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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

TERRI ATWELL, Plaintiff and Appellant, v. CITY OF LONG BEACH, Defendant and Respondent.	B264116 Los Angeles County Super. Ct. No. BC515863

APPEAL from a judgment of the Superior Court of Los Angeles County, John L. Segal, Judge. Affirmed.

Law Offices of Jeffrey A. Sklar and Jeffrey Alan Sklar for Plaintiff and Appellant.

Charles Parkin, City Attorney, Victoria A. Silcox, Deputy City Attorney; Alderman & Hilgers and Allison R. Hilgers for Defendant and Respondent.

INTRODUCTION

Plaintiff Terri Atwell resigned from her position as a public safety dispatcher with the City of Long Beach about two months before the end of her probationary period, citing a burdensome commute to and from work each day as her reason for leaving the job. Atwell then sued the City under the Fair Employment and Housing Act (FEHA) (Gov. Code,[1] § 12900 et seq.) for (1) race discrimination, (2) harassment, (3) retaliation, and (4) failure to investigate protected complaints. The trial court granted summary judgment in the City's favor, concluding Atwell did not suffer any adverse employment action and, in any event, the City did not discriminate against, or harass, Atwell on the basis of her race or retaliate against her for engaging in protected activity. On appeal, Atwell contends triable issues of fact exist as to each of her causes of action and the court erred by denying her request to continue the summary judgment hearing. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Atwell's Employment History

In March 2011, the City hired Atwell and four others as probationary Public Safety Dispatchers I (probationary dispatchers or recruits) in the City's Emergency Communications Dispatch Center (Dispatch Center). Three of the newly-hired probationary dispatchers, including Atwell, were Black, one was Hispanic, and one was White.

The Dispatch Center receives all of the 911 calls out of Long Beach. Dispatchers are responsible for, among other things,

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[1] All undesignated statutory references are to the Government Code.

receiving and documenting 911 calls and directing emergency personnel, such as law enforcement officers, to assist callers.

To ensure these tasks are performed competently, the City requires its dispatchers to complete an intensive, year-long training program before they can move beyond probationary status and be promoted to Public Safety Dispatchers II. Probationary dispatchers attend extensive classroom training followed by nine months of experience in the field, where each one is assigned to, and supervised by, a communications training officer (CTO). A CTO assists and monitors his or her assigned probationary dispatcher's day-to-day performance. A CTO also documents the probationary dispatcher's job performance in weekly evaluations using a numeric scale, as well as by providing written feedback about such things as the dispatcher's strengths, weaknesses, and attitude.

To move beyond probationary status, a dispatcher must meet five skill-based benchmarks that increase in difficulty at specified intervals—typically at seven weeks, nine weeks, three months, six months, and nine months. If a dispatcher meets all of these benchmarks early, he or she will transition to "solo" status, meaning the dispatcher will be allowed to work without a CTO's constant supervision for the rest of the probationary period. Even if the dispatcher "solos out" before the end of the 12-month probationary period, he or she would not be eligible to promote to Public Safety Dispatcher II until that 12-month period expires.

Around May 2011, after finishing her classroom training, Atwell began working as a dispatcher under CTO Sarah Stephenson's supervision. In August 2011, after clearing the seven-week, nine-week, and three-month benchmarks, Atwell

began working under CTO Michelle Johnson's supervision. Atwell cleared the six-month benchmark around November 2011.

Stephenson and Johnson gave Atwell generally positive feedback and scores in their weekly evaluations. Although they gave Atwell some low scores (1s and 2s) in several categories in their first few weekly evaluations (i.e., Stephenson's evaluations from early May 2011 and Johnson's evaluations from early August 2011), they gave her mostly 3s and 4s, and no 1s, in their subsequent evaluations.

Around November 2011, Lieutenant Kenneth Rosenthal, the head of the City's dispatcher training program, reviewed the weekly evaluations, as well other documents, pertaining to each of the dispatchers who were still in their probationary periods. At that time, only the three Black probationary dispatchers, including Atwell, remained under constant CTO supervision—the Hispanic trainee had quit in September 2011 and the White trainee had " 'solo'ed out' " around November 2011. In conducting his review, Rosenthal noticed "inconsistencies" in the way CTOs were documenting their trainees' performances. For example, Rosenthal noticed that in some weekly evaluation forms, a trainee would receive low numeric scores in certain areas of performance but nevertheless would be allowed to advance to the next benchmark or would receive written praise from CTOs for that aspect of the trainee's work. To ensure CTOs more accurately documented the performance of their probationary dispatchers, Rosenthal made several changes to the evaluation process, requiring CTOs to: (1) conduct daily, rather than weekly, evaluations; (2) attach each dispatcher's call reports to the evaluation form rather than merely summarizing the call reports; and (3) focus on the weak areas of performance rather than on giving positive feedback. Rosenthal also prohibited probationary

dispatchers from writing comments on their own evaluations and required CTOs to penalize them for asking the same question twice during training.

