Filed 1/30/13 Thompson v. Pacific Bell Telephone CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NEQUETTA THOMPSON, Plaintiff and Appellant, v. PACIFIC BELL TELEPHONE COMPANY et al., Defendants and Respondents.	B232917 (Los Angeles County Super. Ct. No. BC429555)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed.

Blady Weinreb Law Group, I. Benjamin Blady; Law Offices of Benjamin Davidson, and Benjamin Davidson for Plaintiff and Appellant.

Paul, Plevin, Sullivan & Connaughton, Michael C. Sullivan, Jeffrey P. Ames, Michael J. Etchepare, Gregory J. Halsey for Defendants and Respondents.

INTRODUCTION

Nequetta Thompson appeals from a judgment following an order granting summary judgment in favor of respondents Pacific Bell Directory (PBD), Lillian Baltes, and Rosemary Gonzalez. Appellant contends (1) the superior court erred in finding that she failed to administratively exhaust her disability claims, and (2) there are triable issues of material fact on her remaining claims. We conclude that appellant administratively exhausted her disability discrimination claim, but that she failed to exhaust her claim for failure to reasonably accommodate disability/failure to engage in the interactive process and her claim for harassment on account of race. We further conclude that there were no triable issues of material fact as to appellant's remaining claims. Accordingly, we affirm the judgment.[1]

STATEMENT OF THE FACTS

Appellant, an African-American woman, was employed by PBD from January 27, 1999 until she was terminated on November 6, 2008. Beginning in September 2005, appellant worked as a premise sales representative in the El Segundo office in Los Angeles, California. At all relevant times, respondent Baltes, a Caucasian female, was the general manager (GM) of the El Segundo office. The office also had two premise sales area managers: Isaac Ramsey, an African-American male, and respondent Gonzalez, a Latina female. Ramsey was appellant's direct manager in 2008.

PBD conducted various "campaigns," which are year-long sales efforts directed at existing and potential PBD customers in a geographic area. During

---

[1] Because we are affirming the grant of summary judgment on the cause of action for racial harassment on a ground not relied upon by the superior court, we asked for and received supplemental briefing on this issue from the parties. (See Code Civ. Proc., § 437c, subd. (m)(2).)

these campaigns, appellant was assigned a portion of the target market and provided a certain number of PBD customers for which she was responsible. To gauge progress during each campaign, PBD established several benchmarks that represented dates by which sales representatives should handle a percentage of the accounts assigned to them. A sales representative could meet her benchmarks either by renewing or cancelling a contract of an existing customer.

On April 3, 2008, Baltes sent an e-mail to numerous PBD employees, including appellant, detailing the process to cancel a contract. The e-mail stated: "Team, [¶] This official branch communication . . . is reflective of the new directive set forth from our Vice President of Sales, Danny Deal. [¶] It is effective immediately: [¶] Any and All losses or decreases over $500 . . . , may not be retired by a sales rep . . . without General Manager signature. There are absolutely no exceptions. [¶] Any and All losses of any Dollar amount -- may not be retired by the sales rep or ASA clerk without A hard signature from the customer. Voice verifications are not accepted. [¶] If the customer's hard signature is not included then the contract requires the General Manager's signature. There are no exceptions."

On April 22, 2008, Baltes sent another e-mail to PBD employees, with the subject line, "FW: Re: Loss Control Form/UTC Cancels[2] Message from your GM," stating: "please find the attached new Loss Control Form below. Just to clarify a few things, all Losses over $200 need a loss control form turned into the GM (as stated on the form). Losses without a customer signature need prior GM approval BEFORE contract can be cancelled AND the Loss Control/UTC Letter policy must be followed: [¶] For a UTC Letter to be mailed, the sales rep must contact the customer a minimum of three times, have one Premise visit, and also

---

[2] UTC stands for "Unable to Contact."

have a manager contact. . . . After numerous attempts to reach the customer have proven to be unsuccessful, the loss control form, along with a copy of the contract needs to be submitted to the GM for cancel approval. [¶] GM reviews, approves and then grants permission for UTC letter to be mailed w/notification that contract will be cancelled. Crew CA's send out the certified letter. Once the Green card [from the certified letter] is signed and returned, the sales rep may give contract to ASA to cancel."

The loss control form is a one-page document that has entries for the sales representative, the customer, attempts to contact, and amount of loss. At the bottom, it has lines for a manager's signature and the general manager's signature. The UTC approval form is a one-page form that has entries for the customer, the customer's contact information, dates of contact or attempted contact by the representative, the representative's signature, the dates of contact or attempted contact by a manager, the manager's signature, and the date "certified letter w/contracts sent" to the customer.

On July 8, 2008, appellant submitted loss control forms along with UTC forms for two accounts, one of which was delinquent. The loss control forms were signed by Ramsey and Baltes, and the UTC forms were signed by Ramsey.

On Thursday, October 23, 2008, Ramsey left work early, at around 1:00 p.m. Shortly thereafter, Ramon Cartwright, an internet manager with Pacific Bell Telephone Company, approached Gonzalez and handed her 11 loss control forms. Cartwright told Gonzalez that appellant had given him the forms and asked him to give them to her for her signature. Gonzalez refused to sign the loss control forms because there were no UTC forms or original customer contracts attached.

At 2:47 p.m., appellant sent an e-mail to Baltes, with a copy to Gonzalez and Ramsey, stating: "I have just faxed over four loss control forms for you. I had

asked Ramon to see if Rosemary [Gonzalez] would sign them[;] she refused to because she needs contracts. I have never been required to give contracts on a disconnected # in order to get a signature. The customer[’s] name is Wood Gallery Artist . . . . I will be taking the items out today so that I can try and meet my 10/24/08 benchmark." At 2:53 p.m., appellant cancelled the four contracts belonging to Wood Gallery Artist, through PBD’s computer system.

At 3:08 pm., Gonzalez sent an e-mail to Baltes, with a copy to Ramsey, appellant, and Cartwright. Gonzales stated: "Since Isaac is not here . . . I am handling the entire office. I require contracts with all Loss Control forms that I sign, regardless of who that individual may be. When Ramon brought the paperwork to me, he had told me that Nequetta had asked him to give them to me. Silly as it may seem[] I was going to sign them and told Ramon that I would sign them as soon as I got contracts. He said not a problem and would be back. [¶] If Nequetta had a question, why not address it to me directly for clarification? . . . [¶] Also, if the account is disconnected, I call the account to verify and note . . . it is a disconnect. Once that it is done and it is a true disconnect, then it is forwarded to ASA for cancelling. [¶] So you see, there is more to it than just a refusal as Nequetta assumes. It’s about following the process that has been set."

At 3:09 p.m., appellant cancelled two contracts of PBD customer, Absolute Bee Removal. At 3:23 p.m., appellant sent an e-mail to Gonzalez and Baltes, with a copy to Ramsey and Cartwright. Appellant stated: "I always close my own contracts unless we are in a close and I can not [*sic*] do it. . . . I have one more which is Absolute Bee Removal . . . that I will be sending over unless you would rather that I wait until Ike [Ramsey] is back on Monday. I don’t have any reason to hold cancels on a number that is not in service. It still has to be removed. I

work clean." Appellant then cancelled another contract belonging to Absolute Bee Removal at 3:31 pm.

At 3:33 p.m., Gonzales sent a reply e-mail, stating: "This email sent by you was to indicate a refusal on my part. A refusal that merits no credibility. It is not about closing contracts and you working clean. It [is] about the process that is set in place. It is about having proper documentation that follows certain guidelines. Please do not change the issue at hand. If you have all your documentation in order, I will be happy to help you with the verifying and processing of the disconnected accounts. Should you choose, you may also wait for Isaac and work with him upon his return. The choice is yours."

