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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

NICOLLETTE SHERIDAN, Plaintiff and Appellant, v. TOUCHSTONE TELEVISION PRODUCTIONS, LLC, Defendant and Respondent.	B281267 (Los Angeles County Super. Ct. No. BC435248)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

Baute Crochetiere & Hartley, Mark D. Baute and David P. Crochetiere for Plaintiff and Appellant.

Mitchell Silberberg & Knupp, Aaron M. Wais, Christopher A. Elliott and Adam Levin for Defendant and Respondent.

Touchstone Television Productions, LLC (Touchstone), hired Nicollette Sheridan to appear in the television series *Desperate Housewives*, a show created by Marc Cherry that aired on ABC. Sheridan sued Touchstone under Labor Code section 6310,[1] alleging that Touchstone failed to renew her contract in retaliation for her complaint about a battery allegedly committed on her by Cherry. The trial court granted Touchstone's motion for summary judgment and entered judgment in favor of Touchstone. We affirm.

BACKGROUND

I. *Procedural History*

Sheridan filed her initial complaint in April 2010, asserting claims for wrongful termination in violation of public policy, assault and battery, gender violence, discrimination based on sex, retaliatory termination, breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. In March 2012, the court declared a mistrial after the jury deadlocked 8-4 in favor of Sheridan on her wrongful termination claim, the sole remaining claim.

In *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, we directed the superior court to vacate its order denying Touchstone's motion for a directed verdict on Sheridan's wrongful termination claim because "[a] cause of action for wrongful termination in violation of public policy does not lie if an employer

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[1] Further unspecified statutory references are to the Labor Code.

decides simply not to exercise an option to renew a contract." (*Id.* at p. 678.) We ordered the court to permit Sheridan to file an amended complaint alleging a cause of action under section 6310 for retaliation for complaining about unsafe working conditions. (*Id.* at pp. 678, 684.) Sheridan filed an amended complaint, asserting that she was terminated from the show in retaliation for her complaint about Cherry.[2]

After Sheridan filed her amended complaint to assert the section 6310 claim, the trial court granted Touchstone's summary judgment motion and entered judgment in favor of Touchstone. Sheridan timely appealed.

II. *Factual Background*

"Touchstone hired Sheridan in 2004 under an agreement with her loan-out company Starlike Enterprises, to play the character of Edie Britt in the television series *Desperate Housewives*. The agreement was for the show's initial season and gave Touchstone the option to renew the contract on an annual basis for an additional six seasons. [Citation.] Touchstone renewed Sheridan's contract for five seasons, through 2008. Sheridan alleged that during a September 24, 2008

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[2] The superior court sustained Touchstone's demurrer on the basis that Sheridan failed to exhaust her administrative remedies. (*Sheridan v. Touchstone Television Productions, LLC* (2015) 241 Cal.App.4th 508, 510, 517 (*Sheridan I*).) We concluded that Sheridan was not required to exhaust her administrative remedies under sections 98.7 and 6312 and reversed the judgment of dismissal. (*Id.* at p. 510.)

rehearsal, Sheridan attempted to question Cherry about the script, and he struck her in response." (*Sheridan I*, *supra*, 241 Cal.App.4th at pp. 510-511.) Sheridan told Cherry, "You just hit me on the head. That's not okay. That is not okay," and she left for her trailer. Cherry went to Sheridan's trailer and apologized, and they hugged. Sheridan believed Cherry's apology was sincere.

The following day, Sheridan spoke to George Perkins, the line producer, about the incident. Perkins said that he had heard that Cherry struck Sheridan. He said he was very sorry about it, and he asked Sheridan if she was all right and if she wanted him to speak with Cherry. Sheridan asked Perkins to tell Cherry his behavior was unacceptable and asked that Cherry apologize again and send her flowers. Perkins agreed to tell Cherry.

Sheridan also called her attorney, Neil Meyer, who told Touchstone attorney Howard Davine that Sheridan was very upset and that Cherry "had hit her in the head very hard." Meyer testified that he told Davine that "since it happened to [Sheridan], it might happen to someone else." Meyer also told Davine that Sheridan did not want ABC to take any other action because Cherry had apologized and Sheridan "just wanted to get on with her life."

In October 2008, Mark Pedowitz, then president of Touchstone, read about the incident in the National Enquirer and asked the human resources department to conduct an investigation. Lynne Volk, a Human Resources Business Partner at Touchstone, interviewed several people who were on the set on the day of the incident, but she did not interview Cherry or Sheridan. Volk concluded that Cherry "tapped

Sheridan with the purpose of providing direction to Sheridan in the course of a scene they were rehearsing." She further learned that Cherry had apologized to Sheridan. She "did not believe that any further action was warranted, and thereafter considered the matter closed." Volk did not receive any complaints about the workplace from Sheridan, and she was never told that Sheridan was making a complaint about safety or that Sheridan was concerned Cherry might hit someone else. At trial, Volk stated that she would have interviewed Sheridan and Cherry had she been told that Cherry "hit . . . Sheridan hard," that Davine was concerned it might happen to someone else, and that Sheridan was concerned about retaliation.

