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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

MARTHA ANGELES VILLARA, Plaintiff and Appellant, v. VONS EMPLOYEES FEDERAL CREDIT UNION et al., Defendants and Respondents.	B281839 (Los Angeles County Super. Ct. No. BC528118)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, David Sotelo, Judge. Affirmed in part, reversed in part, and remanded with directions.

Law Offices of Maryann P. Gallagher and Maryann P. Gallagher; Benedon & Serlin, Gerald M. Serlin and Kelly R. Horwitz for Plaintiff and Appellant.

Schimley Althouse and Paul F. Schimley for Defendants and Respondents.

INTRODUCTION

Martha Angeles[1] worked for Vons Employees Federal Credit Union as a collections agent for six years. In January 2012 she commenced a medical leave of absence from which she never returned. In November 2013 she sued the Credit Union for disability harassment, discrimination, retaliation, and other causes of action. Angeles alleged two officers of the Credit Union, Steve Weakley and Donna Young, harassed and discriminated against her based on a medical condition. She also alleged the Credit Union retaliated against her by forcing her to quit after she filed a workers' compensation claim and cooperated with an investigation of the Credit Union. Angeles also asserted a cause of action for intentional infliction of emotional distress against the Credit Union, Weakley, and Young (collectively, the defendants).

The defendants filed a motion for summary judgment or in the alternative for summary adjudication. They argued Angeles could not prove that she was constructively discharged as she alleged in her complaint or that she suffered harassment, retaliation, or emotional distress. The trial court granted the motion for summary judgment, entered judgment against Angeles, and awarded the defendants their costs.

Angeles argues there are triable issues of fact regarding whether the Credit Union constructively discharged her. We

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[1] The case caption identifies Angeles as Martha Angeles Villara. Angeles married after she filed this action and refers to herself by her maiden name to be consistent with the pleadings in the trial court.

agree with the Credit Union, however, the uncontroverted evidence demonstrated the Credit Union did not force Angeles to quit. Therefore, we affirm the trial court's order granting the motion for summary adjudication on Angeles's causes of action for discrimination, retaliation, and wrongful termination, all of which are predicated on her constructive discharge.

Angeles also argues the trial court erred in granting summary adjudication on her causes of action for harassment and failure to prevent harassment because the court applied the wrong legal standard to determine whether the Credit Union harassed her. We agree that the trial court applied an incorrect definition of harassment and that, under the correct standard, there was sufficient evidence to create a triable issue of fact on Angeles's harassment claims. Therefore, we reverse the order granting summary adjudication on these two causes of action, the judgment, and the postjudgment costs order.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Angeles Takes Medical Leave in August 2011*

Angeles began working as a collector at the Credit Union in March 2006. In August 2011 a coworker attempted to assault Angeles after trying to remove items from Angeles's workstation without consent. Following an investigation, Weakley, the Credit Union's Chief Executive Officer, met on August 31, 2011 with Angeles and three other Credit Union employees, including Young, the Credit Union's Chief Operating Officer. Weakley expressed concern about Angeles conducting her own investigation of the incident, including by asking a colleague to show her recordings from a security camera. Weakley gave

Angeles a verbal warning, and Angeles left the office to see a doctor because she was "[f]eeling so sick" she "thought [she] was having a stroke." Angeles began a medical leave of absence that day.

While on leave, Angeles visited the Credit Union and met with Weakley. He suggested Angeles and another employee could "do some outside sales for the Credit Union" when Angeles returned to work because Angeles spoke fluent Spanish and she said she had been successful in a prior banking position "marketing to the community." On December 27, 2011 Angeles sent Weakley a text message signed "ur collector/sales person."

B. *Angeles Returns to Work and Takes Another Medical Leave in January 2012*

Angeles returned to work at the Credit Union on January 3, 2012. The parties dispute much of what happened between her return and when she began another medical leave three weeks later. Angeles's doctor instructed the Credit Union to avoid giving Angeles work that would increase her blood pressure. Angeles contends Weakley and Young ignored these instructions by assigning her to a new department, giving her uncollectible accounts, telling her she was on a 90-day trial, and moving her desk in front of Young, who previously "exhibited hostility" toward Angeles and other employees with health problems. The Credit Union contends it suggested modifications to Angeles's job duties but never required her to perform them, moved Angeles's desk so that she would not have to interact with the employee who tried to assault her, and attempted in good faith to comply with instructions from Angeles's doctor.

