. That decision stands for the proposition that an employer's lack of even-handedness in applying security rules to employees may give rise to an inference of discrimination. (*Id.* at p. 555.) But that proposition is not before us at this stage of appellant's two-complaint litigation against Northrop because the de-accessing allegations are not part of the complaint at issue here. As the pleadings determine the scope of issues a party moving for summary judgment must address, we do not discuss further appellant's de-accessing allegations. (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74; *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98, fn. 4.)

In December 2010, respondents moved for summary judgment. They asserted they had not taken any action against appellant because of her gender or sex. They also argued Northrop's workplace was not a hostile work environment, and appellant did not suffer any adverse employment action. Finally, they asserted that Steinke's allegedly defamatory statements were non-actionable opinion and appellant's defamation cause of action was untimely.

The court granted summary judgment for respondents. It noted that appellant's failure to properly dispute respondents' facts resulted in appellant's failing to create any triable issue of material fact. The court found that appellant's gender and sex discrimination, harassment, and retaliation claims failed because respondents' conduct was not sufficiently severe or pervasive to alter the conditions of appellant's employment. While noting the offensiveness of Steinke's "bitch" comment, the court deemed the remark to have been too isolated to be actionable. Additionally, the court found that Steinke stared at, and stood behind the desk of, not only appellant, but one or

more male co-workers. Finally, the court found appellant's defamation claims were untimely because she had filed her complaint more than one year after Steinke uttered them. The court entered judgment for respondents. This appeal followed.

STANDARD OF REVIEW

" 'A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. [Citation.] The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish, a prima facie case . . . ." [Citation.]' '[O]nce a moving defendant has "shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established," the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff "may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action. . . . ." [Citation.]' [Citation.]" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274 (*Lyle*).)

DISCUSSION

1. *No Triable Issue of Fact in Support of Gender-based Claims*

Appellant claims Northrop permitted a hostile work environment by allowing Steinke to harass her because of her gender. The elements of a claim for sexual harassment or hostile work environment are: "(1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608.) To prevent sexual harassment law from expanding into a "general civility code," the harassing conduct must be sufficiently persistent and

offensive that it would affect any reasonable person's well-being and ability to perform his or her job. "The conduct must be extreme: ' "simple teasing," offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." ' [Citation.] The harassment cannot be occasional, isolated, sporadic, or trivial; the plaintiff must show a ' "concerted pattern of harassment of a repeated, routine or a generalized nature." ' [Citation.] [¶] Thus, for example, ' "mere utterance of an . . . epithet which engenders offensive feelings in a employee," [citation] does not sufficiently affect the conditions of employment . . . .' [Citation.] Rather, ' "[s]exual harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives its victim of her statutory right to work in a place free of discrimination, when the sexually harassing conduct sufficiently offends, humiliates, distresses or intrudes upon its victim, so as to disrupt her emotional tranquility in the workplace, affect her ability to perform her job as usual, or otherwise interferes with and undermines her personal sense of well-being." ' [Citation.]" (*Jones v. Department of Corrections and Rehabilitation* (2007) 152 Cal.App.4th 1367, 1377-1378.) A court may decide as a matter of law whether conduct is sufficiently pervasive to support a claim. (*Lyle, supra,* 38 Cal.4th at p. 292.)

Here, Steinke name-called appellant, labeling her a "big mouth" and "paranoid," derided her as ineffective at her job with a reputation for speaking her mind, and one time called her a bitch. He also stared at her and stood behind her desk, conduct he also directed toward men. But vulgarity, coarseness, and rudeness are not enough by themselves to sustain a cause of action for discrimination, harassment, or hostile work environment. The misconduct must alter the conditions of employment. Workplace anti-discrimination laws are " 'not a "civility code" and [are] not designed to rid the workplace of vulgarity. [Citation.] While [those laws] prohibit[] harassing conduct that creates a work environment that is hostile or abusive on the basis of sex, it does not outlaw sexually coarse and vulgar language or conduct that merely offends.' " (*Lyle, supra,* 38 Cal.4th at p. 295.)