Touchstone killed Sheridan's character during the fifth production season and did not exercise its option to renew Sheridan's contract for the sixth season. According to depositions and declarations submitted by Touchstone, the decision to kill Sheridan's character was made on May 22, 2008 during a private discussion among Cherry, Pedowitz, and executive producers Sabrina Wind and Bob Daily. Cherry believed it "would be a good creative decision," would "help us financially down the road," and could result in large advertising revenues. Daily testified that Pedowitz said that "it was better creatively to do it later in the season rather than earlier, and he also felt because we were paying her for a full season, that that would make the most sense financially." Wind testified that they discussed the financial ramifications of killing off the character early in the season, which would mean Sheridan "could demand a great deal more money for the less episodes." They proposed

"kill[ing] her in that midseason cliffhanger episode," but Pedowitz "suggested that we wait longer until, let's say, March sweeps."

Pedowitz testified that, during season 3, the writers wanted to have the Edie Britt character "end up hanging herself." Cherry asked Pedowitz for permission to kill the character at that time, but the studio and network did not want the character killed off yet. However, by May 2008, Pedowitz and the others believed Sheridan's character "had gone as far as it could for story-telling purposes," and that "the storytelling on that character had reached an impasse."

Immediately following their initial meeting on May 22, 2008, Cherry, Pedowitz, Wind and Daily met privately with Steve McPherson, the head of primetime programming for ABC, to obtain the network's approval to kill Sheridan's character. McPherson approved the decision. As with any decision to kill a character, the decision was kept confidential.

When Sheridan was told of the decision to kill her character, she responded that "it had been a great ride," and she left the room. At the end of season 5, Touchstone did not exercise its option to renew Sheridan's contract for season 6.

DISCUSSION

Sheridan challenges the trial court's grant of summary judgment and some of the court's evidentiary rulings. We conclude that, even if we credit the excluded evidence, Sheridan has not submitted evidence sufficient to withstand summary judgment.

I. *Standard of Review*

"'A court may grant a summary judgment only if there is no triable issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. [Citation.] The defendant can satisfy its burden by presenting evidence that negates an element of the cause of action or evidence that the plaintiff does not possess and cannot reasonably expect to obtain evidence needed to establish an essential element. [Citation.] If the defendant meets this burden, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. [Citation.] [¶] We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. [Citation.]' [Citation.]" (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 914.)

II. *Legal Framework*

Section 6310 "is part of the California Occupational Safety and Health Act (Cal/OSHA, . . . § 6300 et seq.). The statute prohibits retaliation against employees who report or seek to correct unsafe working conditions." (13 Cal. Prac. Guide Civ. Pro. Trial Claims and Def. (Oct. 2017), § 13:1175.) "Section 6310, independently and together with other provisions of Cal–OSHA, reflects a significant public policy

interest in encouraging employees to report health and safety hazards existing in the workplace without fear of discrimination or reprisal. [Citations.]" (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1350 (*Ferrick*).)

Subdivision (b) of section 6310 provides in pertinent part: "Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to . . . his or her employer . . . of unsafe working conditions, or work practices, in his or her employment or place of employment . . . shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer."

California has adopted the three part burden-shifting analysis of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 in wrongful termination cases. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1109; see *Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1193 (*Husman*) ["Like claims for discrimination, retaliation claims are subject to the *McDonnell Douglas* burden-shifting analysis."].) "'To establish a prima facie case of retaliation, a plaintiff must show that she engaged in a protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two. [Citation.]' [Citation.]" (*Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 451 (*Muller*), disapproved on other grounds

by *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6.)

If the employee establishes a prima facie case, the burden "'shifts to the employer to show its action was motivated by legitimate, nondiscriminatory reasons. [Citation.] . . . If the employer meets this burden, the employee then must show that the employer's reasons are pretexts for discrimination, or produce other evidence of intentional discrimination.' [Citation.] [¶] In the context of summary judgment an employer may satisfy its initial burden of proving a cause of action has no merit by showing either that one or more elements of the prima facie case 'is lacking, or that the adverse employment action was based on legitimate nondiscriminatory factors.' [Citations.] '[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory.' [Citations.]" (*Husman*, *supra*, 12 Cal.App.5th at pp. 1181-1182.)