Appellant e-mailed a response at 3:39 p.m. She stated: "You cannot have a signature on a contract if the number is not in service. Who would I get the signature from if I cannot get in contact with the customer? I am trying to follow the process by doing the loss control form and getting the signatures. What more do you want from me? A blank contract?" At 3:42 p.m., appellant cancelled three other contracts belonging to Absolute Bee Removal.

At some time that day, appellant and Gonzalez received an e-mail from human resources stating that it needed to know in what quarter appellant planned on retiring. Appellant sent an e-mail informing human resources that she did not have a copy of the paperwork with her and that Gonzalez was supposed to give her a copy of the retirement paperwork. When appellant left work that day around 4:30 p.m., she had not received a copy of the retirement paperwork from Gonzalez.

That night, appellant went to the emergency room of the Little Company of Mary Hospital, complaining of chest pains, difficult breathing, a migraine headache, and numbness. She was treated and released early next morning with instructions to see her doctor.

That same day, October 24, 2008, appellant saw her doctor, Dr. Darren McDow. During the visit, at around 12:06 p.m., Dr. McDow faxed a CFRA/FMLA Certification of Health Care Provider form to PBD. On the form, which was signed on October 7, 2008, Dr. McDow stated that appellant had a medical condition or need for treatment that began on "2/5/2008" and that she was unable to work from "9/23/08 through 10/30/08."[3] Dr. McDow checked the box that indicated appellant required intermittent leave. With respect to intermittent leave, the form asked: "Is it medically necessary for the employee to be off work on an intermittent basis or to work less than the employee's normal work schedule in order to deal with the serious health condition of the employee or family member? If yes, please provide an estimate of the frequency and duration of the need to be off work (e.g. 2 days per month, 4 hrs each occurance)." In response, Dr. McDow wrote: "Unknown. Intermittent. 12 months. 2-3 days per week."

At around 2:00 p.m., appellant called Gonzalez and told her that appellant's doctor had placed appellant on medical leave. In her deposition, appellant stated that Gonzalez told her that she had left the retirement paperwork on appellant's desk and that appellant could come in to get it. Appellant told Gonzalez that "I would either come in on Friday [that day] or Monday [October 27, 2008]" to get it. Appellant later reiterated that she told Gonzalez, "I might stop by on the 24th to pick it up, but if not, I would definitely be in on Monday to get it." Gonzalez did not respond, and the conversation ended. Later that day, appellant called Ramsey and told him she had no intention of coming back into the office until he returned

[3] Appellant stated that the discrepancy in the dates was the result of Dr. McDow using a previously filled out form. Appellant does not dispute any other statement on the form.

on Monday. She told him that she would be in on Monday to pick up her retirement papers.

Appellant's chest pains and numbness resolved by Friday morning, and her headache "probably got better over the weekend." On Monday, October 27, 2008, appellant came into the office at around 11:45 a.m. She entered through the back door, went to her desk, and filled out the retirement paperwork.

When Baltes learned that appellant was at her desk, she conducted a disciplinary meeting about appellant's actions on October 23, 2008. Ramsey and two union representatives were present at appellant's disciplinary meeting. At the meeting, Baltes asked appellant why she cancelled contracts without a "hard signature" from the customer or GM approval, which is given only upon completion of the UTC form. Appellant responded that she did not know that the policy applied to disconnected numbers. Baltes asked, "[W]hy would you cancel these contracts when a manager told you to follow the process and provide proper documentation?" Appellant responded, "I guess I violated Code of Conduct." Later, appellant claimed she did what she thought she was supposed to do. At the end of the meeting, Baltes suspended appellant for insubordination and failing to comply with company policies, pending further investigation. After the investigation was concluded, Baltes terminated appellant on November 6, 2008.

The termination letter stated that appellant had been suspended for "falsifying company records" and "improperly cancelling contracts." The letter further stated that appellant had admitted knowingly entering false information into the company's sales reporting system in order to make it appear that she had met "workflow" benchmark objectives.

STATEMENT OF THE CASE

On January 13, 2010, appellant filed a 14-count complaint for damages against Pacific Bell Telephone Company doing business as AT&T California, Pacific Bell Directory, Southwestern Bell Yellow Pages, Inc., AT&T Corporation, Baltes, and Gonzalez. In her complaint, appellant alleged causes of action for (1) wrongful termination in violation of public policy, (2) racial harassment, (3) racial discrimination and retaliation, (4) disability discrimination and retaliation, (5) failure to reasonably accommodate disability/failure to engage in interactive process, (6) violation of the California Family Rights Act (CFRA), Government Code section 12945.2, (7) defamation, (8) intentional infliction of emotional distress (IIED), (9) fraud, (10) failure to provide adequate meal and rest periods, (11) failure to pay statutorily mandated wages, (12) unfair business practices under Business and Professions Code section 17200, (13) failure to indemnify and reimburse expenditures and/or loss, and (14) waiting time penalties.[4]

Defendants filed an answer, generally denying the allegations. The parties then stipulated to the dismissal without prejudice of all the corporate entities, except PBD.

On December 9, 2010, respondents filed a motion for summary judgment, or in the alternative, summary adjudication. Respondents contended (1) that appellant failed to exhaust her administrative remedies as to her second, fourth, and fifth causes of action [the racial harassment, disability discrimination, and failure to accommodate claims]; (2) that her third cause of action for racial

---

[4] On January 18, 2012, this court granted appellant's stipulated request for partial dismissal as to the 10th, 11th, 13th, and 14th causes of action. Thus, we omit any further mention of these causes of action.

discrimination failed as a matter of law because PBD had a legitimate, nondiscriminatory, nonpretextual reason for terminating appellant, namely, that appellant was insubordinate and had failed to follow the cancellation policy on October 23, 2008; (3) that her disability claims failed as a matter of law because appellant had no symptoms that required accommodation on October 27, 2008; (4) that her claim for racial harassment failed as a matter of law because the alleged racial harassment was not severe or pervasive; (5) that her sixth cause of action for violation of CFRA failed as a matter of law because PBD did not interfere with her CFRA leave or terminate her in response to her taking CFRA leave; (6) that her retaliation claims failed because respondents had a legitimate, nonpretextual, nonretaliatory reason to fire her; and (6) that her remaining claims failed as they were derivative of her other claims.

In declarations filed in support of the motion for summary judgment, Baltes, Gonzalez, and Ramsey stated that under PBD's customer cancellation policy, the representative could cancel only if she had received approval from the customer or a manager and had filled out a UTC form. Gonzalez stated that before a sales representative could cancel a customer account without the customer's signature, the representative had to complete a UTC form, and then give the UTC form, a loss control form, and the original contract of the customer to the manager to review and sign. Both Ramsey and Gonzalez stated that they held training sessions on the cancellation process for the sales representatives. Baltes testified that the customer cancellation process is taken very seriously. She stated that "[j]ust prior to terminating [appellant], Pacific Bell terminated a Sales Representative for inappropriately cancelling customer contracts without following the UTC process."

In their declarations, Ramsey and Baltes also stated that when appellant came in on October 27, 2008, she never stated that she was on medical leave.