Appellant's gender-based causes of action fail because Steinke's misconduct was not sufficiently pervasive to alter the conditions of appellant's employment, and even if his misconduct were pervasive, appellant offers no link between her gender and Steinke's acts. Appellant testified in her deposition "I don't know" why Steinke harassed her. Steinke never asked her out socially, never touched her, and never inquired about her personal life. And other than her one-time report to Northrop's human resources department when Steinke called her a "bitch," appellant did not complain to Northrop that Steinke was mistreating her because of her gender.[2] She testified in her deposition: "Q. Did you ever tell anyone at Northrop that you thought you were being sexually harassed? A. Not that I recall, using the word 'sexually.' Q. Did you ever tell anyone at Northrop that you thought Mr. Steinke was doing these things to you because of your sex as opposed to the fact that you criticized him? A. I don't think I ever made that statement."

Appellant contends the court granted summary judgment because she did not use the correct "nomenclature." The thrust of her contention appears to be that the court penalized her because she could not "specifically place the correct nomenclature upon [Steinke's] intentions," which she characterizes as the court's requiring her to utter the right "legal terms or buzzwords" or else lose her lawsuit. In the same vein, she asserts the court deemed her deposition admission that she did not know why Steinke mistreated her as dispositive for dismissing her claims; according to her, the court required her "to *know* exactly that she was discriminated [against] because of her gender/sex."

Appellant is mistaken. The court understood appellant alleged gender and sex

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[2] We accept that the insult "bitch" especially stings when hurled against a woman. (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 119, fn. 3 [word has particular import for woman], but see *Lyle*, *supra*, 38 Cal.4th at p. 282 ["it has been cautioned the term 'bitch' is not so sex-specific and derogatory that its mere use necessarily constitutes harassment because of sex"].) But that word's sting does not overcome a fatal flaw in appellant's case, which is the missing gender-component to Steinke's other misconduct. (See *Jones v. Department of Corrections and Rehabilitation, supra*, 152 Cal.App.4th at pp. 1377-1378 [" ' "mere utterance of an . . . epithet which engenders offensive feelings in a employee,' does not sufficiently affect the conditions of employment" ' "].)

discrimination regardless of whatever "nomenclature" she used. The court rejected those allegations, however, because appellant offered no evidence that Steinke treated her differently because she was female, given that Steinke acted similarly towards males. The court highlighted for appellant the Achilles heel in her case when it asked her to describe the link between her gender and Steinke's misconduct. The court told appellant: "What I'm saying is I'm struggling with the issue with the nexus between the . . . admittedly boorish behavior by Mr. Steinke, and whether that boorish behavior was based on gender. . . . A nexus between the harassment and the fact that your client was female and Mr. Steinke was male."[3]

The court did not, contrary to appellant's contention, deem as dispositive appellant's deposition testimony that she did not know why Steinke acted as he did.

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[3] For an example of misconduct more egregious than Steinke's that nevertheless did not support a discrimination claim because it lacked a nexus between the conduct and the plaintiff's gender, consider *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174. In that decision, the female plaintiff suffered the following mistreatment by a male colleague: "(1) [defendant] glaring at her; (2) [defendant] failing to return [the plaintiff's] emails, which were essential to the completion of her job duties; (3) [defendant] shouting at her and hindering the performance of her duties when she inquired about work-related matters; (4) [defendant] turning his back on her when he saw her; (5) [defendant] sneering at her; (6) [defendant] bumping his shoulder into her in the halls or whispering into someone's ear when she was near; (7) [defendant] shouting at her that he was busy, 'get away' and 'what the hell do I have to sign that for?' when she approached him; (8) [defendant] failing to return paperwork that was essential for [the plaintiff] to complete her job duties; (9) [defendant] yelling at her 'psycho,' 'bitch' and 'get out'; and (10) [defendant] shouting 'let's walk past the stick,' calling her 'Ally McBeal' and commenting that he did not understand how he could ever have been attracted to her." (*Id.* at p. 1187.) The appellate court deemed the foregoing misconduct to be very little, if any, evidence of *sexual* harassment – although it could be evidence of a hostile work environment needed to support a retaliation claim. (*Ibid.*) Affirming the difference between ill-treatment and gender discrimination, the court stated, "To be sure, all but the last one or two items on [the plaintiff's] list of complaints bear a stronger resemblance to junior high school-style expressions of personal animus than to harassment on the basis of sex." (*Ibid.*) The *Mathieu* court's observation applies to our case here.