In early November 2011, the City assigned Atwell to CTO Michelle Wilk for the final period of Atwell's supervised training.[2] Wilk had a reputation for being more abrasive and tougher on trainees than other CTOs. Wilk explained that she tended to give lower scores to dispatchers that she trained because she believed the dispatchers needed to be "aware" and "earn their scores." Before training Atwell, Wilk had trained between 10 to 15 other probationary dispatchers, three of whom were Black. None of the other Black recruits Wilk had trained advanced through probation.

In her first two weekly evaluations, spanning November 12 to November 22, 2011, Wilk gave Atwell mostly 1s and 2s in the "performance" and "knowledge" categories and mostly 2s and 4s in the "interpersonal skills" and "readiness" categories. In her third, fourth, and fifth weekly evaluations, however, Wilk gave Atwell all 2s and 2+s, with no 1s, in the "performance" category, and mostly 3s and 4s in the other categories.

According to Atwell, Wilk frequently yelled at her, employed a generally "abrasive" supervising technique, and was "harsher" and more unfair than Atwell's prior supervisors. Atwell would sometimes sit inside her car in the parking lot for several minutes before reporting to work or would have to leave her post during work to go to the restroom to cry because of how Wilk

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[2] Around the same time, Shaina Blalock, the only White recruit in Atwell's class, " 'solo'ed out,' " meaning she was allowed to work without constant CTO supervision until the end of her probationary period.

treated her. Atwell never heard Wilk use any racial epithets or make any comments that could be construed as racially derogatory, however. Atwell also never observed Wilk supervise any other probationary dispatchers.

At some point while she was working under Wilk's supervision, Atwell told Leslie Griggs, who is African American and was a supervisor in the Dispatch Center, that Atwell believed she was being mistreated because of her race. Griggs later reported Atwell's complaints to Sherriel Murry, the City's senior human resources officer, who in turn documented Griggs's report in a January 20, 2012 memorandum to a lieutenant in the internal affairs division of the City's police department.

On January 7, 2012, an officer in the Dispatch Center's communications department sent an email to the remaining recruits, including Atwell, informing them that they should anticipate "soloing out" to non-supervised status in early February 2012 and that, assuming they satisfied the City's requirements, they would be eligible for promotion to Probationary Dispatcher II in March 2012.

On January 14, 2012, Atwell made several mistakes while working the Dispatch Center's telephones and radios. At times, she struggled handling the volume of incoming emergency calls, had difficulty prioritizing radio traffic from officers in the field, and failed to accurately input information into the database that the officers used in the field. Toward the end of her shift, Atwell became overwhelmed and asked Wilk if she could take a break. Atwell told Wilk that she was "lost" and was having difficulty understanding what the officers on the radio were talking about.

On January 15, 2012, Atwell called in sick and did not report to work. The next day, Atwell submitted a letter of

resignation, citing her commute to and from work as the reason for her leaving her position as a probationary dispatcher: "Please accept this as my formal resignation from Long Beach PD. My last day here will be today. I have decided to part ways due to the commute being a hardship on my family. [¶] Thank you for the wonderful opportunity and the knowledge I have gained through this training process."

2. Atwell's Lawsuit

In July 2013, Atwell sued the City for violations of FEHA. In her operative first amended complaint, Atwell alleged claims for: (1) racial discrimination, (2) harassment, (3) retaliation, and (4) failure to investigate a complaint protected under FEHA.

2.1. The City's Summary Judgment Motion and Atwell's Opposition

In December 2014, the City filed a motion for summary judgment or, in the alternative, summary adjudication, which Atwell opposed. In addition to some of the evidence discussed above, Atwell submitted the following evidence in opposition to the City's motion, which she claims creates triable issues as to each of her causes of action.

Murry testified that Rosenthal is a "bigot." When asked how she formed this opinion, Murry stated she had heard other employees at the City complain that Rosenthal was "two-faced" because he often acted polite in front of his superiors but frequently yelled and screamed at his subordinate employees. Murry, however, was not aware of Rosenthal ever using racial epithets or treating the City's White employees better than its Black employees.