"'[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' [Citation.] '[T]he employee [cannot] simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee "'must demonstrate such weaknesses, implausibilities, inconsistencies,

incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [. . . asserted] non-discriminatory reasons."'" [Citation.]" (*Nakai v. Friendship House Assn. of American Indians, Inc.* (2017) 15 Cal.App.5th 32, 39 (*Nakai*).)

III. *Prima Facie Case*

The trial court found that Sheridan provided "no evidence that she communicated to Touchstone that she feared for her safety on the set or that she requested any specific safety or security measures that she wanted Touchstone to implement." The court also reasoned that a safe place of employment under California law concerns only "the physical condition of the place of work rather than activities of other employees."[3] The court further found that Sheridan failed to raise a triable issue of fact whether retaliation for her purported workplace safety complaint was a substantial motivating factor in the decision not to renew her contract.

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[3] The trial court incorrectly held that California's law regarding a safe work environment is concerned only with the physical condition of the workplace. (See, e.g., *Franklin v. The Monadnock Co.* (2007) 151 Cal.App.4th 252, 259 (*Franklin*) [the public policy requiring employers to provide a safe workplace includes "a requirement that an employer take reasonable steps to address credible threats of violence in the workplace"]; *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327, 335 [Cal-OSHA "considers risks of workplace violence to be a workplace safety issue"].)

A. *Protected Activity*

In order to meet the first requirement to establish a prima facie case of retaliation, Sheridan needed to provide evidence that she engaged in a protected activity. (*Muller*, *supra*, 61 Cal.App.4th at p. 451.) Sheridan contends that she made a bona fide complaint of unsafe working conditions, relying on evidence that she and Meyer expressed concern about retaliation by Cherry. She also relies on the allegation that Meyer told Davine that "since it happened to [Sheridan], it might happen to someone else."[4] We disagree.

Sheridan relies on evidence that she was afraid of retaliation by Cherry to argue that she made a bona fide complaint about an unsafe work environment. She cites her deposition testimony that she did not speak to anyone in the human resources department about the incident because she "didn't know what the repercussions would be, and [she] couldn't bear things getting even more hateful with Marc Cherry." She also cites her trial testimony that she wanted Meyer "to help protect

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[4] Sheridan also relies on testimony by Perkins that she argues was erroneously excluded by the trial court. However, the trial court overruled the objection to Perkins' statement that "I knew that she would have to be upset to leave the set." The second statement was, "She was upset. She used the word 'hit' and told me her perspective on the incident." It was undisputed that Sheridan was upset and told Perkins about the incident. However, Perkins further stated that Sheridan "never stated or suggested that she feared [Cherry] might hit her or anyone else in the future." He explained that "I would have been a sympathetic ear because that's what my job is."

[her] and to speak to ABC and Disney and to make sure that this would never happen again." Finally, she cites Meyer's trial testimony that he told Davine that "we weren't looking for ABC Disney to do anything because [Sheridan] was concerned about retribution from Mr. Cherry. And . . . he had apologized to her in her trailer, and she was upset but was prepared to just put her head down and go back to work. She was concerned . . . if we brought this up, that her job would be in jeopardy." Sheridan's alleged concern that she feared for her job does not support a finding that she made a bona fide complaint to Touchstone about an unsafe work environment. As discussed below, Sheridan further communicated that she did not want any further action taken and that she just wanted Cherry to apologize again and send her flowers. Sheridan thus did not complain to her employer that she believed her work environment was unsafe.

The trial court found that Sheridan did not communicate her concern that "it might happen to someone else" to Touchstone, relying on Meyer's deposition. The court mistakenly thought that the transcript showed that Meyer did not voice this concern to Davine. However, the transcript of Meyer's deposition indicates that Meyer did convey this thought to Davine. We set forth the relevant portion of the transcript below.

"[Meyer:] I just thought that [Davine] should know because if it happened to [Sheridan], it might happen to someone else. And it's something that they should be aware of.

"Q. Are you saying that you told [Davine] about [Sheridan] being concerned about making waves?

"A. Did I tell [Davine] concerning—no.

"Q. And you just testified to something about how you were concerned if it happened to [Sheridan] it might happen to someone else. Did you say that to [Davine]?

"A. I said something to that effect to [Davine]."

The deposition transcript accordingly indicates that Meyer answered "no" when asked if he told Davine about Sheridan being concerned about "making waves." However, he stated that he did tell Davine that "it might happen to someone else." Meyer also testified at trial that he told Davine that "since it happened to [Sheridan], it might happen to someone else."

Meyer further told Davine that Sheridan did not want ABC to take any further action because Cherry had apologized, and Sheridan wanted to "get on with her life." Expressing to her employer that she did not want any further action taken because the accused perpetrator had apologized does not support a finding that Sheridan told her employer that she believed her work environment was unsafe. "To be protected by a public policy, an employee 'must convey the information in a form which would reasonably alert his or her employer of the nature of the problem and the need to take corrective action.' [Citation.]" (*Ferrick*, *supra*, 231 Cal.App.4th at pp. 1350-1351 [finding allegations insufficient to withstand demurrer].) Sheridan has failed to present evidence that she reasonably alerted Touchstone of the need to take corrective action about an unsafe work environment.

