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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

YOLANDA C. MENDOZA, Plaintiff and Appellant, v. CEDARS-SINAI MEDICAL CENTER et al., Defendants and Respondents.	B258540 (Los Angeles County Super. Ct. No. BC472002)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed in part; vacated in part.

Miranda Morales Law Firm and Rita Morales for Plaintiff and Appellant.

Gordon & Rees, Christopher B. Cato and Marita M. Lauinger for Defendants and Respondents.

INTRODUCTION

Plaintiff Yolanda C. Mendoza (Mendoza) sued defendants Cedars-Sinai Medical Center (Cedars-Sinai) and Christine Patrick (Patrick) for discrimination, retaliation, and harassment in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), as well as other causes of action. The trial court granted defendants' motion for summary judgment and awarded costs to defendants. Mendoza appeals, contending that the trial court erred in granting summary judgment because triable issues of material fact exist as to her claims. We vacate the costs award but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *Background Facts*

Mendoza, who is a Filipina, began working at Cedars-Sinai as a surgical technician in 1988. She became a registered nurse in 2003 and began working as an operating room nurse in 2004. She received positive performance evaluations, indicating that

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[1] "On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) To the extent that Mendoza has cited in her statement of facts evidence as to which the trial court sustained defendants' objections, and she has failed to demonstrate error in the trial court's evidentiary rulings, we disregard that evidence.

she met or exceeded expectations, and received merit pay increases, including a 6 percent increase in 2008.

Patrick began working for Cedars-Sinai in 2000 as a clinical nurse IV. She was one of the nurses responsible for supervising and evaluating nurses assigned to the sixth floor operating room (6OR), including Mendoza. She encouraged Mendoza to complete the requirements to become a registered nurse, after which Mendoza was promoted to clinical nurse I and assigned to the third floor operating room (3OR). Mendoza was subsequently promoted to clinical nurse II. In 2007, at Mendoza's request, she was transferred back to 6OR. In April 2009, on Patrick's recommendation, Mendoza was promoted to clinical nurse III.

Mendoza believed that Patrick treated "White/Caucasian" employees better than she treated Filipino employees. She also heard Patrick say that certain employees were "'too old' to be working anymore and should resign."

Mendoza had been diagnosed with attention-deficit/hyperactivity disorder (ADHD) in "approximately 2004." The condition was controlled with medication. According to Mendoza, she "befriended" Patrick in September 2009 and at that time disclosed to Patrick that both she and her son had ADHD. According to Patrick, Mendoza revealed that she had ADHD "well before 2009," possibly "around 2003, when she was studying to take the test to be a nurse." Mendoza also told her she was taking medication for the condition because it helped her concentrate.

B. *Events Leading Up to the November 2, 2009 Incident*

According to Patrick, in the fall of 2009, Mendoza told her that she was having problems with her son and husband. Mendoza said that people in cars were watching her and following her wherever she went, and that bright purple lights were focused on her house and helicopters were circling overhead. Mendoza said she was sleeping on the floor between rooms so that people could not see her through the windows. Patrick advised her to report this to the police. Mendoza acknowledged in her deposition that she told Patrick that she was having problems with her neighbors following her when she was with her son.

Patrick states that she became concerned that Mendoza might be having an adverse reaction to the medication she was taking, and Patrick encouraged her to see a doctor. Mendoza later told Patrick that her doctor had taken her off her medication, and she thanked Patrick.

Mendoza stated in her deposition that she did not recall Patrick saying that her medication could be affecting her and advising her to see a doctor. She said that she went to see her doctor for a regularly scheduled appointment. She could not recall what his response was to her statements about being followed. She said he asked her to stop taking Adderall because she was complaining about difficulty concentrating. He prescribed Vyvanse, which he said was a stronger medication. She took Vyvanse for a month. She felt it was too strong for her and caused palpitations, however, so she stopped taking it. She had some Adderall left, so she took it again on November 2, 2009.

C. *November 2, 2009 Incident*

About 5:45 a.m. on November 2, 2009, Patrick saw Mendoza in the locker room before Mendoza's shift began. Mendoza was almost crying, and she told Patrick about problems she was having with her son, being followed,[2] and her ADHD. Mendoza saw Patrick again at 6:30 a.m., and Mendoza was assigned to an open heart surgery.

According to Patrick, Mendoza came to her office and "told [Patrick] she was being followed and that 'these guys' were everywhere. She said they were following her all the time, including following her on the freeway from Santa Clarita to the hospital. She was extremely earnest and [Patrick] could not convince her that there was no reason for people to be following her." Mendoza "appeared more agitated and distracted," and Patrick became concerned about both Mendoza's well-being and her ability to safely care for patients.

Patrick asked the operating room manager, Kyung Jun, to speak with Mendoza. Patrick then brought a coworker to the operating room to relieve Mendoza and told Mendoza that Jun wanted to talk to her. Mendoza said she wondered why, and the coworker asked what she did. Others speculated she "'must be in trouble.'"