On February 8, 2011, appellant filed an opposition, arguing: (1) that by alleging discrimination and retaliation claims, she had asserted mixed motives with respect to the alleged adverse employment actions, thus shifting the burden to PBD to show that it would have taken the same action in the absence of the impermissible motivating factor -- a burden it had not met; and (2) that she had raised triable issues of material fact as to the discrimination and retaliation claims (and the derivative claims) by presenting evidence of discriminatory remarks made by Baltes and disparate treatment by Baltes and Gonzalez.

The discriminatory remarks by Baltes allegedly occurred in May 2005, at the meeting/sales rally where Baltes was introduced to the sales representatives as their new general manager. At her deposition, appellant had stated:

"So as Lillian goes on to talk about Old MacDonald having this farm, she eventually goes to the point where and [*sic*] we say the E-I-E-I-O thing, and then she starts talking about there is a big house and on the big house that's where the master lives, and then you have [the] farmhands. Well's that's what you guys are, you guys are the farmhands, you guys go out and do the work."

Appellant later clarified that Baltes called the sales representatives "field hands." In a declaration filed in support of the opposition, Myriam Turner, a Haitian-American and former PBD employee, stated that she recalled that at that meeting, Baltes referred to herself "as the 'farmer' who owns the 'plantation.' She [Baltes] said, 'The farmer can't do all the work himself, so the farmer has to hire field hands to do the work for him.'"

In her declaration, Turner also stated (1) that she was denied a promotion based on her race in 1989 or 1990, (2) that she was not paid commissions she earned in 2003 and 2004, (3) that non-African-American employees made negative stereotypical or racist comments about Compton and other "black areas" and

wrongly accused her of "keying" a car and stealing a fax, (4) that Baltes treated African-Americans differently from non-African-American counterparts by not assigning special projects to African-Americans, denying transfers, rarely calling on African-Americans during company meetings and events, and not mentioning any accomplishments of African-Americans on Martin Luther King, Jr. Day or Black History Month, although Baltes held herself out as an American History buff, (5) that Gonzalez discriminated against her by "routinely with[holding] my sales, [giving] my accounts to other non-African-American sales reps against company policy, [writing] me up for minor alleged infractions that she overlooked with respect to non-African-American sales reps, and encourag[ing] other reps not to cooperate with me," and (6) that PBD did not accommodate her disability and forced her to retire while she was on disability in 2008.

Three other former PBD employees (Douglas DeJohn, Alex Franey, and David Sullivan), all African-American males, also filed declarations in which they stated that they experienced racial discrimination while employed at PBD, including discriminatory conduct by Baltes and Gonzalez. Sullivan also stated he was terminated while on disability leave.[5]

Appellant also filed a declaration in support of the opposition. In her declaration, she stated: (1) that her suspension and termination were wrongful as she was prohibited from using the UTC process with delinquent accounts; (2) that she had cancelled accounts without obtaining a manager's signature previously "per my training and approval of my managers"; (3) that she was not insubordinate because she "did not act in any way contrary to Defendants' instructions"; (4) that she "had to come in [to work on October 27] to fill out the [retirement] paperwork

[5] Although appellant asserts that Franey was terminated during stress leave, Franey stated that he faxed his resignation to PBD during his sick leave.

because [Gonzalez] did not offer to send it to me"; (5) that she told Gonzalez that "I would try to come in during my FMLA leave to fill out the retirement form later that day or Monday, October 27th"; and (6) that she still had migraines and trouble concentrating on October 27, 2008.

Appellant also stated that Baltes engaged in numerous instances of purportedly racist behavior, including: (1) referring to African-Americans as "field hands" several times during meetings, (2) referring to African-American female representatives as "girls"; (3) "implying that as a black person, I needed to always dress professionally when this rule did not apply for non-blacks"; (4) failing to sign a certificate for recognition of excellent service that was awarded to appellant; and (5) permitting a discriminatory racist culture at the office by, among other things, not disciplining employees who referred to "black areas of town" as "ghetto." Appellant also alleged numerous acts or incidents by Baltes and Gonzalez which she claimed were discriminatory or retaliatory in nature, including: (1) being treated differently from a Caucasian with respect to being in an "off-limits" area; (2) being written up for "violations of non-existent policies"; (3) blocking her in her cubicle when she attempted to go out to eat; (4) not being responsive to her complaints; and (5) giving her a written reprimand for complaining about another employee, Lauren Sepulveda, taking absences without filling out the required documentation.

Respondents filed a reply in which they contended, among other grounds, that appellant's opposition was untimely, that appellant had not stated a mixed motives case, and that she had not shown that the PBD's legitimate, nondiscriminatory reasons for firing her were false or pretextual.

On March 9, 2011, the superior court granted respondents' motion for summary judgment. The court found that appellant's opposition was untimely

filed, and it overruled her objections to the evidence presented by respondents.[6] As to the fourth and fifth causes of action for disability discrimination and failure to accommodate/failure to engage, the court ruled that appellant had failed to exhaust her administrative remedies. As to the third cause of action for discrimination and retaliation on account of race, the court found respondents had "provided evidence of a legitimate, non-discriminatory reason for the adverse employment decision: Plaintiff's insubordination and violation of company policies." Finally, as to the remaining causes of action, the court ruled that appellant failed to raise triable issues of fact.

A final order and judgment were entered May 2, 2011. Appellant timely appealed.

DISCUSSION

Appellant contends the trial court erred in granting summary judgment. For the reasons explained below, we disagree.

A. Standard of Review

"A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]" (*Molko v. Holy Spirit Assn*. (1988) 46 Cal.3d 1092, 1107.) Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) In moving for summary judgment, "all

---

[6] In her opening brief, appellant contends the superior court acknowledged appellant timely filed her opposition papers, but the cited record is to the contrary.

that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X." (*Id*. at p. 853.)

"'Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid*.)

In claims involving discrimination, a defendant may show entitlement to summary judgment using the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*). (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 353-357 (*Guz*).) Thus, an employer is entitled to summary judgment on a discrimination claim if it sets forth competent, admissible evidence of its nondiscriminatory reasons for its actions, and the plaintiff fails to show "a triable issue that decisions leading to [plaintiff's] termination were actually made on [a] prohibited basis . . . ." (*Id*. at p. 360.)

"Although we independently review the grant of summary judgment [citation], our inquiry is subject to two constraints. First, we assess the propriety of summary judgment in light of the contentions raised in [appellant's] opening brief. [Citation.] Second, to determine whether there is a triable issue, we review the evidence submitted in connection with summary judgment, with the exception of evidence to which objections have been appropriately sustained. [Citations.]" (*Food Safety Net Services v. Eco Safe Systems USA, Inc*. (2012) 209 Cal.App.4th

1118, 1124.) Here, although appellant noted that the superior court "overruled all 118 evidentiary objections without comment or any stated reason," she does not attack the rulings on appeal. Thus, she has forfeited any contentions of error regarding them. (*Wall Street Network, Ltd. v. New York Times Co*. (2008) 164 Cal.App.4th 1171, 1181.) Finally, a plaintiff may not create a materially disputed fact by offering a declaration in conflict with an admission or concession made during deposition testimony. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21.)

B. Appellant's Complaint

In assessing the propriety of summary judgment, we look first to appellant's allegations in her complaint, which frame the issues pertinent to a motion for summary judgment. (*Bostrom v. County of San Bernardino, supra*, 35 Cal.App.4th at p. 1662.) As discussed previously, appellant alleged 10 causes of action against respondents. In her first cause of action for wrongful termination in violation of public policy, she alleged her termination was based upon racial and/or disability discrimination and/or her protected activity of complaining about fellow employee Sepulveda's "stealing time from the company."