Rather, the court suggested that the admission was one fact which tended to show the absence of any triable issue. In doing so, the court gave appellant the benefit of the doubt, because case law would have supported the court's summary adjudication turning on that fact alone. Indeed, during the summary judgment hearing the court cited that case law when it recalled *Jones, supra*, 152 Cal.App.4th at page 1378. In that decision, the plaintiff failed to present a triable issue of material fact when she answered "no" and "I don't know" during her deposition whether the defendant's offensive behavior was based on the plaintiff's gender. The *Jones* court held "The absence of the nexus between the alleged harassment and [the plaintiff's] gender negates her . . . claim." (*Jones*, at p. 1378.)

The trial court correctly found no triable issues of material fact exist to support appellant's gender-based claims.

2. *No Triable Issue of Fact in Support of Retaliation*

Appellant claims her transfer to the Master Scheduling Department in November 2008 was an adverse employment action constituting retaliation. Retaliation for what is not exactly clear. For lack of anything else in the record, we will assume the transfer was retaliation for appellant's having complained about Steinke (despite Northrop's having vindicated appellant's complaint when it reprimanded Steinke).[4] Also not exactly clear is

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[4] Citing *Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035 for the proposition that an employer's obligation to provide a discrimination-free workplace includes a duty to investigate discrimination claims, appellant asserts Northrop failed to follow its own procedures when investigating her complaint about Steinke's comment. Appellant's reliance on *Northrop Grumman Corp.* is misplaced; what more did Northrop need to learn after Steinke's admission? Also misplaced given Steinke's admission is appellant's citation to *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 106-107. That decision dealt with a jury's role in an employment case after an employer fires an employee who has an implied contract allowing termination only for good cause: does the jury decide whether good cause actually existed, or does it decide whether the employer had an objective, good faith belief it had good cause? *Cotran* does not purport to impose on an employer a duty to

whether the transfer was retaliation since it seemingly fulfilled appellant's request to get away from Steinke.[5] Be that as it may, appellant contends her transfer to the Master Scheduling Department was an adverse employment action.

Appellant asserts one must look to the totality of an employment decision to determine whether the decision is adverse to an employee. Her assertion is not quite right. A decision is adverse when it "materially affects the terms, conditions, or privileges of employment," and we must assess those workplace changes in their totality instead of in piece-by-piece isolation from one another. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036, 1051.)

Appellant contends her transfer to the Master Scheduling Department was adverse because it required her to assume "two jobs," her implication being that two jobs imposed "double duty" requiring her to work harder. The record does not support her contention. Her work week remained the same length after her transfer, the only change being that she divided her time equally between two departments and two managers. Her brief states that two Northrop managers support her claim, but neither stated that her transfer worsened her working conditions or made her work longer or harder.

Appellant also contends the transfer to Master Scheduling moved her to a "dead end" position. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [lateral transfer can be adverse if it affects employee's opportunity for career advancement].) We disregard this contention because the court sustained respondents' objection to appellant's evidence in support of it, a ruling that appellant acknowledges but then ignores: "Appellant contend[s] that the transfer . . . was in fact a demotion, a 'dead-end' position as a scheduler. (This part of [appellant's] Declaration was erroneously sustained, Plaintiff believes, by the trial court.)" Because she does not

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continue an investigation after the investigation elicits the offending employee's confession.