Sheridan relies extensively on *Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936 (*Boston*), but *Boston* is distinguishable. The

plaintiff in *Boston*, who worked with juveniles with histories of violent behavior, had repeatedly told her supervisors that the increased number of clients and failure to increase the number of staff had led to safety concerns, such as increased fights and furniture being thrown. Her employer "did not increase the number of staff to accommodate the increased client load, despite Boston's insistence that she needed more support due to safety concerns." (*Id.* at p. 941.) Her supervisor told Boston "to 'get over it and stop whining.'" (*Ibid.*) After she was injured during a fight, she again raised her concern that the work environment had become unsafe, and her employment subsequently was terminated. She filed a complaint alleging a violation of sections 6310 through 6312 and wrongful termination in violation of public policy. The jury found in her favor on her wrongful termination claim, the sole remaining claim at trial, and we affirmed. (*Id.* at p. 940.) The employer contended the plaintiff's claim was within the scope of Health and Safety Code sections encompassing retaliation for reporting violations of laws, including laws regarding staff-child ratios. (*Id.* at pp. 944-945.) We disagreed, citing the plaintiff's oral and written complaints regarding safety issues, and concluded that "the gravamen of [her] claim is that she was retaliated against for complaining about an unsafe work environment." (*Id.* at p. 946.)

The facts in *Boston* are very different from those in the instant case. There was substantial evidence that the plaintiff in *Boston* repeatedly expressed her concern to her supervisors that she often was placed in unsafe situations with violent incidents occurring. As

discussed above, Meyer's communication to Davine that Sheridan did not want ABC to take further action because Cherry had apologized does not support a finding that Sheridan told her employer that her work environment was unsafe. Sheridan's evidence is nothing like the substantial evidence presented by the plaintiff in *Boston* and does not raise a triable issue of fact whether Touchstone understood her complaint to raise an issue of unsafe work environment. "'[E]mployers need not approach every employee's comment as a riddle, puzzling over the possibility that it contains a cloaked complaint of discrimination.'" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1047, quoting *Garcia–Paz v. Swift Textiles, Inc.* (D.Kan.1995) 873 F.Supp. 547, 560; see *Husman*, *supra*, 12 Cal.App.5th at p. 1193 [""The relevant question . . . is . . . whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.""]; *Yanowitz*, *supra*, 36 Cal.4th at p. 1046 [under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), "an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination"].)

Even assuming that Meyer's statement that "it might happen to someone else" is sufficient to establish that Sheridan engaged in protected activity by complaining of an unsafe work environment,

Sheridan also must establish that she was thereafter subjected to adverse employment action and that there was a causal link between the two. (*Muller*, *supra*, 61 Cal.App.4th at p. 451.) It is undisputed that Touchstone did not renew Sheridan's contract after season 5. However, Sheridan has provided no evidence of a causal link between her complaint and an adverse employment action. (*Muller*, *supra*, 61 Cal.App.4th at p. 451; see *Chen v. County of Orange* (2002) 96 Cal.App.4th 926, 949 (*Chen*) ["the necessity of a causal link is a part of a plaintiff's prima facie case of retaliation."].) Nor has she presented "'substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' [Citation.]"[5] (*Nakai*, *supra*, 15 Cal.App.5th at p. 39.)

B. *Causation*

Sheridan contends the trial court erroneously applied the causation standard of *Harris v. City of Santa Monica* (2013) 56 Cal.4th

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[5] Touchstone does not address causation, instead moving on to discuss whether Sheridan has established that Touchstone's proffered, nondiscriminatory reason for the employment decision was pretextual. "In the context of summary judgment an employer may satisfy its initial burden of proving a cause of action has no merit by showing either that one or more elements of the prima facie case 'is lacking, or that the adverse employment action was based on legitimate nondiscriminatory factors.' [Citations.]" (*Husman*, *supra*, 12 Cal.App.5th at p. 1181.)

203 (*Harris*). We disagree. Sheridan quotes a few statements from the trial court's decision to support her contention, but the trial court's findings as a whole indicate that the court applied the proper standard.