In her second cause of action for racial harassment, appellant alleged (1) that her prior manager, Georgiana Lopez, committed battery against her on account of her race in 2004; (2) that co-workers Tony Foggs[7] and Patty Thompson sexually and racially harassed her through "sexual comments, gestures, and descriptions of the female body" in 2004; and (3) that she had complained on various occasions

[7] Tony Foggs is referred to later in the complaint as Tony Fobbs. In the deposition transcript, his name is also referred to as Tony Fox. For clarity, we will refer to him as Tony Foggs.

about "harassment and discrimination by Defendant Baltes and Gonzalez," although appellant did provide any specific incidents or dates.

In her third cause of action for racial discrimination and retaliation, appellant alleged (1) that she was denied employment opportunities made available to other non-African-American employees; (2) that she was illegally disciplined for complaining about Sepulveda "stealing time from the company"; and (3) that she was illegally suspended and terminated for her actions on October 23, 2008.

In her fourth cause of action for disability discrimination and retaliation, appellant alleged that she was suspended and terminated after being placed on medical leave. In her fifth cause of action for failure to accommodate disability/failure to engage in interactive process, she alleged that PBD did not accommodate her disability and/or initiate any discussion with her concerning an accommodation. In her sixth cause of action for violation of the CFRA, she alleged that respondents interfered with her medical leave by requiring her to come to work on October 27, 2008 and retaliated against her for taking CFRA leave by suspending her that day and firing her on November 6, 2008.

In her seventh cause of action for defamation, appellant alleged that the November 6, 2008 termination letter contained false and defamatory statements. In her eighth cause of action for IIED, she alleged that she suffered emotional distress because respondents' wrongful termination in violation of public policy was extreme and outrageous conduct. In her ninth cause of action for fraud, she alleged that respondents misrepresented that they would comply with applicable antidiscrimination and employment laws. Finally, in her 12th cause of action for unfair business practices under Business and Professions Code section 17200, she alleged that respondents' wrongful conduct constituted unlawful, unfair and fraudulent activity.

C. Exhaustion of Administrative Remedies

In granting summary judgment, the superior court determined that appellant failed to administratively exhaust her fourth (disability discrimination and retaliation) and fifth (failure to accommodate) causes of action under the Fair Employment and Housing Act (FEHA), Government Code sections 12900 et seq.[8] On appeal, respondents contend that appellant also failed to administratively exhaust her second cause of action for racial harassment.

The FEHA prohibits harassment and discrimination in employment because of, among other bases, race, color, mental or physical disability, or medical condition, and it prohibits retaliation for protesting illegal discrimination related to one of these categories. (§ 12940.) The CFRA, which is part of the FEHA, extended the FEHA's anti-discrimination provisions to include the exercise of family care and medical leave, including family care and medical leave under the federal Family and Medical Leave Act of 1993 (FMLA), Title 29 United States Code section 2601. (§ 12945.2.)

Before filing a lawsuit on a FEHA-related claim, a private plaintiff must exhaust her administrative remedies by filing a verified complaint with the Department of Fair Employment and Housing (DFEH) within one year of the allegedly unlawful act. (§ 12960; *Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 153 (*Wills*).) The DFEH complaint must state the perpetrator(s) and set forth the "particulars" of the allegedly unlawful act. (§ 12960, subd. (b).) Thus, before a private plaintiff can sue on an allegedly unlawful act, the claimant "must [have] specif[ied] that act in the administrative complaint." (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724; *Yurick v. Superior Court* (1989)

---

[8] All further statutory citations are to the Government Code, unless stated otherwise.

209 Cal.App.3d 1116, 1121-1123.) A claim in a civil complaint, however, is administratively exhausted if the claim is like or reasonably related to the DFEH claim or is likely to be uncovered in the course of the DFEH investigation into the claim. (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1617 (*Okoli*).)

Here, appellant filed two relevant DFEH complaints -- one on September 29, 2008 (amended on October 27, 2008 and January 13, 2009) alleging race discrimination/retaliation, and one on October 23, 2009, alleging CFRA/FMLA violations.

In the 2008 DFEH complaint, as amended, appellant alleged:

> "I. I filed prior charges: 340-2004-1919, 340-2005-00207 and 480-2007-02725. On March 28, 2008, I received a written complaint that included a write up which I never received. On July 10, 2008, I complained about my previous Manager, Rosemary Gonzalez [*sic*] conduct towards me. On August 4, 2008, Bertha Campos, Manager suggested that I should be disciplined because I complained that we did not have artists to do the work. In October 2008, my attorney sent a letter to the employer informing them of her intent to file a lawsuit. Subsequent to my attorney's letter, I was suspended indefinitely on October [2]7, 2008. On November 6, 2008, I was discharged.
>
> "II. I was told that my behavior was unprofessional. I was informed by Lillian Baltes that I was suspended for failure to follow policy.
>
> "III. I believe that I was subjected to different terms and conditions of employment, disciplined, suspended and discharged because of my race, Black[,] and in retaliation for complaining and filing a prior charge which is in violation of Title VII of the Civil Rights Act of 1964, as amended."

On the 2008 DFEH complaint, appellant indicated that the discrimination was based on "Race" and "Retaliation," and that it took place from July 10 to August 4, 2008.[9]

During her deposition, appellant stated that the 2004 DFEH charge was about sexual harassment and assault by Foggs and Georgina Lopez. She stated that the 2005 DFEH charge was a claim that she had been retaliated against for filing the previous harassment charge. Finally, the 2007 DFEH charge was for discrimination and retaliation when "Gonzalez had written me up because she claimed I was in a[n] area that was off limits" on July 10, 2007.

On September 29, 2008 (the same day she filed her DFEH complaint), appellant's attorney sent a letter to AT&T asserting that she had been retained to represent appellant "with respect to claims for sexual harassment, race discrimination, and retaliation for complaints of harassment and discrimination." The letter specified that the following causes of action were being considered against respondents: "1. Sexual Harassment [¶] 2. Race Discrimination [¶] 3. Violation of the California Fair Employment and Housing Act (FEHA) [¶] 4. Retaliation for Complaints of Sexual Harassment and Race Discrimination [¶] 5. Failure to Prevent Harassment and Discrimination [¶] 6. Failure to Correct and Remedy Harassment and Discrimination [¶] 7. Intentional Infliction of Emotional Distress." AT&T advertising and publishing sent a reply letter responding to the three alleged instances of retaliation, charged in the September 29, 2008 DFEH complaint. The letter did not address the charges of sexual harassment; nor did it mention racial harassment.

In the 2009 DFEH complaint, appellant alleged that:

---

[9] In her amendments to the 2008 DFEH complaint, appellant alleged the discrimination occurred from March 28, 2008 to November 6, 2008.

> "I. On October 27, 2008, I was denied medical leave benefits under California Family Leave Rights Act. I was subsequently terminated on November 6, 2008. . . .
>
> "II. Lillian Baltes, General Manager, stated that I was terminated because I had not retired items in the system properly.
>
> "III. I believe that I was denied medical leave benefits in violation of California Government Code Section 12945.2 for the following reasons:
>
> "A. On October 24, 2008, my doctor placed me on medical leave until November 19, 2008. On October 24, 2008, I called my employer Rosemary Gonzalez, Manager, and informed her that I was placed on leave. On October 27, 2008, Lillian Baltes, General Manager, informed me that I was being suspended and on November 6, 2008, I was terminated.
>
> "B. I have worked for the company more than 12 months, have worked at least 1,250 hours in the 12-months period prior to my leave and worked at a location that has at least 50 employees within the 75 miles."