In the summer of 2011, Griggs applied for a promotion to Communications Supervisor. Although Griggs scored the highest out of all the applicants, Rosenthal ordered her to go through a second round of interviews, a process that Griggs had never seen used during her 27 years with the City. After the second interview, Rosenthal apparently dropped Griggs to the second highest spot among applicants. Nevertheless, Griggs was promoted to Communications Supervisor. Rosenthal later told Griggs to " 'take a look at yourself in the mirror' " to find out why she was promoted. Griggs also overheard Rosenthal's phone conversation with one of the other Black recruits from Atwell's class. After getting off the phone, Rosenthal said to Griggs, " 'I don't think he's gonna make it.' " Griggs resigned from the City in January 2012.

Around January 2012, CTO David Barrow expressed concern to Rosenthal that Griggs had favored Black employees while she was a supervisor. Rosenthal asked Barrow to draft a memo detailing Barrow's concerns, which Barrow drafted and submitted on January 13, 2012. At the end of the memo, Barrow stated, "I hope this is what you wanted. I need to go take a shower now." Barrow later testified that the contents of the memo were based on reports he had received from other City employees, but he could not recall who made those reports. With respect to the last line of the memo, Barrow explained that he was expressing his frustration about Rosenthal ordering him to memorialize his concerns in writing rather than allowing him to report them orally.

Atwell presented no evidence that she ever spoke to, or otherwise interacted directly with, Rosenthal.

2.2. The Court's Ruling Granting Summary Judgment in the City's Favor

On March 2, 2015, the court held a hearing on the City's motion for summary judgment. At the hearing, Atwell's counsel told the court that, due to a malfunctioning office copier, he had inadvertently failed to attach to Atwell's opposing papers portions of evidence that were cited in Atwell's separate statement. Atwell's counsel also informed the court that he intended to depose the City employee to whom Atwell submitted her letter of resignation, as well as the City's former chief of police. Atwell's counsel then made an oral request to continue the hearing on the summary judgment motion to allow Atwell to file the omitted evidence and to depose the additional witnesses.[3] The court denied Atwell's request for a continuance.

After hearing argument, the court adopted its written tentative ruling and granted the City's motion for summary judgment. With respect to Atwell's claim for discrimination, the court found Atwell did not suffer any adverse employment actions and that, in any event, none of the City's actions were racially motivated. The court also found that, even if Wilk's evaluations or Rosenthal's changes to the evaluation procedures negatively affected Atwell's ability to promote to a permanent position, there was no evidence that Wilk's or Rosenthal's actions were racially motivated.

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[3] Before the hearing, Atwell's counsel never filed a noticed motion or ex parte application requesting a continuance, nor did he file an affidavit explaining the reasons why a continuance would have been warranted.

The court found no triable issues existed with respect to Atwell's claim for harassment. The court concluded the alleged harassment—i.e., Wilk's abrasive training style—would only support a claim for discrimination, since that conduct qualified as "fundamental management conduct." With respect to Atwell's claim for retaliation, the court found Atwell failed to identify any protected activity she engaged in, and that, in any event, Atwell failed to demonstrate the City retaliated against her for engaging in protected activity. Finally, the court found Atwell could not assert a claim for failure to investigate because such a claim is dependent on the success of a discrimination, harassment, or retaliation claim, which Atwell could not establish.

On March 11, 2015, after the court granted the City's motion for summary judgment, Atwell filed a "Notice of Errata," which included about 60 pages of transcript from Atwell's deposition and three pages of transcript from Barrow's deposition. Along with the Notice of Errata, Atwell filed a declaration from one of her attorneys explaining that the attached deposition transcripts had been inadvertently omitted from Atwell's opposition papers due to a copier malfunction. Atwell did not, however, ask the court to reconsider its order granting the City's summary judgment motion or its ruling denying her request for a continuance. Atwell also did not file a motion under Code of Civil Procedure section 473, or any other type of motion or application, seeking reconsideration of the order or ruling.

On March 20, 2015, the court entered judgment in favor of the City, from which Atwell timely appealed.

DISCUSSION

1. The Court Did Not Abuse its Discretion in Denying Atwell's Oral Request for a Continuance.

Before reaching the merits of her appeal, we address Atwell's claim that the court erred when it denied her oral request to continue the hearing on the City's summary judgment motion to allow her to file evidence that had been omitted from her opposing papers. As we explain below, the court did not abuse its discretion.

Generally, a party does not have a right to a continuance as a matter of law.[4] (*Fisher v. Larsen* (1982) 138 Cal.App.3d 627, 648, accord *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 547.) Rather, the party seeking a continuance must demonstrate good cause. (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 172; Cal. Rules of Court, rule 3.1332(c) [trial court "may grant a continuance only on an affirmative showing of good cause requiring the continuance"].)