Harris addressed the mixed-motive jury instruction in a claim of sex discrimination under FEHA. (*Harris*, *supra*, 56 Cal.4th at p. 214.) Under *Harris*, a plaintiff alleging employment discrimination must show that "discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor" in a challenged employment decision. (*Id.* at p. 232.) The court further held that, "when a jury finds that unlawful discrimination was a substantial factor motivating a termination of employment, and when the employer proves it would have made the same decision absent such discrimination, a court may not award damages, backpay, or an order of reinstatement. But the employer does not escape liability." (*Id.* at p. 211.) The remedy in such a circumstance is, "where appropriate, declaratory relief or injunctive relief to stop discriminatory practices." (*Ibid.*)

Sheridan takes issue with the trial court's statement that "[i]n *Harris*, the California Supreme Court held that even if an employment action was motivated by discriminatory and non-discriminatory reasons (i.e., 'mixed-motives'), the employer was not liable if it could establish that its legitimate reason, standing alone, would have induced it to make the same decision." Sheridan also takes issue with the following statement: "The Court finds that the Defendant has presented substantial undisputed evidence of the creative decision to kill off Sheridan's character, developed over several seasons of the show. Thus,

under *Harris v. City of Santa Monica*, Touchstone's legitimate reasons for killing off Sheridan's character would have resulted in the same decision."

The trial court clearly stated that "a plaintiff must prove that discrimination was a 'substantial motivating factor' of the employment decision." The statements Sheridan challenges do not indicate that the court incorrectly applied the causation standard. The court's statement that Touchstone would have reached the same decision regardless of Sheridan's alleged workplace safety complaint merely was another way of expressing the court's finding in the very next sentence that "retaliatory animus" was not a substantial factor in the employment decision. We therefore disagree with Sheridan's contention that the trial court erroneously applied the causation standard.[6]

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[6] Even if we agreed with Sheridan that the court incorrectly applied *Harris*, we conclude below that Sheridan has not provided evidence that retaliation was a substantial motivating factor of the employment decision. Furthermore, *Harris* is clear that "[i]f a plaintiff has shown that discrimination was a substantial factor motivating a termination decision, but the employer has shown that it would have made the same decision in any event," an order of reinstatement or backpay is not appropriate. (*Harris*, *supra*, 56 Cal.4th at p. 232.) The court reasoned that "forcing an employer to retain someone when it had sufficient and legitimate reasons not to do so—would cause inefficiency and would thus tend to 'deprive[] the state of the fullest utilization of its capacities for development and advancement,' contrary to the FEHA's purposes," and that an award of economic damages "would provide the plaintiff with an unjustified windfall." (*Id.* at p. 233.) The relief Sheridan sought in her amended complaint was economic damages of $20 million, exemplary and punitive damages, and attorney fees and costs.

Sheridan further contends that this issue cannot be decided on summary judgment, citing *Husman*. Discussing the standard set forth in *Harris*, *Husman* stated that "'there must be a causal link between the employer's consideration of a protected characteristic and the action taken by the employer' and a plaintiff must demonstrate 'discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor.' [Citations.] If triable issues of material fact exist whether discrimination was a substantial motivating reason for the employer's adverse employment action, even if the employer's professed legitimate reason has not been disputed, the FEHA claim is not properly resolved on summary judgment." (*Husman*, *supra*, 12 Cal.App.5th at p. 1186.)

In *Husman*, the employer had legitimate nondiscriminatory reasons for discharging the plaintiff, which included insubordinate behavior and unsatisfactory job performance. However, the plaintiff, who was gay, presented evidence that a supervisor "harbored stereotypical views of gay men and articulated clear opinions as to what he considered appropriate gender identity expression," making remarks at various times about the plaintiff's sexual orientation and appearance. (*Husman*, *supra*, 12 Cal.App.5th at p. 1191.) The plaintiff also presented evidence of remarks by his direct supervisor about the reason for his termination and about the first supervisor "ha[ving] it out for him." (*Id.* at p. 1192.) The court concluded that, although it was "a close case," the plaintiff had "raised a triable issue of material fact that impermissible bias was a substantial motivating factor for his

termination," and therefore reversed the grant of summary judgment as to his discrimination claim. (*Ibid.*)

Husman does not help Sheridan. *Husman* stated that summary judgment was not appropriate if "triable issues of material fact exist whether discrimination was *a substantial motivating reason* for the employer's adverse employment action." (*Husman*, *supra*, 12 Cal.App.5th at p. 1186, italics added.) The plaintiff in *Husman* presented evidence of discriminatory remarks, as well as evidence tying those remarks to his termination. Thus, although the court found it was a close case, it was sufficient to raise "a triable issue of material fact that impermissible bias was a substantial motivating factor for his termination." (*Id.* at p. 1192.) Here, by contrast, Sheridan has not presented any evidence of a causal link between the adverse employment action and her complaint. (*Id.* at p. 1186.) Nor has she raised a triable issue of material fact whether retaliation was a substantial motivating reason for the employment action. (*Ibid.*)

Moreover, although *Husman* found that the plaintiff had presented sufficient evidence to withstand summary judgment on his discrimination claim, the court found that he failed to raise a triable issue of fact as to his retaliation claim. (*Husman*, *supra*, 12 Cal.App.5th at p. 1194.) The court explained that "[a]lthough '[r]etaliation claims are inherently fact-specific' [citation], 'an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew

that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination.' [Citation.] '[C]omplaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct.' [Citations.]" (*Id.* at p. 1193.) *Husman* accordingly does not support Sheridan's position that summary judgment is inappropriate in the context of retaliatory discharge.