The letter from Angeles's doctor stated it was "imperative that [Angeles's] blood pressure is not elevated" because increasing her blood pressure could "cause the rupture of one of [two] aneur[y]sms" and "result in death." Weakley called Angeles's doctor on January 4, 2012 to ask how the Credit Union should accommodate Angeles. The doctor instructed Weakley to keep the workplace as stress free as possible "considering the normal demands of a workplace." From January 4 to January 9, 2012 Angeles expressed her gratitude to Weakley for his efforts in creating a "safe" workplace for her. Angeles also expressed concern, however, about "miscommunication" over her return to the Credit Union. On January 5, 2012 she said she was "distress[ed]" by proposed changes to her responsibilities, the Credit Union's failure to provide a functional computer, and meetings to discuss her role at the Credit Union.

On January 17, 2012 Angeles filed a workers' compensation claim alleging she suffered "[c]ontinuous harassment, hostile work environment and retaliation" from March 9, 2006 to January 18, 2012. Angeles argues that, not long after filing this claim, Young called Angeles into her office with Weakley present and told Angeles she should leave because Young "refuse[d] to walk on eggshells around [her]."[2] Young admits she "mention[ed]" to Angeles that Young "felt like [she] was walking on eggshells" because Angeles's doctor "essentially said 'don't

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[2] Angeles's declarations and deposition testimony suggest Young made this statement at various times between January 3, 2012 and January 23, 2012. Sometimes Angeles stated Weakley was present when Young made this statement and sometimes she does not mention Weakley's presence.

cause her any undue stress or she may die' but gave us no guidance as to what that really meant."

Angeles also contended Young yelled at her every day. Angeles claimed that, between January 17, 2012 and January 23, 2012, Young "made it clear she wanted me out." Angeles claimed that on an unspecified date Young called Angeles into her office with Weakley and another employee, Cathy Pelham, and said, "[P]eople that are sick have bad in them." Pelham replied, "Well, then I must be rotten because I had cancer." Angeles said Young's comment "shocked and upset" her and reflected Young's attitude toward employees who suffer from "obvious disabilities." Angeles said that on one occasion Young told another collector who was "hemorrhag[ing]" to "go home and put on a Kotex and come back," even though "[t]here was a pool of blood where the collections employee had been sitting." On another occasion Young yelled at an employee who was having a stroke, and Young refused to call 911. Angeles contended these episodes reflected Young's belief that "anyone who was ill [was] weak or evil."

On January 18, 2012 Angeles gave the Credit Union a "Work Status Report" recommending the Credit Union temporarily transfer Angeles to a different location or approve a two-week leave of absence. Weakley met with Angeles to discuss the report and according to Weakley, Angeles agreed to certain accommodations regarding her job responsibilities and the location of her desk.[3]

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[3] Weakley stated in his declaration this meeting occurred on January 19, 2012, but an email from Weakley to Young and other documentation suggest it occurred on January 23, 2012.

Angeles asserts, however, that on January 23, 2012 Weakley reacted angrily to Angeles's workers' compensation claim. She said she "began to experience a panic attack and [her] blood sugar was getting elevated." Weakley asked Pelham to take Angeles to the hospital, and Weakley and Young went there too. Angeles said their presence "upset" her, and she left the hospital. Angeles commenced a series of medical leaves on January 23, 2012 "due to the hostile conditions at work and the effect it [had] on her health." She never returned to the Credit Union.

C. *Angeles Reports Alleged Illegal Activity to the National Credit Union Administration and Files a Complaint with the Department of Fair Employment and Housing*

On June 4, 2012 Angeles communicated with Cheryl Voss, the Credit Union's Vice President of Human Resources, to ask whether a particular person was still the head of the National Credit Union Administration (NCUA)[4] and to complain about the Credit Union's alleged practice of handpicking board members rather than allowing Credit Union members to vote for them. Voss told Angeles all Credit Union members who attend the

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[4] The NCUA is the federal agency charged with administering the Federal Credit Union Act, which authorizes the chartering of credit unions and provides that federal credit unions may offer banking services only to their members. (*National Credit Union Admin. v. First Nat. Bank & Trust Co.* (1998) 522 U.S. 479, 483.)

annual meeting could vote for board members, to which Angeles replied, "That's a crock and you know it! . . . You all need to be inve[sti]gated by [the] Feds!" Angeles in fact cooperated in an NCUA investigation of the Credit Union between January and October 2012. Angeles alleged the Credit Union engaged in a variety of illegal activities in which Weakley and Young participated, and Angeles provided the NCUA documents concerning her allegations. NCUA representatives told Angeles not to talk to anyone about her complaints during the investigation, and she said she heeded that instruction.