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[4] Code of Civil Procedure section 437c, subdivision (h), provides an exception to this rule. (See *Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765, 770–771 [the trial court's discretion to deny a request for continuance is limited under Code of Civil Procedure section 437c, subdivision (h)].) Under subdivision (h), a trial court must grant a continuance to allow an opposing party to conduct additional discovery if that party submits an affidavit explaining "that facts essential to justify opposition may exist but cannot, for reasons stated, be presented" at the time the opposition is due. The affidavit must be filed before or at the time the party's opposition is due. (Code Civ. Proc., 437c, subd. (h).) Here, however, Atwell does not challenge the court's denial of her request for a continuance to conduct additional discovery, and she did not submit an affidavit under Code of Civil Procedure section 437c, subdivision (h).

The decision to grant or deny a continuance of a hearing on a motion for summary judgment lies within the sound discretion of the trial court. (*Mahoney*, at pp. 171–172.)

In this case, the trial court acted well within its discretion when it denied Atwell's request. First, Atwell made only an oral request for a continuance. That is, she never filed a noticed motion or an ex parte application supported by a declaration explaining (1) why a continuance would have been warranted and (2) that the request was made as "soon as reasonably practical once the necessity for the continuance [was] discovered."[5] (See Cal. Rules of Court, rule 3.1332, subd. (b) [a request for a continuance must be made "by a noticed motion or an ex parte application . . . with supporting declarations" as soon as reasonably practical once the reason for the continuance is discovered].) For that reason alone, the court was justified in denying her request. (See *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1353 [trial court did not err in denying a continuance where the appellant "failed to request a continuance of the summary judgment motion hearing at any time prior to the hearing itself" and "failed to submit any affidavits whatsoever to justify a continuance"].)

Second, Atwell failed to show at the time she made her oral request that there was good cause for granting a continuance. (See Cal. Rules of Court, rule 3.1332, subd. (c).) Certainly, Atwell's counsel explained that the copier at his office had broken

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[5] Although Atwell later filed the declaration of one of her attorneys explaining why the evidence was omitted from her opposing papers, that declaration was filed almost two weeks *after* the court denied her oral request for a continuance and granted the City's summary judgment motion.

on the day he filed the opposition papers, which apparently led to the omission of some of the evidence he intended to submit with the opposition. But counsel never explained that he did not, or could not, have discovered the evidence was omitted before the date of the hearing on the City's motion, which was held more than two weeks after Atwell filed her opposition.

Atwell claims the court nevertheless committed reversible error in denying her request for a continuance, relying on *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, and *Leep v. American Ship Management* (2005) 126 Cal.App.4th 1028. These cases do not support Atwell's argument since none of them address whether a court abuses its discretion in denying an oral request for a continuance made for the first and only time on the date of the hearing on a summary judgment motion. (See *Nazir*, at pp. 262–263 [noting that it would have been error for the court to strike or totally disregard the plaintiff's noncompliant separate statement and then immediately grant the defendant's motion for summary judgment]; *Ambriz*, pp. 1527–1528 [trial court erred in sustaining certain objections to the plaintiff's evidence]; *Leep*, at p. 1040 [the plaintiff's inadvertent response of "undisputed" to a fact included in the defendant's separate statement did not conclusively establish the truth of that fact, where it was clear from the evidence and the arguments the plaintiff submitted in opposition to summary judgment that the fact was actually in dispute].)

In sum, we conclude the court did not abuse its discretion when it denied Atwell's oral request for a continuance. As a result, we do not consider the evidence Atwell submitted after the court granted summary judgment in considering the merits of her appeal.

2. Standard of Review for Summary Judgment

We independently review a trial court's ruling on a motion for summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) 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. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476 (*Merrill*).) A defendant moving for summary judgment must demonstrate that one or more elements of the plaintiff's claim cannot be established or that there exists a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant meets this burden, the plaintiff must present evidence establishing a triable issue of material fact. (*Ibid.*) A triable issue of fact exists if the evidence would allow a reasonable trier of fact to find the fact in favor of the party opposing summary judgment. (*Aguilar*, at p. 850.)

In reviewing a court's ruling on a summary judgment motion, we consider all of the evidence presented by the parties in connection with the motion, except that which was properly excluded, and all uncontradicted inferences that the evidence reasonably supports. (*Merrill*, *supra*, 26 Cal.4th at p. 476.) However, "[w]e do not resolve conflicts in the evidence as if we were sitting as the trier of fact. [Citation.] Instead, we draw all reasonable inferences from the evidence in the light most favorable to the party opposing summary judgment. [Citation.]" (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 961.) "[W]e liberally construe plaintiffs' evidentiary submissions and strictly scrutinize defendants' own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

3. Race Discrimination

FEHA prohibits an employer from discriminating against an employee on the basis of the employee's race. (§ 12940, subd. (a).) To establish a claim for race discrimination, a plaintiff must present evidence showing that: (1) she belongs to a protected class; (2) she is otherwise qualified to perform her job or was performing her job competently; (3) she was subjected to an adverse employment action, such as termination, demotion, or denial of an available job; and (4) the circumstances surrounding the plaintiff's employment or adverse employment action suggest a discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).)