On the complaint form, as the basis for the charge of discrimination, appellant checked the box for "Other" and specified "FAMILY CARE."

1. Disability Claims

Appellant contends she exhausted her claims for disability discrimination and retaliation and for failure to accommodate/failure to engage in interactive process because the allegations in her 2009 DFEH complaint are sufficient to exhaust those claims.

We conclude that appellant has exhausted her fourth cause of action for discrimination and retaliation on the basis of disability. Although the 2009 DFEH complaint does not specify a claim for disability discrimination, it does allege that appellant's doctor "placed me on medical leave until November 19, 2008." While an employee may take CFRA leave for situations other than her own illness, the allegation that appellant's doctor placed *her* on leave sufficiently alleges that

appellant was placed on leave because of "an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee." (See § 12945.2, subd. (c)(3) [family care or medical leave includes taking leave for (1) birth, adoption, and care of a child, (2) care for a family member, and (3) own serious health condition].) Being unable to work because of a medical condition is a disability under the FEHA. (See § 12926, subd. (*l*)(1)(B).) Accordingly, appellant's allegations in her 2009 DFEH complaint were sufficient to exhaust her disability discrimination claim, as she alleged she had a disability and that she was suspended and terminated after she informed Gonzalez of such disability.

The 2009 DFEH complaint did not, however, exhaust appellant's claim for failure to accommodate/failure to engage in interactive process. The complaint did not specify that appellant requested an accommodation, and there are no allegations in the complaint that can be construed to allege a claim for failure to accommodate/failure to engage in interactive process. Thus, appellant must show that this claim was like or related to the claims specified in her DFEH complaint, or that the claim was likely to be uncovered during a reasonable DFEH investigation into the charges in the DFEH complaint. (*Okoli*, *supra*, 36 Cal.App.4th at p. 1617.)

The 2009 DFEH complaint alleges that appellant was "denied medical leave benefits" and that she was subsequently suspended and terminated. The denial of family care/medical leave is not necessarily a failure to accommodate a known disability or a failure to engage in the interactive process in response to a request for accommodation. Indeed, the FEHA addresses those claims in separate provisions. (See §§ 12945.2 [part of the CFRA, which generally prohibits denial of family care/medical leave]; 12940, subd. (m) [failure to reasonably

accommodate known disability]; 12940, subd. (n) [failure to engage in interactive process in response to request for accommodation].) Thus, a claim for denial of family care/medical leave is not necessarily related to a claim for failure to accommodate or engage in interactive process. (See *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 706 (*Roby*) [discrimination claim does not include harassment claim, as the FEHA treats harassment in a separate provision]; *Wills, supra*, 195 Cal.App.4th at pp. 153-154, 157 [DFEH complaint alleging discrimination based on "denial of family or medical leave" did not exhaust claims for failure to reasonably accommodate disability and for failure to engage in interactive process].)

In addition, a DFEH investigation into the allegations of the 2009 DFEH complaint would not likely have uncovered a claim for failure to reasonably accommodate a known disability or to engage in the interactive process. There is no evidence appellant ever requested an accommodation and there is uncontradicted evidence that she did not. Thus, an investigation would not have uncovered a claim for failure to accommodate/failure to engage in interactive process.[10] Accordingly, appellant's fifth cause of action for failure to accommodate/failure to engage in interactive process was not exhausted.

---

[10] In her reply brief, appellant contends she was not required to specifically request an accommodation because her employer was aware of her disability, citing *Prilliman v. United Air Lines, Inc*. (1997) 53 Cal.App.4th 935 (*Prilliman*) and *Gelfo v. Lockheed Martin Corp*. (2006) 140 Cal.App.4th 34 (*Gelfo*). Even assuming this argument has not been forfeited as it was raised for the first time in the reply brief, the cited cases do not support appellant's argument. In *Prilliman*, the court found a triable issue of material fact as to whether the employer reasonably accommodated the plaintiff when the employer offered him only insured disability leave, as opposed to another position. (*Prilliman*, at p. 954.) The court never addressed whether an employer has the initial burden to provide an accommodation in the absence of a request. In *Gelfo*, the court specifically held

2. Racial Harassment Claim

Respondents contend that appellant failed to administratively exhaust her second cause of action for racial harassment because (1) appellant did not mention racial harassment in her DFEH complaints, (2) the acts specified in the DFEH complaints cannot be construed as racial harassment, and (3) the racial harassment claim alleged in her lawsuit is not "like or related" to the allegations in her administrative complaint. We agree.

The parties do not dispute that the 2009 DFEH complaint did not exhaust any claim relating to race, as that complaint related to adverse employment actions for taking a medical leave. (*Wills*, *supra*, 195 Cal.App.4th at pp. 153-154, 157 [DFEH complaint alleging discrimination based on "denial of family or medical leave" did not exhaust harassment claims].) Rather, the parties focus on the 2008 DFEH complaint, as amended. It is undisputed that the 2008 DFEH complaint did not specify racial harassment. Appellant did not check the "Other" box on the complaint form, or specify "racial harassment." Nor did she use the word "harass," "harassment" or any similar word in the complaint. (Cf. *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 265 [plaintiff exhausted claim for racial harassment where he stated in DFEH complaint that he had been "'[h]arassed'" "nonstop since 1991"].) In addition, while the letter from appellant's attorney specified a claim for sexual harassment, it did not mention any acts of racial harassment or even reference a claim for racial harassment. Finally, the prior charges referenced in the 2008 DFEH complaint did not include claims for racial harassment; rather, they charged sexual harassment, discrimination on the basis of race, and retaliation.

---

that an employee must request an accommodation in order to state a claim for failure to accommodate. (*Gelfo*, at p. 54.)

Appellant contends, however, that the allegations in her 2008 DFEH complaint can be construed to allege a claim of racial harassment. First, appellant asserts that her allegation that she was "subjected to different terms and conditions of employment . . . because of my race, Black" is sufficient to allege a claim for racial harassment because that phrase is "the very definition of harassment" under Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (Title VII). She is mistaken. While courts have recognized that Title VII's prohibition against discrimination may encompass harassment that is sufficiently pervasive to alter the conditions of employment, there is no language in Title VII expressly defining harassment. (*Roby*, *supra*, 47 Cal.4th at p. 706, fn. 7.)

Appellant also contends her allegations that "I complained about my previous Manager, Rosemary Gonzalez [*sic*] conduct towards me" and that her claim that she "was told that my behavior was unprofessional" could be construed as a racial harassment claim. We are not persuaded. In her 2008 DFEH complaint, appellant charged she was "subjected to different terms and conditions of employment, disciplined, suspended and discharged because of my race, Black[,] and in retaliation for complaining and filing a prior charge which is in violation of Title VII of the Civil Rights Act of 1964, as amended." This is a claim of racial discrimination and retaliation. As the California Supreme Court has stated, "Because the FEHA treats harassment in a separate provision, there is no reason to construe the FEHA's prohibition against discrimination broadly to include harassment." Accordingly, "discrimination refers to bias in the exercise of official actions on behalf of the employer, and harassment refers to bias that is expressed or communicated through interpersonal relations in the workplace." (*Roby*, *supra*, 47 Cal.4th at p. 706, 707.) The allegation about Gonzalez is vague, and in the context of the complaint, it would reasonably be construed as acts or comments

made during Gonzalez's "'"exercise of personnel management authority [that was] properly delegated by an employer,"'" namely, disciplining an employee. (*Id*. at p. 706.) As to the second allegation, the record shows that it was a comment made by Baltes when she reprimanded appellant for complaining about Sepulveda, which is an exercise of an official action on behalf of an employer. Thus, these two allegations cannot be construed to refer to racial harassment.