On July 9, 2012 an attorney for Angeles sent a letter to Weakley informing him that Angeles had a claim against the Credit Union for disability discrimination (among other claims) under the California Fair Employment and Housing Act (FEHA) and that Angeles wanted to settle out of court. Angeles contends the Credit Union "cut off" her benefits after receiving that letter. Gina Barron Hurd, the Credit Union's Director of Human Resources, had previously informed Angeles the Credit Union would deduct Angeles's share of her health insurance premium from Angeles's accrued vacation and sick leave until exhausted. After that time, Hurd said, Angeles would be responsible for paying her share of her health insurance premium. To pay for her health insurance, Angeles requested access to her 401(k) retirement account, but the Credit Union denied her request because, according to Angeles, the Credit Union said she was still an employee.[5]

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[5] Federal law prohibits distributions of funds in a qualified 401(k) retirement plan earlier than "severance from employment,

On November 19, 2012 Angeles filed a charge of discrimination, harassment, and retaliation with the Department of Fair Employment and Housing and requested an immediate right to sue notice. Among other things, Angeles alleged "[t]he harassment, discrimination and retaliation were continuing until [Angeles] was wrongfully terminated [or constructively terminated]." She alleged the Credit Union retaliated against her when she returned from medical leave in January 2012 by "taking away her job duties and refusing to return her to her position." Angeles said she "could not take the hostile work environment any longer and she went back out on stress leave." Angeles also claimed she "reported illegal activities at the Credit Union to the NCUA." The Department granted Angeles's request for a right to sue notice, and shortly thereafter Hurd received a copy of Angeles's complaint.

On or soon after December 3, 2012 Hurd received a note from Angeles's doctor stating that Angeles could "return to work with the following restriction: . . . [t]hat she **not return** to work for **Von's Credit Union** in an[y] capacity." The doctor said Angeles could seek part-time employment elsewhere. On December 31, 2012 Hurd wrote Angeles and said: "As we understand it, your healthcare provider has indicated that you are not to be released to return to work at the Credit Union; furthermore, the letter seems to indicate that this restriction is ongoing (indefinite). If this is inaccurate, or we have misunderstood your healthcare provider's instruction, please immediately advise." Hurd's December 31, 2012 letter also

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death, or disability," or other enumerated circumstances. (See 26 U.S.C. § 401, subd. (k)(2)(B)(i)(1).)

acknowledged the Credit Union had received Angeles's request for forms to withdraw her funds from the Credit Union's 401(k) plan. Hurd wrote: "Pursuant to our understanding of the letter from your healthcare provider, please note that we will process your [401(k)] withdrawal as though your employment has terminated as of the date of this letter, December 31, 2012. If this is not accurate or does not conform with your understanding, please so advise immediately, but no later than January 7, 2013."

On January 7, 2013, Angeles sent Voss two emails, one of which said, "I am under medical care from workers comp doctors and following their restrictions to protect my health." The other email said, "If you have any questions contact my workers com[p] attorney . . . . I have not quit my possit [*sic*]."

D. *Angeles Sues the Credit Union*

Angeles filed this action on November 19, 2013. The operative complaint alleged causes of action against the Credit Union for violation of Labor Code section 1102.5 (the whistleblower statute), age discrimination, sexual harassment and discrimination, disability harassment and discrimination, retaliation, failure to investigate and prevent harassment, discrimination, and retaliation, intentional infliction of emotional distress (which Angeles also alleged against Weakley and Young), and wrongful constructive termination in violation of public policy.

Angeles alleged that when she returned to the Credit Union in January 2012 "Weakley and Young made the atmosphere hostile and unbearable for [her], they mistreated her, took away her job duties, and refused to return her to her position. She was stripped of her duties, others were told in the

company and outside that she did not work in collections, they did everything they could to make her job so unbearable that she would quit." Angeles also alleged that, after "she made her complaint to the NCUA, Weakley and Young began to retaliate against her" by moving her to a cubicle outside Weakley's office so he and Young could monitor Angeles. Angeles alleged she "went out on stress [*sic*] due to the intolerable atmosphere until December 2012 when [she] was constructively terminated." Specifically, Angeles alleged the Credit Union "constructively terminated [her] in December 2012 when her doctor sent a letter to the Credit Union." Angeles alleged that, as of December 3, 2012, "her doctor told her she could not return to work at the Credit Union because of the damage it had done to her emotional health and wellbeing." She demanded a jury trial and sought damages, punitive damages, attorneys' fees, and costs.