Nor do the other cases on which Sheridan relies to argue that she has presented evidence sufficient to withstand summary judgment support her position. For example, she relies on *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290 (*Hentzel*), *Daly v. Exxon Corp.* (1997) 55 Cal.App.4th 39 (*Daly*), *Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101 (*Cabesuela*), and *Franklin*, *supra*, 151 Cal.App.4th 252. However, in each of those cases, the issue was whether the plaintiff had sufficiently stated a cause of action to withstand demurrer. (See *Hentzel*, *supra*, 138 Cal.App.3d at p. 293 [trial court erred in sustaining employer's demurrer because plaintiff who alleged that his employer terminated him "in retaliation for his protesting what he considered to be hazardous working conditions caused by other employees smoking in the workplace" sufficiently stated cause of action for retaliatory dismissal]; *Daly*, *supra*, 55 Cal.App.4th at pp. 41-42 [reversing sustaining of employer's demurrer where the plaintiff's employment contract was not renewed after she complained about Cal-OSHA violations and told her supervisor that a subcontractor

was not providing for employee safety]; *Cabesuela*, *supra*, 68 Cal.App.4th at p. 109 [plaintiff's allegation that he was terminated from his employment for complaining about the long hours the truck drivers were required to work, which he believed was a health and safety hazard, in violation of section 6310 sufficient to withstand demurrer]; *Franklin*, *supra*, 151 Cal.App.4th at p. 255 [plaintiff's allegations that he was terminated from employment after complaining to his employer's human resources department that a coworker threatened to kill him and other employees, and that the coworker thereafter attempted to stab him were "sufficient to state a claim for wrongful termination based on the public policies that require employers to provide a safe and secure workplace and encourage employees to report credible threats of violence in the workplace"].) Not only do these cases involve clear complaints by employees to their employers about workplace safety, but sufficiently stating a cause of action to withstand a demurrer is not the same as presenting evidence sufficient to withstand summary judgment. (See *Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1007 ["A 'demurrer tests the pleading alone, and not the evidence or the facts alleged. Thus, a demurrer will be sustained only where the pleading is defective on its face.'"].)

IV. *Pretext*

Assuming that Sheridan established a prima facie case, she further contends that she presented sufficient evidence that Touchstone's proffered reason for the employment decision was pretextual. She argues that the timing of the decision and the "sham"

investigation of the incident constitute evidence of pretext, citing *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 479 ["Pretext may also be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination."].

"'[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory.' [Citations.] "'Circumstantial evidence of "pretense" must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate' on an improper basis.'" [Citation.]" (*Husman*, *supra*, 12 Cal.App.5th at p. 1182.)

A. *June 2008 Letter*

Sheridan cites a June 2008 letter that she claims "fully vest[ed] her with profit participation for all eight seasons of the Show." The copy in the record is difficult to read, but the letter only appears to address Sheridan's participation in the fifth season of the show and does not state that her contract was renewed for a full eight seasons. To the contrary, the letter states that Touchstone was exercising its option to engage Sheridan's services "as a performer in the role of 'Edie' during the 5th Contract Year."

B. *Timing of Decision*

The trial court found that Touchstone presented undisputed evidence that the decision to kill Sheridan's character was made on May 22, 2008, before the alleged battery. The court relied on the declarations and testimony of Cherry, Pedowitz, Wind, Daily, and McPherson, all of whom stated that they made the decision during a private discussion and kept it confidential so that the decision would not be leaked to the press. The court rejected Sheridan's reliance on the testimony of two writers, Jeffrey Greenstein and Lori Baker, on the ground that they admitted they were not involved in the private May 22, 2008 meetings.

It is true that Greenstein and Baker both admitted they were not present at those meetings. However, the fact that Greenstein and Baker were not involved in the May 22, 2008 meetings is not dispositive of the question whether the final decision was made on that date. Sheridan contends she presented evidence contradicting Touchstone's evidence that the final decision was made on May 22, 2008.[7]

Baker testified that there was no discussion of killing Sheridan's character at a writers' retreat in Las Vegas, which was held around May 26, 2008. She stated in her deposition that she first heard Cherry talk about killing Sheridan's character sometime during the fall of

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[7] Sheridan challenges the trial court's rulings excluding some of this evidence. We will consider the excluded evidence and nonetheless conclude that, even if this evidence were admitted, it is "'insufficient to permit a rational inference that the employer's actual motive was discriminatory.' [Citations.]" (*Husman*, *supra*, 12 Cal.App.5th at p. 1182.)