Finally, appellant relies on *Baker v. Children's Hosp. Medical Center* (1989) 209 Cal.App.3d 1057 (*Baker*) for the proposition that her allegations of racial discrimination also exhausted her racial harassment claim. In *Baker*, the plaintiff "filed a charge of discrimination with the DFEH, charging that during the summer of 1984 he was the victim of racial discrimination, in that he was denied the opportunity to work on-call hours in favor of a Caucasian employee with less seniority." (*Id*. at p. 1060.) The plaintiff, along with five other former coworkers, then brought a civil complaint, in which they "alleged generally that respondents harassed them, subjected them to differential treatment and biased evaluations, engaged in racial epithets, and denied them equal opportunities for promotions and pay raises based on race." (*Id*. at p. 1061.) The Court of Appeal held that the harassment, disparate treatment, and retaliation claims were administratively exhausted, as "the allegations of harassment and differential treatment encompass the allegations of discrimination in his DFEH complaint." (*Id*. at p. 1065.) As the specific allegations of harassment were not provided, we cannot determine whether the harassment was part and parcel of discriminatory acts -- for example, denying employment opportunities with racist comments -- and thus whether *Baker* is factually distinguishable from the instant case. However, to the extent *Baker* suggests that an allegation of racial discrimination in a DFEH complaint is, by itself, sufficient to exhaust claims for racial harassment, we respectfully decline to

follow it. As noted, the California Supreme Court has held that "there is no reason to construe the FEHA's prohibition against discrimination broadly to include harassment." (*Roby, supra*, 47 Cal.4th at p. 706.)

We find more persuasive the holding in *Lattimore v. Polaroid Corp*. (1st Cir. 1996) 99 F.3d 456 (*Lattimore*) that a claim of racial discrimination in an administrative complaint does not automatically exhaust a claim for racial harassment. (*See id*. at pp. 460-461, 464-465 [plaintiff's claim for racial harassment by his former supervisor in March was not administratively exhausted by his claim for racial discrimination related to his termination in September by a new supervisor]; accord, *Lam v. City & County of San Francisco* (N.D. Cal. 2012) 868 F. Supp.2d 928, 937, 948-949 [employee's claim for racial harassment not administratively exhausted by underlying EEOC charge predicated upon racial discrimination claims that employee was subjected to "'unequal discipline'"]; *Vance v. Department of Veterans Affairs* (S.D. Ohio May 18, 2012, No. 3:11-cv-281) 2012 U.S. Dist. Lexis 69582 [harassment and retaliation claim not exhausted where plaintiff's EEOC complaint raised only one claim for racial discrimination]; *Encinas v. Tucson Elec. Power Co*. (9th Cir. 2003) 76 Fed.Appx. 762, 764 [plaintiff's claim for racial harassment/hostile work environment not exhausted where her underlying EEOC charge for discriminatory discharge did not mention harassment and listed only date of her termination]; *Anderson v. Fresno County Human Servs. Sys.* (E.D. Cal. Nov. 30, 2007, No. CV F 05-1325 LJO GSA) 2007 U.S. Dist. Lexis 88200 [plaintiff's claim for racial harassment not administratively exhausted where her two EEOC/DFEH complaints alleged only racial discrimination with respect to promotion/demotion and discriminatory discharge].)

Although *Lattimore*, is factually distinguishable from the instant case, the same holding was reached in a factually similar case, *Harvey v. City of San Diego* (S.D. Cal Mar. 8, 2011, No. 09cv0740 DMS (RBB)) 2011 U.S. Dist. LEXIS 23012 (*Harvey*). In *Harvey*, the plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging discrimination on the basis of race and for purposes of retaliation. In his civil complaint, he asserted a cause of action for harassment. The federal district court ruled the plaintiff had not exhausted his racial harassment claim because he could not show that the harassment claim would reasonably have been expected to fall within the scope of an EEOC investigation into the charge of discrimination. (*Id*. at pp. *10-*14.)

Appellant attempts to distinguish *Harvey* from the instant matter on the ground that there, the EEOC charge was restricted to plaintiff's suspension and termination, the charge was temporally limited to the individual dates of plaintiff's suspension and termination, and the charge failed to identify by name the harassers alleged in plaintiff's civil complaint. Appellant's attempt is unpersuasive. In fact, the plaintiff's EEOC charge in *Harvey* was not limited to the dates of his suspension and termination, but rather encompassed the nearly two-month period between his suspension and termination. (*Harvey*, *supra*, 2011 U.S LEXIS 23012 at pp. *11-*12.) As in *Harvey*, appellant's DFEH complaint charged that she was disciplined, suspended, and terminated because of her race and for the purposes of retaliation, and she did not name Baltes or Gonzalez as harassers. Indeed, she did not mention any act of racial harassment. On this record, we find no material distinction between *Harvey* and the instant case.

Appellant also contends the instant case is distinguishable because the alleged harassers were also the people who discriminated against her. However, in *Pasco v. Red Robin Gourmet Burgers, Inc*. (E.D. Cal. Nov. 18, 2011, No. 1:11-cv-

01402-AWI-SKO) 2011 U.S. Dist. LEXIS 133613 (*Pasco*), the federal district court determined that a claim for harassment was not exhausted even though the alleged harasser was the same person alleged to have discriminated against the plaintiff. In *Pasco*, the plaintiff filed a DFEH complaint alleging discrimination based on sex, age, and retaliation by her immediate supervisor. In her civil complaint against the same supervisor and other defendants, the plaintiff alleged causes of action for discrimination and harassment based on her sex. (*Id*. at pp. *14-*15.) The federal district court determined that the plaintiff had not administratively exhausted her harassment claim under the FEHA because her DFEH complaint did not indicate a claim for harassment or describe any harassing conduct by the offending supervisor. Thus, her harassment claim was not like or reasonably related to the discrimination and retaliation allegations in her DFEH complaint or likely to be discovered during a DFEH investigation. (*Id*. at pp. *15, *19-*37.) Accordingly, the allegations in appellant's 2008 DFEH complaint did not exhaust her claim for harassment and retaliation on account of race.

We further conclude that appellant has not shown that her racial harassment claim would likely have been uncovered during a reasonable DFEH investigation into her administrative complaint. As the federal appellate court in *Lattimore* noted, "[a]n investigation is a systematic inquiry into a particular matter. When it is launched in response to a charge of employment discrimination, the direction and scope of the investigation are guided by the allegations contained in the charge. Although an investigation is not strictly confined to allegations in the charge, it is not a 'fishing expedition' that should be expected to extend to matters unrelated to the charge." (*Lattimore*, *supra*, 99 F.3d at pp. 464-465.) Moreover, "[u]nlike a discriminatory discharge claim, a claim of racial harassment in the workplace focuses not only on the pervasiveness of the racially discriminatory

conduct, but also on the employer's possible knowledge of that conduct and failure to take remedial action. [Citation.] The proof required to demonstrate the differing claims varies, so investigation of a discriminatory termination claim will rarely focus on all the elements necessary to state a hostile work environment claim." (*Encinas v. Tucson Elec. Power Co.*, *supra*, 76 Fed.Appx. at p. 764.) We note that the harassing incidents cited by appellant in her civil complaint do not involve any acts specifically alleged to have occurred within the time period charged in her 2008 DFEH complaint. In addition, appellant's strongest incident of racial harassment -- Baltes's purported comments about "field hands" in May 2005 -- occurred well outside the limitations period for her 2008 DFEH complaint. (See *Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 880 ["In short, because Thompson can identify no act of racial harassment occurring within the year preceding his DFEH complaint, his hostile working environment claim is necessarily barred by the statute of limitations."].) Thus, it is unlikely that a reasonable DFEH investigation into the 2008 DFEH complaint, which mainly focused on her suspension and termination in 2008, would have uncovered that incident. In short, we conclude that appellant has not exhausted her second cause of action for harassment on account of race. We turn to the grant of summary judgment on the causes of action that were administratively exhausted by appellant.