E. *The Defendants File a Motion for Summary Judgment or in the Alternative for Summary Adjudication*

The defendants filed a motion for summary judgment or in the alternative for summary adjudication. The Credit Union argued Angeles did not suffer an adverse employment action in connection with her causes of action for retaliation, discrimination, and failure to prevent discrimination because her January 7, 2013 email, in which she stated she had not quit, conclusively demonstrated the Credit Union did not constructively discharge her on December 3, 2012. The Credit Union argued that, for the same reason, Angeles could not demonstrate constructive wrongful termination. The Credit Union also argued Angeles could not show Weakley, Young, or

anyone else at the Credit Union knew about Angeles's complaints to the NCUA before taking any allegedly retaliatory actions. The Credit Union pointed out Angeles left the Credit Union on January 23, 2012, but she did not mention her involvement with an NCUA investigation to anyone at the Credit Union until November 2012. The Credit Union argued that, to the extent Angeles suffered an adverse employment action, there were legitimate non-discriminatory and non-retaliatory reasons for its employment decisions. With respect to Angeles's causes of action for harassment and failure to prevent harassment, the Credit Union argued Angeles could not show a concerted pattern of harassment or any single act sufficiently severe to constitute harassment.

The defendants argued Angeles could not show sufficiently extreme and outrageous conduct to support her cause of action for intentional infliction of emotional distress. They also argued Angeles could not demonstrate oppression, fraud, or malice sufficient to support her punitive damages claim.

Angeles opposed the motion on all of her causes of action except those for age and sex discrimination and sexual harassment, which she abandoned. Angeles argued the factual dispute "[a]t the heart" of the defendants' contention she did not suffer an adverse employment action was whether the Credit Union actually or constructively discharged her. Angeles argued the Credit Union "ha[d] not provided any evidence or argument on this basic factual issue," whereas she had "provided undisputed [e]vidence she was terminated on December 31, 2012." Yet Angeles also argued, "The factual dispute lies in whether [she] was constructively terminated, and if so, when was she constructively terminated?" She contended the Credit Union

did "not even attempt to present any facts to answer this question," even though the Credit Union "control[s] when [she] is terminated." Angeles concluded, "If [she] was constructively terminated and not actually terminated on December 2012, [Angeles] alleges it would have occurred when [Angeles's] doctor said she could not go back to work at the Credit Union on December 3, 2012. . . . But that is in dispute." Angeles did not identify or provide evidence of any other adverse employment action that could support her causes of action for retaliation, discrimination, and failure to prevent discrimination. She also failed to respond meaningfully to the Credit Union's arguments on her causes of action for harassment and intentional infliction of emotional distress, but she did not expressly abandon them.

The trial court granted the motion for summary judgment. Angeles filed a motion for a new trial or to vacate the judgment, which the trial court denied. The trial court also denied Angeles's motion to strike or to tax costs and awarded the defendants $18,334.73 in costs. Angeles timely appealed from the judgment and the order denying her motion to strike or tax costs.

DISCUSSION

A. *Applicable Law and Standard of Review*

Summary judgment is appropriate "'where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.'" (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618.) "A triable issue of material fact exists if the evidence and inferences therefrom would allow a reasonable juror to find the underlying

fact in favor of the party opposing summary judgment." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1158 (*Featherstone*); see *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 856.)

"The pleadings play a key role in a summary judgment motion. "'The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues . . . '" and to frame 'the outer measure of materiality in a summary judgment proceeding.'" (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493 (*Hutton*); accord, *Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 363-364.) "As our Supreme Court has explained it: 'The materiality of a disputed fact is measured by the pleadings [citations], which "set the boundaries of the issues to be resolved at summary judgment."'" (*Hutton*, at p. 493, quoting *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250 (*Conroy*).) "Accordingly, the burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." (*Hutton*, at p. 493; see *Johnson v. Raytheon Company, Inc.* (2019) 33 Cal.App.5th 617, 636 ["'To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. [Citation.] If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion.'"].)

Moreover, papers filed in response to a motion for summary judgment may not create issues outside the pleadings and are not

a substitute for an amendment to the pleadings. (*Hutton*, *supra*, 213 Cal.App.4th at p. 493; *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 332.) "An opposing party's separate statement is not a substitute for amendment of the complaint." (*Hutton*, at p. 493; see *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1201-1202, fn. 5.) "Similarly, ""[d]eclarations in opposition to a motion for summary judgment "are no substitute for amended pleadings." . . . If the motion for summary judgment presents evidence sufficient to disprove the plaintiff's claims, . . . the plaintiff forfeits an opportunity to amend to state new claims by failing to request it."""" (*Hutton*, at p. 293; see *Conroy, supra,* 45 Cal.4th at p. 1254.)