2008. However, at trial, she testified that the first time she heard about killing Sheridan's character was in December 2008, when Cherry entered a meeting, shut the door, and told the writers that "he had just gotten permission from Steve McPherson to kill off Edie Britt in the season finale." In evidence excluded by the trial court, Baker testified that when she learned of the October 2008 article in the National Enquirer about the incident between Sheridan and Cherry, she spoke with Wind, who "said something to the effect of, this is not going to be good for [Sheridan]."

Greenstein testified that he believed the discussion about killing Sheridan's character arose in June, July, or August of 2008. He acknowledged that he only attended part of the May 2008 Las Vegas writers' retreat. He believed the decision to kill Sheridan's character was not final, stating that, "as the fall went on," the writers continued to discuss whether it was a good idea. Greenstein also testified that Cherry continued to express reservations about killing Sheridan's character in October, November, and December of 2008.[8] Greenstein believed that he would have been informed of any discussions regarding significant story developments, although he conceded that he was working only three days a week and thus was not present for all the writers' discussions during that timeframe. He recalled that the decision to kill Edie Britt was still under discussion in December 2008

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[8] Contrary to Sheridan's assertion in her brief, the trial court overruled the objection to this testimony.

and learned that it was final in January 2009, when the episode was shot.

In addition to the evidence of Cherry, Pedowitz, Wind, Daily, and McPherson, Touchstone presented the testimony of Joe Keenan, a consulting producer on the show, who stated that he learned about the decision to kill Sheridan's character at the May 2008 writers' retreat in Las Vegas. Alexandra Cunningham, a writer on the show for season 5, testified that she learned about the decision to kill Sheridan's character at a meeting in the writers' room on June 2, 2008.

Sheridan's evidence of pretext "'must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate' on an improper basis.'" [Citation.]" (*Husman*, *supra*, 12 Cal.App.5th at p. 1182.) Even if the decision was not finalized until December 2008, the fact that the idea was discussed by the writers after the September 2008 incident is not specific and substantial evidence that the decision to kill her character was made in retaliation for her alleged complaint of an unsafe work environment. "[A] plaintiff in a retaliation suit must show, as part of his or her prima facie case, some causal connection between an adverse employment action and the original complaint of discrimination. Mere sequence is not enough—that would be the classic logical fallacy of 'post hoc ergo propter hoc' (after the fact, therefore because of the fact)." (*Chen*, *supra*, 96 Cal.App.4th at p. 931.)

"'[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's

actual motive was discriminatory.' [Citations.]" (*Husman*, *supra*, 12 Cal.App.5th at p. 1182.) The evidence as a whole does not permit the inference that the actual motive for the decision was retaliation.

There is substantial evidence (in the form of declarations and testimony by Cherry, Pedowitz, Wind, Daily, McPherson, Keenan and Cunningham) that the idea to kill Sheridan's character first arose in May or June, before the September 2008 incident. Even Greenstein testified that the idea began to be discussed in June, July, or August 2008. Greenstein also explained that writers often discuss "killing off actors." He gave examples of discussions about killing several other characters and stated that "everyone is up for discussion. It's a soap." There was also evidence that the writers had proposed killing Sheridan's character during the third season and that the final decision to kill her character during the fifth season was a creative decision. The statements that "the storytelling on that [Edie Britt] character had reached an impasse," and that "the character had gone as far as it could for story-telling purposes" are ""facially unrelated to prohibited bias."" (*Nakai*, *supra*, 15 Cal.App.5th at p. 41.) "If the employer provides a legitimate business reason for the employee's termination, the employee has the burden to provide 'substantial evidence' which could convince a "'reasonable factfinder'" that the ""employer did not act for the [. . . asserted] non-discriminatory reasons."" [Citation.]" (*Ibid.*) Sheridan has failed to meet this burden.

C. *Investigation*

Sheridan also contends that pretext is shown because the investigation of the incident was a "sham," citing *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174 (*Mathieu*). She relies on evidence excluded by the trial court that Volk testified that she would have interviewed Sheridan and Cherry had she been told that Cherry "hit . . . Sheridan hard," that Davine was concerned it might happen to someone else, and that Sheridan was concerned about retaliation.