If the plaintiff presents evidence falling within each of these categories, a presumption that the employer engaged in race discrimination arises and the burden shifts to the employer to present evidence demonstrating that it had a legitimate, nondiscriminatory business reason for making the adverse employment action against the plaintiff. (*Guz*, *supra*, 24 Cal.4th at pp. 355–356.) If the employer presents evidence showing a legitimate, nondiscriminatory business reason, the burden shifts back to the plaintiff to show the employer's proffered reason is untrue or pretextual, or that the employer nevertheless acted with discriminatory animus, such that a reasonable trier of fact could conclude the employer intentionally discriminated against the plaintiff or engaged in some other unlawful act. (*Id.* at p. 357; see also *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038.)

In the context of a summary judgment motion, however, the burden-shifting analysis is modified; the employer, as the moving party, has the initial burden to present admissible

evidence showing either that one or more elements of a plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors. (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1523.) Where an employer offers undisputed evidence of a proper motive for the employee's termination, the employee "must adduce substantial additional evidence from which a trier of fact could infer the articulated reasons for the adverse employment action were untrue or pretextual" in order to avoid summary judgment. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1112–1113.)

3.1. Adverse Employment Action

We begin by noting the City met its initial burden by showing that Atwell did not suffer an adverse employment action. Specifically, the City presented Atwell's letter of resignation, in which Atwell states she voluntarily quit her job because the commute to and from work was too much of a burden on her family. The letter makes no mention of Wilk's evaluations, Rosenthal's changes to the procedures for evaluating probationary dispatchers, or any other conduct by City supervisors or decision makers that Atwell now alleges contributed to, or constituted, an adverse employment action.

Atwell nevertheless contends the court erred in finding the City did not subject her to any adverse employment action. She argues she presented sufficient evidence in opposition to the City's summary judgment motion to support an inference that she: (1) was constructively discharged; (2) received undeserved negative performance evaluations from Wilk; (3) was subjected to Rosenthal's adverse changes to the procedures for evaluating probationary dispatchers; and (4) was passed over for a

promotion to Public Safety Dispatcher II. As we will explain, the court properly found no triable issues exist as to whether Atwell suffered any adverse employment action.

A "constructive discharge" qualifies as an adverse employment action for purposes of FEHA. (See *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1248.) An employee who resigns from her job will be treated as having been constructively discharged by her employer if her resignation was "*employer*-coerced, not caused by the voluntary action of the employee or by conditions or matters beyond the employer's reasonable control." (*Ibid.*) "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, 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." (*Id.* at p. 1251.)

An employee also need not be discharged or demoted before qualifying for relief under FEHA. The statute prohibits adverse employment actions that do not result in an employee's discharge or demotion if they "are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054 (*Yanowitz*).)

With these principles in mind, we reject Atwell's claim that there was sufficient evidence to support a finding that she was passed over for a promotion to Public Safety Dispatcher II. It is undisputed that a Public Safety Dispatcher I, or a probationary dispatcher, is required to complete an entire year of training

before she is eligible for promotion to Public Safety Dispatcher II. Atwell started working as a Public Safety Dispatcher I in March 2011. Accordingly, the earliest she could have been promoted was in March 2012. But Atwell quit her job in January 2012, about two months before the earliest possible promotion date. Although Atwell also argues she was denied the opportunity to "solo out" during her probationary period, she presented no evidence showing she satisfied all of the requirements of the nine-month benchmark—i.e., the point at which she could have "solo'ed out"—before she quit her job.

We also reject Atwell's contention that the evidence concerning Wilk's low evaluation scores could support an inference that Atwell was constructively discharged or otherwise suffered an adverse employment action. While it is true that "undeserved negative job reviews," when coupled with a larger pattern of conduct aimed at undermining an employee's ability to perform or advance her job, can constitute an adverse employment action (see *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424), there is no evidence in this case that Wilk's reviews of Atwell were "undeserved." Although Wilk had a reputation for being a more demanding CTO than many of the other supervisors at the City, that evidence, by itself, does not support an inference that Wilk tried to undermine Atwell's ability to maintain her job or advance her career at the City. In each of the evaluations she generated for Atwell, Wilk provided written comments explaining in what areas Atwell needed improvement.