We review a trial court's order granting summary judgment de novo. (*Samara v. Matar* (2018) 5 Cal.5th 322, 338; *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.) We consider "'all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.'" (*Featherstone*, *supra*, 10 Cal.App.5th at p. 1158; see *Regents of University of California v. Superior Court*, *supra*, 4 Cal.5th at p. 618.) "'In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [his or] her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor.'" (*Featherstone*, at p. 1158; see *Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763, 768.) "We accept as true both the facts shown by the losing party's evidence and reasonable inferences from that evidence." (*Sakai v. Massco Investments, LLC* (2018) 20 Cal.App.5th 1178, 1183; see *Featherstone*, at p. 1159 ["[a]lthough an employee's evidence submitted in

opposition to an employer's motion for summary judgment is construed liberally, it 'remains subject to careful scrutiny'"].)

""[T]he appellant has the burden of showing error, even if he did not bear the burden in the trial court."" (*Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 379; see *Centex Homes v. St. Paul Fire & Marine Ins. Co.* (2018) 19 Cal.App.5th 789, 796 ["'the [appellants] bear the burden of establishing error on appeal, even though [the respondent] had the burden of proving its right to summary judgment before the trial court'"].) We affirm an order granting a motion for summary judgment or summary adjudication if it is correct under any theory. (*Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1186.)

B. *The Trial Court Did Not Err in Granting the Motion for Summary Adjudication on Angeles's Causes of Action for Discrimination, Failure To Prevent Discrimination, Retaliation, and Wrongful Termination Because She Cannot Establish the Constructive Discharge She Alleged in Her Complaint*

Angeles's causes of action for retaliation, discrimination, and failure to prevent discrimination required her to show she suffered an adverse employment action. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 [retaliation under FEHA]; *Featherstone*, *supra*, 10 Cal.App.5th at p. 1161 [disability discrimination under FEHA]; *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384 [retaliation under Labor Code section 1102.5].) In the trial court Angeles asserted the Credit Union actually or constructively discharged her, which qualifies as an adverse employment action. (See *Steele v.*

Youthful Offender Parole Bd. (2008) 162 Cal.App.4th 1241, 1253 [constructive discharge is an adverse employment action].) Her alleged constructive discharge also provided the basis for her cause of action for "wrongful constructive termination in violation of public policy."

On appeal Angeles argues the trial court erred in summarily adjudicating her causes of action based on her alleged constructive discharge because there was a triable issue of fact regarding whether the Credit Union constructively discharged her. Angeles does not argue, as she did in the trial court, the Credit Union actually terminated her. Because Angeles cannot demonstrate a triable issue of fact regarding whether the Credit Union constructively discharged her on December 3, 2012, the trial court properly granted the motion for summary adjudication on those causes of action that required her to show constructive discharge.[6]

"'Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say "I quit," the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation.'" (*Simers v. Los*

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[6] For the first time on appeal (and only in connection with her cause of action for disability discrimination), Angeles argues she suffered an adverse employment action when the Credit Union required her "to drive around soliciting new business." Angeles forfeited this argument by not making it in the trial court. (See *Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068, 1093.) Moreover, Angeles admitted the Credit Union never required her to perform those duties.

Angeles Times Communications, LLC (2018) 18 Cal.App.5th 1248, 1269; see *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245; *Steele v. Youthful Offender Parole Bd.*, *supra*, 162 Cal.App.4th at p. 1253.) "To establish a constructive discharge, an employee must prove 'that 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.'" (*Simers*, at p. 1269; see *Turner*, at p. 1251.) "[T]he question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.'" (*Turner*, at p. 1248; see *Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827.)

Angeles alleged the Credit Union constructively discharged her "in December 2012 when [Angeles's] doctor sent a letter to the Credit Union." But uncontroverted evidence showed that on January 7, 2013, the date by which the Credit Union asked Angeles to correct the impression that she had quit, Angeles told the Credit Union she had not quit. Whether she was hoping the Credit Union would then terminate her employment is unclear. But on January 7, 2013 Angeles believed and told the Credit Union she was still an employee. Thus, Angeles cannot show conditions in December 2012 were such that she felt she had no reasonable alternative but to quit.