[5] For reasons discussed *post*, we do not address whether appellant's "de-accessing" was retaliation.

present any argument that the court erred in sustaining respondents' objection, she waives the point on appeal.[6]

The trial court correctly found no triable issues of material fact exist to support appellant's retaliation claim.

3. *No Triable Issue in Support of Defamation*

Appellant's response to respondents' separate statement of undisputed facts established that her cause of action for defamation rested on Steinke's calling her a "big mouth" and "paranoid" and his accusing her of not doing her work and being inefficient at her job. During the hearing on respondents' motion for summary judgment, the court observed that the purportedly defamatory statements occurred more than one year before appellant filed her complaint in August 2008, and were therefore untimely. Scrambling to save her cause of action, appellant identified for the first time a prediction by Steinke to a co-worker that appellant would not be interviewed for a job opening posted in Northrop's on-line employment board. Although appellant did not include in her response to respondents' separate statement Steinke's assessment that she was unqualified for the job opening,[7] she fleshes out her allegation by inserting Steinke's following deposition testimony in her appellate brief (her full quotation is much longer; we repeat only its gist): "Q. Did you tell Matt [Jasinski] that [appellant] was not going to be interviewed for that position. A. I did. Q. How did you know that? A. I'm not clear. . . I think Roger told me, or there was a time when they delegated to me permissions to look at [Grumman's on-line career website for posting and applying for job openings]."

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[6] We note that the court overruled on multiple grounds all of appellant's objections to respondents' evidence.

[7] See *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 (if a "fact" is not included in the separate statement, it does not exist to create a triable issue of material fact for purposes of summary judgment).

Appellant contends Steinke's prediction was defamation per se because it impugned her professional qualifications. Her contention fails. Opinions are not defamatory when they involve no provable facts, even if those opinions involve another's job qualifications. Unless one falsely accuses "an employee of criminal conduct, lack of integrity, dishonesty, incompetence or reprehensible personal characteristics or behavior [citation], it cannot support a cause of action for libel. This is true even when the employer's perceptions about an employee's efforts, attitude, performance, potential or worth to the enterprise are objectively wrong and cannot be supported by reference to concrete, provable facts." (*Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 965; see also *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1153 [alleging worker's "poor performance" is not defamatory because it is opinion]; accord, *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 728 [statement employee was dishonest and unethical could be libelous if speaker implied knowing undisclosed supporting facts].) Steinke's prediction went to Northrop's response to appellant's job application. Steinke did not accuse appellant of criminality, dishonesty, or other reprehensible conduct. And even if his prediction could be understood as his implying she was unqualified for the job, one's opinion about a colleague's job performance is not actionable. (*Gould*, at p. 1153.)[8]

The trial court correctly found no triable issues of material fact exist to support appellant's defamation claim.

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[8] Appellant cites *Rodriguez v. North American Aviation, Inc.* (1967) 252 Cal.App.2d 889, 894, for the proposition that a statement one is not "competent [in one's work] may be held to be defamation *per se*." Appellant's citation to *Rodriguez* is incomplete. *Rodriguez* actually held that statements that an employee "was 'not a competent engineer' and was 'a traitor to the company' " were defamatory per se. In support of its holding, *Rodriguez* cited *Washer v. Bank of America Nat'l Trust & Sav. Asso.* (1943) 21 Cal.2d 822, overruled on another ground in *MacLeod v. Tribune Pub. Co.* (1959) 52 Cal.2d 536, 551. *Washer* involved statements that a bank employee had embezzled bank funds. (*Id.* at p. 825.) Because Steinke did not accuse appellant of criminal behavior, appellant's reliance on *Rodriguez* (and by extension, *Washer*) is misplaced.

DISPOSITION

The judgment is affirmed. Respondents to recover their costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.