Atwell has not presented any evidence, other than her own testimony that she personally disagreed with some of Wilk's evaluations, that disputes the accuracy of those evaluations. And

an employee's "subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433.) Further, Atwell admitted in her deposition testimony that she had never seen Wilk supervise any other recruits and was unaware of how Wilk scored other recruits. In addition, it is undisputed that at each successive benchmark in the probationary period, the City's standards for evaluating recruits became more difficult and demanding. Thus, the fact that Atwell had received higher scores from her previous CTOs while working through lower benchmarks does not establish that Wilk's lower evaluation scores during Atwell's final and most difficult benchmark were undeserved or fabricated.

More importantly, Atwell presented no evidence that Wilk's evaluations or Rosenthal's changes to the procedures for evaluating probationary dispatchers affected Atwell's ability to promote to Probationary Dispatcher II. As noted, Atwell was still about two months away from being eligible to promote to a permanent position when she quit. Less than a week before she quit, Atwell received an email from an officer in the City's communications division informing the remaining recruits, which included Atwell, that they should anticipate "soloing out" to non-supervised status in early February 2012 and that, assuming they satisfied the City's requirements, the recruits would be eligible to promote to Probationary Dispatcher II in March 2012. Atwell presented no evidence that despite receiving this notification, she was not on track to "solo out" in February 2012 and promote to a permanent position in March 2012. Indeed, Wilk testified that, at the time of Atwell's resignation, she was

close to being able to "solo out" of supervised training for the remainder of the probationary period and was on track for a promotion to Probationary Dispatcher II in March 2012.

Even assuming that Atwell's negative reactions to Wilk's abrasive training techniques could support a finding that Atwell was constructively discharged, as we explain in the next section, there is no evidence that Wilk's conduct was racially motivated. With respect to the other evidence Atwell argues gave rise to a hostile work environment, such as the City's treatment of other Black employees, such conduct would not support a claim that Atwell suffered an adverse employment action because there is no evidence Atwell was aware of that conduct while she was employed by the City.

3.2. Discriminatory Motive

The City also produced evidence that none of Atwell's supervisors or any other decision makers discriminated against her because of her race. With respect to Atwell's allegations concerning the changes Rosenthal made to the procedures for evaluating probationary recruits, the City presented evidence that Rosenthal implemented those changes for a legitimate, nondiscriminatory reason. Specifically, Rosenthal testified that he made the changes after reviewing all of the recruits' evaluations, which showed that many of the written comments of praise CTOs were giving to their recruits were often inconsistent with the recruits' corresponding numerical scores for the same areas of performance. Rosenthal believed that these inconsistencies did, or at least could, lead to recruits being promoted to permanent positions when they were not in fact qualified for promotions.

As to Atwell's allegations that Wilk's abrasive training style and negative evaluations of Atwell's performance were racially motivated, the City presented Wilk's declaration in which she explained that any criticisms she made of Atwell were based "solely" on her observations of Atwell's performance and were in no way influenced by Atwell's race. The City also presented Atwell's deposition testimony, in which she admitted that she never observed Wilk make any racially derogatory remarks or engage in any conduct that appeared to be racially motivated.

Atwell contends she presented substantial evidence to show the legitimate, nondiscriminatory business reasons that the City proffered were pretextual. Primarily, Atwell relies on evidence of Rosenthal's conduct toward other Black employees to assert that any adverse employment actions she may have suffered were motivated by racial animus. Atwell failed to create a triable issue of fact on this issue.

In arguing that Rosenthal acted with racial animus when he changed the procedures for evaluating probationary dispatchers, Atwell cites Murry's testimony that Rosenthal is a "bigot." Atwell insists this testimony is a binding admission that Rosenthal's actions were racially motivated because the City designated Murry as the "person most knowledgeable" in Atwell's lawsuit. As the court correctly reasoned in its ruling granting summary judgment, however, Murry's opinion that Rosenthal is a "bigot" has no evidentiary value. As Murry testified, she never heard Rosenthal make any statements that could be construed as racist or saw him treat Black employees worse than others. Instead, she indicated her opinion of Rosenthal was based on the fact that some people thought he was "two-faced," since he acted differently depending on whether he was speaking to his

superiors or his subordinates. But that type of conduct does not reflect on whether Rosenthal's actions were racially motivated.[6]