Angeles argues "no formal statement of resignation is required to establish that [she] was constructively discharged." True, some cases have defined constructive discharge to include conduct that falls short of an express resignation, such as a forced

retirement or involuntary medical leave without pay. (See *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1317 [constructive discharge occurred when an employer "dr[ove] plaintiff to request disability retirement"]; *Siraj v. Bayer Healthcare LLC* (N.D.Cal., Mar. 8, 2010, No. 09-00233) 2010 WL 889996, p. 7 [denying summary adjudication on a cause of action based on constructive discharge where the plaintiff "'remains on medical leave of absence until she is able to perform the essential functions of her position'"]; but see *Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 740 [cause of action based on constructive discharge does not accrue until "the coerced resignation finally occurs," even if "the employee retains employment in the hope that conditions will improve or that informal conciliation may succeed"]; *Payne v. Huhtamaki Co. Mfg.* (E.D.Cal., June 17, 2011, No. CIV S-10-0475 KJM) 2011 WL 2462990, p. 4 ["'[a]n employee's actual resignation functions as a necessary prerequisite to bringing a claim based upon constructive discharge'"].) But Angeles did not merely fail to make a "formal statement of resignation." She affirmatively asserted she was still an employee after the date on which her complaint alleged she was constructively discharged. Angeles cannot "'bring up new, unpleaded issues in [her] opposing papers'" (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 585) or create a triable issue by contradicting the factual allegations in the complaint (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1129).[7]

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[7] We acknowledge that "mistaken conclusions of a legal character are not binding on the pleader, for purposes of

C. *The Trial Court Erred in Granting the Motion for Summary Adjudication on Angeles's Causes of Action for Disability Harassment and Failure To Prevent Disability Harassment*

1. *Prohibited Harassment in the Workplace*

FEHA prohibits an employer from harassing an employee because of a physical disability or perceived disability. (Gov. Code, § 12940, subd. (j)(1); *Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 (*Cornell*); see *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 705-706.) "'The law prohibiting harassment is violated "[w]hen the workplace is permeated with 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

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summary judgment." (*Food Safety Net Services v. Eco Safe Systems USA, Inc.*, *supra*, 209 Cal.App.4th at p. 1129, fn. 3.) Angeles, however, did not make this argument in response to the Credit Union's argument she was bound by the allegations in her complaint. (See *Jackpot Harvesting Co., Inc. v. Superior Court* (2018) 26 Cal.App.5th 125, 155 ["arguments not raised in summary judgment proceedings" are forfeited]; *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1056 [by not making an argument in opposition to a motion for summary judgment, the appellants forfeited the argument on appeal].) Moreover, rather than addressing the legal and factual relevance of her January 7, 2013 email, Angeles ignored it altogether and asserted in the trial court the Credit Union actually terminated her on December 31, 2012. That assertion also contradicted the complaint, and Angeles did not seek leave to amend the complaint to include it.

environment.""""" (*Caldera v. Department of Corrections and Rehabilitation* (2018) 25 Cal.App.5th 31, 38 (*Caldera*); see *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 869 (*Serri*)). "Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell*, at p. 927.)

"Harassment includes but is not limited to . . . [v]erbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act." (Cal. Code Regs., tit. 2, § 11019, subd. (b)(2)(A); see *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129.) "'[H]arassing 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." [Citation.] "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."'" (*Serri*, *supra*, 226 Cal.App.4th at p. 869; see *Roby v. McKesson Corp.*, *supra*, 47 Cal.4th at p. 706.)

"'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.'"'" (*Serri*, *supra*, 226 Cal.App.4th at p. 870.) "Actionable harassment consists of more than 'annoying or "merely offensive" comments in the workplace,' and it cannot be

'occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature.'" (*Cornell*, *supra*, 18 Cal.App.5th at p. 940, quoting *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283.) Incidents of harassing conduct over a short period of time, however, may constitute severe or pervasive harassment, especially when committed by a supervisor. (*Caldera*, *supra*, 25 Cal.App.5th at p. 39; *Fuentes v. AutoZone, Inc.* (2011) 200 Cal.App.4th 1221, 1224; see *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 36 ["a single offensive act by a coemployee is not enough to establish employer liability for a hostile work environment," but "where that act is committed by a supervisor, the result may be different"].)

"""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."'" (*Serri*, *supra*, 226 Cal.App.4th at p. 870; accord, *Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 951-952; see *Cornell*, *supra*, 18 Cal.App.5th at p. 940 ["[w]hether the harassment is sufficiently severe or pervasive to create a hostile work environment 'must be assessed from the "perspective of a reasonable person belonging to [the same protected class as] the plaintiff"'"].) "[W]hether an employee was subjected to a hostile environment is ordinarily one of fact."

(*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 264; see *Caldera*, *supra*, 25 Cal.App.5th at p. 38.)

2. *Whether the Credit Union Supervisors Unlawfully Harassed Angeles Is a Factual Issue*

The trial court ruled the "facts establish there was no disability harassment" because "Angeles offer[ed] no evidence of epithets, derogatory comments, slurs, physical harassment, or visual harassment that Young addressed to her concerning her possible aneurysms or medical leave." Angeles argues, and we agree, that the trial court applied the wrong definition of verbal harassment and that a jury could find Young's conduct was sufficiently severe or pervasive that a jury could find it amounted harassment.