D. Discrimination and Retaliation on Account of Race

In granting summary adjudication on the third cause of action for discrimination and retaliation on account of race, the superior court determined that respondents had shown there were legitimate, nondiscriminatory reasons (insubordination and violation of company policy) for appellant's termination, and that appellant had raised a triable issue of material fact that these reasons were

untrue or pretextual. Appellant contends (1) that the superior court erred in determining her burden of proof, and (2) that she has met her burden to show that the respondents' proffered reasons were false or pretextual. She also contends (1) the superior court erred by conflating her discrimination claims with her retaliation claim, and (2) the court erred by failing to address her allegations of adverse employment actions other than suspension and termination. We address each contention in turn.

Appellant initially contends that despite PBD's proffer of legitimate reasons for her suspension and termination, she need only present a sufficiently strong prima facie case for her claim to survive summary judgment, citing *Chuang v. University of Cal. Davis* (9th Cir. 2000) 225 F.3d 1115, 1128 (*Chuang*). In reaching its conclusion, *Chuang* cited *Reeves v. Sanderson Plumbing Prods.* (2000) 530 U.S. 133 (*Reeves*), in which the U.S. Supreme Court held "that if factfinder rejects employer's proffered nondiscriminatory reasons as unbelievable, it may infer 'the ultimate fact of intentional discrimination' without additional proof of discrimination." (*Chuang*, *supra*, 225 F.3d at p. 1127, quoting *Reeves*, *supra*, at p. 147.) We decline to follow *Chuang*, as in that case, the federal appellate court applied a standard of proof applicable to sustain a jury verdict to the burden of proof required to survive a motion for summary judgment. Rather, we agree with the court in *Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102 (*Loggins*), which concluded that "an employee seeking to avoid summary judgment cannot simply rest on the prima facie showing, but 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." (*Id*. at p. 1113.) In short, to raise a triable issue of material fact about an employer's legitimate, nondiscriminatory reasons for its actions, "there must be

evidence supporting a rational inference that intentional discrimination, on grounds prohibited by the statute, was the *true cause* of the employer's actions. [Citation.]" (*Guz*, 24 Cal.4th at p. 361, partial italics omitted.)[11]

Appellant contends her evidence of prior, purportedly discriminatory acts and harassing conduct by Baltes and Gonzalez created a triable issue as to whether Baltes suspended and fired her with discriminatory intent. Although this evidence may raise a triable issue of fact as to Baltes's racial animus, it does not raise a triable issue of material fact as to whether Baltes's conduct in suspending and terminating appellant was committed with discriminatory intent. (Cf. *Fuller v. Phipps* (4th Cir. 1995) 67 F.3d 1137, 1142 [in mixed motives cases, the plaintiff must produce "evidence of conduct or statements that both reflect directly the

---

[11] In a supplemental letter brief, appellant contends the recent case of *Alamo v. Practice Management Information Corp*. (2012) 210 Cal.App.4th 95 (*Alamo*) supports the argument in her reply brief that she may show a triable issue of fact on summary judgment by presenting evidence that permits a reasonable inference that intentional discrimination was a "motivating factor" as opposed to the "true cause" of the employer action. Thus, she argues, it would be unnecessary to demonstrate that the employer's proffered reasons for her termination were false or pretextual, if she could show that Baltes was also motivated by racial animus. Assuming this argument was not forfeited as it was raised for the first time in the reply brief, we would find *Alamo* distinguishable as it addressed a post-jury verdict, not a motion for summary judgment. (See *Alamo*, 210 Cal.App.4th at p. 105 [trial court did not err in using standard CACI instructions on causation for FEHA-related claims].) *Guz* states that on a motion for summary judgment, after an employer has proffered a legitimate, non-discriminatory reason, the plaintiff must show that the "true cause" of the employer's action was intentional discrimination. Until the California Supreme Court rules otherwise, *Guz* remains the law.

alleged discriminatory attitude and that bear directly on the contested employment decision."].)[12]

Appellant further contends that respondents' reasons were false and/or pretextual because (1) the cancellation policy was "heavily controverted," mainly by her own testimony and the fact that the policy changed numerous times during 2008; (2) Gonzalez's instructions to provide the customer's contract with the loss control forms was unreasonable or impossible; and (3) she acted pursuant to her manager Ramsey's prior authorization. We disagree.

The record shows that as of April 22, 2008, PBD had a written policy that before a customer's contract could be cancelled without obtaining the customer's signature, the general manager's approval was needed and "the Loss Control/UTC Letter policy must be followed." As part of the "UTC Letter policy," when "numerous attempts to reach the customer have proven to be unsuccessful, the loss control form, along with a copy of the contract needs to be submitted to the GM for cancel approval." (*Ibid*.) The record also shows that appellant submitted both a loss control form and a UTC Letter, with manager's signatures on both forms, in July 2008. In addition, appellant has never produced a loss control form without a

---

[12] Appellant also contends that the declarations from other former PBD employees attesting to prior discriminatory conduct by Baltes and Gonzalez raised a triable issue of fact as to the "true cause" of appellant's termination, citing *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740. In that case, the plaintiff asserted she was fired because she was pregnant. In its motion for summary judgment, the employer presented evidence that it fired the plaintiff because she had falsified her worktime records. She opposed the summary judgment by, among other things, presenting declarations from former female workers stating that they had been fired because of their pregnancy and that employees who had been cited for dishonesty had not been fired. (*Id*. at pp. 744, 759.) In contrast, no declarant in this case suggested that a PBD employee who was insubordinate and violated the cancellation policy was not fired. Indeed, there is uncontradicted evidence to the contrary.

manager's signature. On this record, appellant has not controverted the cancellation policy articulated by respondents in their motion for summary judgment.

The record further shows that on October 23, 2008, appellant sought signatures on 11 loss control forms from Gonzalez, indicating she knew signatures were required before she could cancel a customer's contract. Gonzalez refused because no UTC letter or customer contract was attached. Thus, despite any subjective belief by appellant about the cancellation policy, she was expressly informed about how Gonzalez interpreted the policy. In addition, it was not unreasonable for Gonzalez to require the customer's contract, as that contract eventually would be sent to the customer and submitted to the general manager for cancellation.

Instead of complying with Gonzalez's requests for proper documentation, appellant attempted to go over Gonzalez's head, contacting Baltes directly for her approval. *During* this time, appellant was cancelling the relevant contracts in the computer system, although no signatures or approval had been -- or were ever -- obtained from Gonzalez or Baltes. This was clear insubordination.

Appellant's argument that she believed she had a special exemption from Ramsey to cancel contracts without signatures fails because she was told by Gonzalez that no such exemption would be given her.[13] Appellant has neither suggested nor shown that any other employee was granted this exemption. Indeed, there is uncontradicted evidence that another PBD employee was fired for not complying with the UTC policy. In short, respondents have shown that appellant was suspended and terminated because she committed insubordination and violated

[13] Although Gonzalez advised appellant she could wait for Ramsey to return, appellant elected not to do so, cancelling the contracts instead.