Atwell also contends that Rosenthal's comments directed at or made in the presence of Griggs show that Rosenthal's changes to the evaluation process were racially motivated. We disagree. First, Atwell cites Rosenthal's comment to Griggs that another Black recruit was "not gonna make it" after Rosenthal spoke to the recruit over the phone. This comment, by itself, does not evince any racial animus because there is no evidence that Rosenthal made any comments about that recruit's race. Second, Atwell points to Rosenthal's decision to subject Griggs to an "unprecedented" second round of interviews for the Communications Supervisor position as evidence of Rosenthal's bias against Black employees. But Griggs ended up receiving the promotion to Communications Supervisor, which mitigates against an inference of racial animus in Griggs' interview process. Third, Atwell points to Rosenthal's conversation with Griggs after she was promoted to Communications Supervisor when he told her to "go home and look in the mirror" to find out

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[6] Atwell cites *O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 570–575 and *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1077, to argue that Murry's status as a "person most knowledgeable," by itself, renders Murry's testimony that Rosenthal is a "bigot" a binding admission that Rosenthal acted with racial animus. Those cases, however, discuss the admissibility of an authorized employee's statement under Evidence Code section 1222 (*O'Mary*) and an agent's authority to bind his principal (*Dart*). They do not support Atwell's assertion that any statement by a witness designated as a "person most knowledgeable" that may be adverse to the interests of the witness's employer necessarily constitutes a binding admission, regardless of whether that statement has an adequate evidentiary foundation.

why she was promoted. While Rosenthal's statement could be construed as a confirmation that Griggs's race was a motivating factor in her *promotion*, since the comment references Griggs's appearance, it does not demonstrate that Rosenthal tended to treat Black employees *less* favorably.

Atwell asserts an inference of racial animus can also be drawn from the timing of Rosenthal's order to change the evaluation process for probationary dispatchers, which occurred after the only White recruit in Atwell's class had "solo'ed out" and the only Hispanic recruit had quit, leaving the three Black recruits under CTO supervision. Again, we disagree. As explained above, the City presented evidence demonstrating that Rosenthal made the changes to the evaluation procedures based on his review of the recruits' performance evaluations and what he perceived as a discrepancy between the recruits' numerical scores and the written comments provided by the recruits' CTOs. After the City established this legitimate basis for changing the evaluation process, Atwell did not meet her burden of showing pretext. (See *Loggins v. Kaiser Permanente Internat.*, *supra*, 151 Cal.App.4th at p. 1113.)

Atwell also claims CTO Barrow's statement at the end of his memorandum to Rosenthal that Barrow "need[ed] to go take a shower" somehow shows that Rosenthal harbored a racial animus. Barrow, however, testified that he wrote the memorandum based on his own discussions with other supervisors and that he made the comment about needing to take a shower because he was upset that Rosenthal required him to memorialize his observations in writing. There is no evidence that Rosenthal asked Barrow to fabricate negative comments about the Dispatch Center's Black employees.

Finally, Atwell points to evidence that unidentified CTOs had made fun of one of the other Black recruits' personalized license plate, "which said something about being proud to be black." This evidence does not demonstrate that any supervisor acted with a discriminatory motive toward Atwell, however. Atwell did not present evidence that any of her supervisors were aware of those CTOs' comments, and there is nothing in the record showing the comment was directed at, or made in the presence of, Atwell.

4. Harassment

FEHA also prohibits an employer from harassing an employee because of the employee's race. (§ 12940, subd. (j)(1).) To prevail on a claim for harassment, a plaintiff must show that: (1) she belongs to a protected class; (2) she was subject to unwelcome harassment; (3) the harassment was based on her race; and (4) the harassment was so pervasive that it altered the conditions of employment and created an abusive working environment. (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1377.)

Harassment involves conduct that falls outside the scope of necessary job performance and that typically is " 'engaged in for personal gratification, because of meanness or bigotry, or for other personal motives.' " (*Reno v. Baird* (1998) 18 Cal.4th 640, 645–646.) Thus, "commonly necessary personnel management actions such as hiring and firing, job or project assignments, . . . promotion or demotion, [and] performance evaluations . . . , and the like [generally] do not come within the meaning of harassment." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 64–65 (*Janken*).)

Atwell argues the following evidence would allow a trier of fact to conclude she was harassed on the basis of her race: (1) Wilk's abrasive training style; (2) Wilk's evaluations that rated Atwell's work lower than the evaluations issued by Atwell's prior supervisors; (3) Rosenthal's implementation of stricter guidelines for CTOs to evaluate the performance of probationary dispatchers when only the Black probationary dispatchers remained under CTO supervision; and (4) Rosenthal's alleged racial discrimination against Griggs.