The trial court adopted an unduly narrow definition of verbal harassment limited to "epithets, derogatory comments, [and] slurs." The regulations defining "harassment" for purposes of FEHA provide that verbal harassment is not limited to those enumerated examples. (Cal. Code Regs., tit. 2, § 11019, subd. (b)(2)(A).) Comments and actions that "communicate[ ] an offensive message" may constitute unlawful harassment if they are sufficiently severe or pervasive. (See *Roby v. McKesson Corp.*, *supra*, 47 Cal.4th at p. 706; *Serri*, *supra*, 226 Cal.App.4th at p. 869.) For example, in *Cornell* the court held harassing conduct toward an obese employee included comments that "were not explicitly derogatory or threatening." (*Cornell*, *supra*, 18 Cal.App.5th at p. 940.) The plaintiff once heard her supervisor tell the kitchen staff of the private club where she worked "not to give her extra food because '"she doesn't need it,"' and [her supervisor] once told her that she did not '"need to eat that."'"

(*Ibid.*) The court stated these comments must be considered in context with the club's other allegedly harassing conduct, including ordering uniform shirts that were significantly too small for the plaintiff and reporting to the personnel committee that she was resisting the uniform policy by not wearing appropriate shirts. (*Id.* at p. 941.) Under the totality of circumstances in that case, the court held summary adjudication of the plaintiff's cause of action for disability harassment was improper. (*Ibid.*)

Angeles argues the following conduct was sufficiently severe or pervasive to constitute verbal harassment because of her actual or perceived disability: (1) Young told Angeles "people who are ill have bad/evil in them"; (2) Young yelled at Angeles for filing a workers' compensation claim; (3) Young treated Angeles with hostility and yelled at her every day; and (4) Young told Angeles she would not "walk on eggshells" around her and Angeles needed to leave. Angeles does take some liberties with the record. For example, the record indicates only that Young and Weakley reacted with "immediate anger" to Angeles's workers' compensation claim, not that Young yelled at her for filing it. And while Angeles stated in her declaration Young yelled at her every day, Angeles did not say in her declaration what or why Young yelled.

Given the context in which Young made these statements, however, Angeles's evidence was sufficient to create a triable issue of fact on her cause of action for harassment. Angeles presented evidence that the Credit Union moved her desk in front of Young's office, which caused Angeles stress because of Young's hostility toward her, and that Young had mistreated sick and injured Credit Union employees. Taken together and viewed in

the light most favorable to Angeles, this evidence could allow a reasonable jury to conclude the Credit Union created an environment that was intolerable to Angeles and to a reasonable person with actual or perceived disabilities. (See *Cornell*, *supra*, 18 Cal.App.5th at p. 941 ["'some official employment actions done in furtherance of a supervisor's managerial role can also have a secondary effect of communicating a hostile message' and thus also support a harassment claim"]; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610 ["[e]vidence of the general work atmosphere, involving employees other than the plaintiff, is relevant to the issue of whether there existed an atmosphere of hostile work environment"].)

The Credit Union argues Young's comments were "at best some isolated incidents" that occurred over a "relatively short" time. As stated, however, incidents of harassing conduct over a short period of time may constitute severe or pervasive harassment. (See *Caldera*, *supra*, 25 Cal.App.5th at p. 39; *Fuentes v. AutoZone, Inc.*, *supra,* 200 Cal.App.4th at p. 1224.) For example, in *Fuentes* the court upheld a jury verdict for a plaintiff who suffered harassment for a little more than three weeks. (*Fuentes*, at pp. 1224-1225.) The court emphasized that the "compressed period of time" during which the plaintiff experienced harassment did not preclude the jury from finding the harassment was pervasive, severe, and unreasonably interfered with the plaintiff's ability to do her job. (*Id.* at pp. 1234-1235.) Moreover, in light of the fact Young made all of the allegedly offensive statements to Angeles during a three-week period, we cannot agree with the Credit Union's characterization of them as "isolated incidents." Ultimately whether the harassment here was sufficiently severe or pervasive to create a

hostile work environment is a question for the finder of fact. (See *Caldera*, at p. 39.)