PBD's cancellation policy. Appellant has not raised a triable issue that these reasons were false or pretextual, or that the true cause of her suspension and termination was intentional discrimination. (*Guz, supra*, 24 Cal.4th at p. 361.)

Appellant further contends that the trial court conflated her discrimination claim with her retaliation claim, as there is a different burden of proof to raise a triable issue of material fact with respect to summary judgment on retaliation claims. We disagree.[14] California courts have applied the *McDonnell Douglas* framework to motions for summary judgment on retaliation claims. (See, e.g., *Loggins, supra*, 151 Cal.App.4th at p. 1113 [retaliatory termination claim]; *Flait v. North American Watch Corp*. (1992) 3 Cal.App.4th 467, 476 [same].) Here, appellant's retaliation claim -- that she was suspended and terminated for prior DFEH complaints -- arises from the same underlying incident on October 23, 2008. Accordingly, the retaliation claim fails for the same reasons stated above -- that there were legitimate, nondiscriminatory, nonpretextual reasons for the suspension and termination.

Finally, appellant contends the superior court ignored her allegations of other adverse employment actions based on race. We construe this contention as an argument that appellant suffered adverse employment actions aside from her suspension and termination. After reviewing appellant's complaint, we conclude she has not sufficiently pleaded any other adverse employment actions, except for her claim that she received a written reprimand on August 5, 2008, for complaining

---

[14] The case appellant cites for this proposition -- *George v. California Unemployment Ins. Appeals Bd*. (2009) 179 Cal.App.4th 1475 -- does not support her contention. That case affirmed a jury verdict, and held that the doctrine of res judicata did not preclude a state employee from pursuing both internal administrative civil service remedies and those available under the FEHA. (*Id*. at p. 1479.) It did not address burdens of proof on summary judgment.

about Sepulveda. Even were we to assume that a written reprimand is an adverse employment action (cf. *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1457 ["negative performance reviews or counseling memoranda are generally insufficient to show an adverse employment action"]), appellant has not shown how this reprimand was racially motivated. Accordingly, the superior court did not err by failing to specifically address appellant's claims for other adverse employment actions. In short, the superior court properly granted summary adjudication on appellant's third cause of action for discrimination and retaliation on account of race.

E. Disability Claims

In her fourth cause of action for discrimination and retaliation on account of disability and her sixth cause of action for violation of the CFRA, appellant alleged (1) that respondents interfered with her CFRA leave by requiring her to come into work on October 27, 2008 and to participate in a formal disciplinary meeting, and (2) that respondents violated the FEHA by suspending and/or terminating her because of her disability and/or her exercise of her rights under the CFRA. We disagree.

Appellant's claim that respondents interfered with her CFRA leave is based on her factual contention that she was on "permanent disability" and unable to work through October 30, 2008. Her sole support for this factual contention is the first page of the CFRA/FMLA certification by Dr. McDow, in which he stated that appellant was "unable to work" from "9/23/08 to 10/30/08." Appellant does not, however, dispute that she worked on October 23, 2008. Moreover, on the second page of the form, Dr. McDow stated that appellant required only intermittent leave for the next 12 months. Dr. McDow did not specify any particular day. Thus,

respondents could not be aware that appellant was on permanent disability and would be unable to work on October 27, 2008.

Appellant asserts that respondents knew that she was taking CFRA leave on October 27, 2008, and that they interfered with that leave by requiring her to come into the office to pick up retirement paperwork. This claim fails, as appellant does not dispute she was never required to come into work that day. Appellant asserts that "[i]t is . . . irrelevant whether Respondents explicitly 'required' [her] to come into the office; her reasonable belief that she could potentially lose retirement benefits if she did not sign the time-sensitive documents that Gonzalez 'placed . . . on my desk' was sufficiently coercive to render her appearance non-voluntary." She cites no authority for this contention and we are aware of none. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [contention not supported with reasoned argument and citation forfeited].)

Appellant's claim that respondents interfered with her CFRA leave by requiring her to participate in a disciplinary meeting also fails. When appellant elected to come into the office on October 27, 2008, respondents could presume that she was not taking CFRA leave that day, as she had requested only intermittent leave. In addition, appellant does not claim to have told Baltes or Ramsey that she was on leave that day, nor does she claim to have sought an accommodation to reschedule the disciplinary meeting. Accordingly, appellant has failed to show any interference with CFRA leave.

As to any disability claim arising from appellant's suspension and termination, those claims fail for the same reasons previously stated: respondents have presented legitimate, nondiscriminatory reasons (insubordination and violation of PBD's cancellation policy) for the suspension and termination, and appellant has not shown how the proffered reasons were false or pretextual.

Specifically, appellant has failed to present evidence that would lead to the reasonable inference that the true cause of the suspension and termination was disability discrimination and/or retaliation for complaining about previous instances of disability discrimination, or for exercising her rights under the CFRA. Thus, respondents were entitled to summary adjudication on the fourth and fifth causes of action.

F. Remaining Claims

The superior court granted summary adjudication on appellant's remaining claims. We agree.

As to appellant's first cause of action for wrongful termination in violation of public policy against PBD, this claim fails, as PBD has shown good cause for terminating appellant because she was insubordinate and violated company policy. (*Crosier v. United Parcel Service, Inc*. (1983) 150 Cal.App.3d 1132, 1139-1140, disapproved on another point by *Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 688, 700, fn. 42.) In addition, it is not against public policy to discharge a plaintiff who reported that a fellow employee was stealing from the company. (See *Foley v. Interactive Data Corp*., *supra*, 47 Cal.3d at p. 670 ["Whether or not there is a statutory duty requiring an employee to report information relevant to his employer's interest, we do not find a substantial public policy prohibiting an employer from discharging an employee for performing that duty."].)

Appellant's seventh cause of action for defamation is based upon allegedly libelous statements in the termination letter. Specifically, the letter stated that appellant falsified company records, improperly cancelled customer contracts, knowingly entered false information into the company's sales reporting system in order to meet "workflow" benchmark objectives. Respondents are entitled to summary adjudication on this claim because those statements are substantially true.

(See *Unelko Corp. v. Rooney* (9th Cir. 1990) 912 F.2d 1049, 1057 ["A factual statement need only be substantially true in order to be protected from a suit for defamation."].) By cancelling customer contracts, appellant made misrepresentations that the cancellation process was followed with each contract. Alternatively, appellant cannot show that respondents made those statements knowing them to be false, or that respondents were not entitled to the qualified privilege to speak to others about subjects of common interest. (See *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203-1204 ["communications made between persons on a matter of common interest are privileged if the statements are made 'without malice'"]; see also *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913, 930-931 [parties in a business or contractual relationship have the requisite "common interest" for the privilege to apply].) We reject appellant's argument that she has shown malice because she has presented evidence of prior discrimination and harassment. That evidence is insufficient to show that the statements in the termination letter were made with hatred or ill will toward appellant, especially where the statements were substantially true and where the qualified privilege is implicated. (Accord, *Taus v. Loftus* (2007) 40 Cal.4th 683, 722 ["The qualified privilege embodied in Civil Code section 47, subdivision (c)(1) is intended to provide substantial protection."].)

Finally, as to appellant's causes of action for IIED, fraud, and unfair business practices, appellant concedes these claims are derivative of the underlying claims. As we have concluded that appellant has no other viable claim, these claims must also fail. In short, we conclude the superior court properly granted respondents' motion for summary judgment.

DISPOSITION

The judgment in favor of respondents following an order granting summary judgment is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.