As a preliminary matter, we note that to the extent Atwell's harassment claim relies on evidence that Wilk gave Atwell lower evaluation scores than Atwell's prior supervisors and that Rosenthal made changes to how CTOs were required to evaluate their recruits' work, those actions do not support a claim for harassment, since they are "commonly necessary [for] personnel management." (See *Janken*, *supra*, 46 Cal.App.4th at pp. 64–65.) Thus, the only conduct cited by Atwell that could give rise to a claim for harassment is Wilk's abrasive supervising techniques or Rosenthal's allegedly racist comments to Griggs. The court properly found no triable issues of fact exist as to whether these actions support Atwell's harassment claim.

With respect to Atwell's allegations that Wilk's abrasive training style constituted harassment, the City presented evidence that none of Wilk's conduct was racially motivated. For example, in her declaration, Wilk testified that all of her criticisms of Atwell were based on her observations of Atwell's job performance and were in no way influenced by Atwell's race. And in Atwell's deposition testimony she admitted she never heard Wilk use any racially derogatory terms, never saw Wilk engage in any conduct that appeared to be racially motivated, and never

saw Wilk train any other recruits. Indeed, the only evidence that addresses how Wilk treated other dispatchers is Atwell's own testimony that she believed most recruits, including the only White recruit in Atwell's class, did not want to work for Wilk because of her reputation for being a difficult supervisor. Atwell presented no evidence that would support a finding that Wilk treated Atwell and other Black recruits worse than recruits who were not Black.

Finally, the evidence concerning Rosenthal, such as Murry's comment that he was a "bigot" and his interactions with Griggs, does not support Atwell's claim for harassment. As discussed above, Murry's belief that Rosenthal was a bigot is not substantial evidence that Rosenthal's actions were racially motivated; Murry testified that she was not aware of Rosenthal ever using racial epithets or engaging in any type of behavior that could be perceived as racist toward Black people. The evidence of Griggs's interactions with Rosenthal also does not support Atwell's claim for harassment because none of that conduct was directed at or otherwise affected Atwell.

5. Retaliation

FEHA prohibits an employer from retaliating against an employee for engaging in activity protected under the statute. (§ 12940, subd. (h).) "It is an unlawful employment practice . . . [f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under [FEHA]." (§ 12940, subd. (h).)

To establish a prima facie case for retaliation, a plaintiff must show that (1) she engaged in a "protected activity"; (2) she

was subjected to an adverse employment action by her employer; and (3) a causal link exists between the protected activity and the employer's action. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1042.) A "protected activity" under FEHA is conduct that opposes, or complains of, the employer's actions based on the employee's reasonable belief that some act or practice of the employer is discriminatory or otherwise unlawful under FEHA. (See *id.* at p. 1043.)

In challenging the court's ruling granting summary adjudication in the City's favor on her retaliation cause of action, Atwell focuses only on the portion of the ruling addressing the first element of a retaliation claim: whether the employee engaged in activity that is protected under FEHA. Atwell asserts the court ignored evidence that she engaged in protected activity when she complained to Griggs that she believed she was being discriminated against because of her race. Atwell does not, however, address the court's finding with respect to the other two elements of a retaliation claim. That is, Atwell fails to explain why the court erred in finding the City did not subject Atwell to any adverse employment action that was causally connected to any protected activity she may have engaged in.

" 'It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and " ' "all intendments and presumptions are indulged in favor of its correctness." ' [Citation.]" [Citation.] An appellant must provide an argument and legal authority to support [her] contentions. This burden requires more than a mere assertion that the judgment is wrong. "Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived." [Citation.] It is not our place to construct

theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citation.]' [Citation.]" (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799 (*Dietz*).)

Because Atwell has failed to provide us with any reasoned argument, citations to authority, or citations to the record demonstrating why the court erred in finding no triable issue exists as to two elements of her retaliation claim, she has waived any challenge on appeal to that part of the court's ruling. As a result, we find the court properly granted summary adjudication in favor of the City on Atwell's third cause of action for retaliation.

6. Failure to Investigate

Finally, FEHA prohibits an employer from failing to take all necessary and reasonable steps to prevent unlawful discrimination or harassment from occurring in the workplace. (§ 12940, subd. (k).) To prevail on a failure to investigate claim, a plaintiff must show the employer actually engaged in prohibited discrimination, harassment, or retaliation. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 880.) Thus, a plaintiff cannot prevail on a claim for failure to investigate without first establishing that the employer engaged in at least one of these prohibited courses of conduct.

As discussed above, Atwell has failed to demonstrate triable issues exist as to whether the City harassed or discriminated against her on the basis of her race or retaliated against her for engaging in activity protected under FEHA. As a result, Atwell cannot establish a successful claim for failure to

investigate under FEHA. The trial court therefore properly granted summary adjudication in favor of the City on Atwell's fourth cause of action.

DISPOSITION

The judgment is affirmed. The City shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

CURREY, J.