The Credit Union also argues Angeles cannot show Young's comments interfered with Angeles's ability to do her job, a necessary element of a cause of action for harassment. (See *Serri*, *supra*, 226 Cal.App.4th at p. 870 [to demonstrate harassment the plaintiff must prove the defendant's conduct would have interfered with a reasonable employee's work performance].) The Credit Union points to emails Angeles sent to Weakley suggesting that in January 2012 Angeles appeared content working at the Credit Union. But Angeles submitted evidence she left the Credit Union on January 23, 2012 because Young made it too stressful for Angeles to work there in any capacity while Angeles suffered from her disability. This evidence included Angeles's statement in her declaration that "[t]he actions by Young which were ratified by Weakley in discriminating against me because she perceived the fact that I was suffering from medical conditions as 'bad/evil' and her actions in trying to force me out of the credit union were extremely hurtful and upsetting to me. At the same time, she was yelling at me and causing me more stress at a time I was trying to manage my stress. This all caused me additional anxiety and distress for something I had no control over, I was suffering from a medical condition that compromised my immune system and made me weak." While Angeles's emails to Weakley may provide the Credit Union with ample impeachment evidence on cross-examination, and the emails may cause the trier of fact to discount Angeles's testimony, the Credit Union's evidence did not preclude Angeles from demonstrating that the conditions created by Young interfered with her job performance.

3. *Whether the Credit Union Failed To Prevent Harassment Is Also a Factual Issue*

FEHA requires employers to "take all reasonable steps necessary to prevent . . . harassment from occurring." (Gov. Code, § 12940, subd. (k); see *Caldera*, *supra*, 25 Cal.App.5th at p. 43.) A plaintiff seeking to recover for failure to prevent harassment must show he or she was subjected to harassment, the defendant failed to take all reasonable steps to prevent harassment, and the failure caused the plaintiff harm. (*Caldera*, at pp. 43-44; *Nazir v. United Airlines, Inc.*, *supra*, 178 Cal.App.4th at p. 263.) The trial court granted the Credit Union's motion for summary adjudication on Angeles's cause of action for failure to prevent harassment because the trial court ruled Angeles could not maintain the predicate harassment claim, which was the only reason the Credit Union moved for summary adjudication on Angeles's failure to prevent harassment cause of action. Because we reverse the trial court's order granting summary adjudication on Angeles's cause of action for harassment, we reverse the order granting summary adjudication on her cause of action for failure to prevent harassment.

D. *Angeles Forfeited Any Argument the Trial Court Erred in Granting the Motion for Summary Adjudication on Her Cause of Action for Intentional Infliction of Emotional Distress*

Angeles does not argue in her opening brief the trial court erred in granting the motion for summary adjudication on her cause of action for intentional infliction of emotional distress. Angeles's reply brief also fails to discuss her cause of action for

intentional infliction of emotional distress, except in connection with her argument concerning the trial court's postjudgment order awarding costs. Because Angeles does not identify any error in granting the motion for summary adjudication on her cause of action for intentional infliction of emotional distress, she has forfeited any argument we should reverse that order. (See *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [issue not raised on appeal is forfeited]; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177-1178 ["failure to address summary adjudication of a claim on appeal constitutes abandonment of that claim"].)

E. *Whether Angeles Is Entitled to Punitive Damages Is a Factual Issue*

The trial court granted the motion for summary adjudication on Angeles's claim for punitive damages because the court ruled the Credit Union was entitled to summary adjudication on all of Angeles's causes of action. The reversal of the judgment necessarily invalidates the trial court's reasoning. Moreover, the statements by Weakley and Young in their declarations they had no feelings of hatred, ill will, or malice toward Angeles do not foreclose her from proving by clear and convincing evidence the Credit Union was "guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a); see *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1435 ["[a] court can award Civil Code section 3294 punitive damages in an FEHA case"].) Angeles submitted declarations supporting her allegations that Young harassed Angeles with conscious disregard for Angeles's wellbeing. A reasonable jury could find

such evidence demonstrated oppression or malice. (See Civ. Code, § 3294, subd. (c)(1) ["malice" includes "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others"]; *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1055-1056 [a reasonable jury could find defendants acted with conscious disregard for the plaintiff's rights by evicting the plaintiff "despite concerns about the legality of the acts and about their effect on plaintiff's welfare"].)

DISPOSITION

The judgment is reversed. The trial court's order granting the motion for summary adjudication on Angeles's causes of action for disability harassment and failure to prevent disability harassment, and on her claim for punitive damages, is reversed, and the trial court is directed to enter a new order denying the motion on those causes of action and on the claim for punitive damages. The trial court's order granting summary adjudication on Angeles's causes of action for violation of Labor Code section 1102.5, disability discrimination, failure to prevent disability discrimination, retaliation, wrongful constructive termination, and intentional infliction of emotional distress is affirmed. The trial court's postjudgment order granting the defendants' request for costs is also reversed. The parties are to bear their costs on appeal.

SEGAL, J.

We concur: PERLUSS, P. J. FEUER, J.