In *Mathieu*, the plaintiff, Laura Mathieu, was placed by a temporary employment agency at Gulfstream Aerospace Corporation, where Richard Fluck, her former boyfriend, worked. After enduring six months of harassment by Fluck, Mathieu complained to Susan Dunn, a customer service manager for the employment agency, about behavior that included "Fluck shouting at her and hindering the performance of her duties when she inquired about work-related matters; . . . Fluck shouting at her that he was busy, 'get away' and 'what the hell do I have to sign that for?' when she approached him"; "Fluck failing to return paperwork that was essential for Mathieu to complete her job duties; [and] Fluck yelling at her 'psycho,' 'bitch' and 'get out.'" (*Mathieu*, *supra*, 115 Cal.App.4th at p. 1187.) Mathieu also complained to Gulfstream about this treatment. Gulfstream's response was to tell Fluck and Mathieu "to stay away from one another." (*Id.* at p. 1180.) Gulfstream eventually told Mathieu she "was being released from her assignment as a cost-containment measure." (*Ibid.*)

Mathieu subsequently told Dunn she believed she was being released because of her complaints and brought suit against Fluck, Gulfstream and the employment agency. As pertinent here, the trial court granted summary judgment in favor of the employment agency.[9] The appellate court affirmed the grant of summary judgment as to Mathieu's claims for sexual harassment, sexual discrimination, wrongful termination and punitive damages, but reversed as to her retaliation claim. (*Mathieu*, *supra*, 115 Cal.App.4th at p. 1179.) The court relied in part on the adequacy of Dunn's initial investigation of Mathieu's claims in affirming summary judgment as to the harassment claim, and on the inadequacy of Dunn's subsequent investigation in reversing as to the retaliation claim. We explain in further detail below.

After Mathieu initially complained to Dunn about Fluck, Dunn called Gulfstream and was told that "Fluck had been advised to stop his improper behavior and that Mathieu had not complained since the warning. Dunn contacted Mathieu the next day and told her that Fluck had been admonished to stop his rude behavior. Dunn asked Mathieu to let her know immediately if any further problems arose. Mathieu told Dunn there had been no further problems and things had calmed down. Dunn contacted Mathieu again [a few weeks later], to inquire about the situation with Fluck. Mathieu repeated that everything had calmed down. After [her initial complaint], Mathieu did not complain to anyone about Fluck's behavior." (*Mathieu*, *supra*, 115 Cal.App.4th at p.

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[9] Mathieu settled her claims against Gulfstream and Fluck.

1180.) In light of these circumstance, the court held that "the trial court correctly concluded . . . that [the employment agency] acted reasonably with respect to Mathieu's initial complaint of sexual harassment." (*Id.* at p. 1185.)

The investigation found inadequate in *Mathieu* occurred after Dunn's initial investigation and after Mathieu was terminated. Mathieu presented evidence that, after she was terminated and told Dunn she believed it was in retaliation for her complaint, Dunn's investigation consisted of speaking with a Gulfstream employee who "admittedly had no firsthand knowledge" regarding the situation. (*Mathieu*, *supra*, 115 Cal.App.4th at p. 1186.) Mathieu also presented evidence that "other Gulfstream employees had told Mathieu they believed she was terminated because of her problems with Fluck." (*Ibid.*) Nonetheless, "Dunn did not pursue the matter further." (*Ibid.*) The court thus concluded that "a finder of fact could reasonably conclude Mathieu engaged in protected activity (complaining to her supervisor and to Gulfstream's human resources department about hostile work environment sexual harassment by Fluck) and was thereafter subjected to adverse employment action . . . . Mathieu's additional evidence that Dunn failed adequately to investigate or attempt to correct the alleged retaliation by Gulfstream is certainly sufficient at this stage to raise an inference of a causal connection between her protected activity and the adverse employment action. [Citations.]" (*Id.* at p. 1188.) The court therefore found triable issues of fact with respect to retaliation, but not sexual harassment. (*Id.* at p. 1189.)

The situation here is more similar to the investigation that the court in *Mathieu* found to be a reasonable response to the initial complaint. After Volk learned about the incident, she interviewed people who were on the *Desperate Housewives* set on the day of the incident and, based on those interviews, concluded that Cherry only "tapped Sheridan with the purpose of providing direction" during the rehearsal. She also learned that Cherry had apologized to Sheridan. Sheridan never complained to Volk, and, in fact, apparently never raised the incident again. Thus, similar to Dunn's initial investigation in *Mathieu*, Volk interviewed witnesses, concluded that the situation had been resolved, and did not hear any further complaints. Volk's speculation that she might have conducted her investigation differently had she known about Meyer's comments to Davine does not constitute evidence that her investigation was a "sham." Instead, under the circumstances, Volk's investigation was reasonable.

Unlike in *Mathieu*, there is no evidence that Touchstone's investigation of the incident was unreasonable. Sheridan has failed to raise a genuine issue of material fact whether Touchstone's reason for the employment decision was pretextual.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

MICON, J.*

*Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.