Jun spoke with Mendoza in Patrick's office. According to Jun, Mendoza said she was being followed by people, including

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[2] While Mendoza initially stated in her deposition that on November 2, 2009, she had a conversation with Patrick about being followed, she later stated that she did not recall telling Patrick that she had been followed to work and then stated that she did not tell Patrick anything on November 2 about being followed.

the police. They followed her on the freeway and were waiting for her and watching her. Mendoza "was very distracted and obsessed by her ideas." Jun attempted to comfort Mendoza and recommended that she go with Mendoza to Employee Health Services (EHS). Mendoza agreed, and Jun went with her to EHS.

Jun acknowledged that she did not suspect that Mendoza was under the influence of alcohol or a controlled substance. Jun simply "knew that she was not acting like her normal self," which was why she took Mendoza to EHS. She believed that Mendoza was not able to perform any of her essential job duties. Jun also acknowledged that she did not write out any notes or a report regarding her conversation with Mendoza. She also did not know why Mendoza was permitted to go into the operating room if Patrick had concerns about her ability to perform her job duties.

According to Mendoza, Jun asked how she was, and she said she was fine. Jun then said she was taking Mendoza to EHS. Mendoza was not sure why and asked if she was going there to talk to someone about her problems with her son. Jun said she could talk to someone there, so Mendoza went with her.

At some point while Mendoza was in Patrick's office, Patrick called Nada Paruszkiewicz to the office. Paruszkiewicz was a charge nurse who participated in supervising Mendoza and evaluating her performance; she also had a background as a psychiatric technician. Because Paruszkiewicz had a relationship with Mendoza, Patrick felt her input would be helpful in assessing Mendoza's behavior and ability to perform her work safely. Mendoza agreed to speak with Paruszkiewicz, and the two had a conversation.

Nurse practitioner Jennifer Lau worked at EHS, where her duties included performing fitness for duty examinations. These

are conducted if an employee shows signs of being unable to perform his or her job or of being a danger to self or others.[3] Lau spoke to Mendoza, who told her about problems with her son and about being followed and trying unsuccessfully to file a report with the police. Mendoza said she had trouble at home but was "'dealing with it. I think people think I'm crazy but I'm not. I'm an RN and I learned everything. They think I have paranoia but I don't. And I'm not depressed.'" She acknowledged no one was after her at that time, adding, "'but I know they're out there.'" Mendoza did not have any apparent delusions or hallucinations during the examination, and she was "[o]riented to self, place, time" and able to carry on a conversation. She was cooperative until she learned that Patrick did not expect her to return to work that day. At that point, Mendoza became agitated and accusatory. Lau spoke to someone from Life and Work Matters, who advised her to take Mendoza to the emergency department for an examination; Lau did so.

Mendoza recalled only that Lau asked her how she was doing, and she said she was fine. Mendoza did not recall telling Lau about problems she was having with her son or being followed. Lau then told her she was taking her to Life and Work Matters, but first she was taking her to the emergency department. Mendoza asked why, and Lau did not respond. Mendoza stated in her deposition that she asked to call her supervisor, but Lau would not let her do so, saying that her supervisor said she did not have to go back to work. Mendoza

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[3] An employee who fails to submit to a fitness for duty examination can be suspended. Jun did not advise Mendoza of her rights with respect to the fitness for duty examination.

later stated that she did call Patrick, who informed her she did not have to go back to work.

Lau and another nurse accompanied Mendoza to the emergency department. Mendoza testified that she did not know whether she had a choice about going to the emergency department, but she did not tell Lau that she did not want to go. Once at the emergency department, Mendoza was required to provide urine and blood samples. While waiting to see a physician, Mendoza called her father and let him know she had been taken to the emergency department and did not know why.

According to Mendoza, after she had waited about an hour, Dr. Reza Danesh came to see her. Dr. Danesh asked how she was doing, and she said she was fine. The doctor then asked what brought her to the emergency room, and she said she did not know. Then Patrick came to the emergency room and told Dr. Danesh about Mendoza's family history and problems. The doctor did not interview Mendoza.

Mendoza did not recall talking to a psychiatrist, Dr. Katherine Revoredo; she remembered speaking only to Dr. Danesh. However, Dr. Revoredo reported conducting a psychiatric interview of Mendoza, during which Mendoza discussed problems with her neighbors and being followed. Mendoza said she had a history of ADHD for which she was taking Adderall; she said her psychiatrist told her to stop taking Adderall two weeks earlier, but she started taking it again the previous day because she was tired during the day and the Adderall helped her to feel more alert and awake. Mendoza also told Dr. Revoredo that she had an appointment with her psychiatrist on November 5 and would be willing to stop taking the Adderall and start taking another medication. Dr. Revoredo

contacted Mendoza's psychiatrist, who confirmed the appointment and agreed that Mendoza could be started on another medication. Dr. Revoredo agreed that Mendoza could be discharged and receive outpatient care from her own psychiatrist.

D. *Mendoza's Return to Work and Complaints About Harassment*

Mendoza saw her psychiatrist on November 5, and he cleared her to return to work the following day. On November 6, Lau cleared her to return to work, noting that Mendoza told her that "'my problem of being followed is ok now.'"

Mendoza provided her release paper to Patrick. Patrick did not give Mendoza an operating room assignment that day but instead assigned her to "'hall duty'" (per Mendoza's declaration) or to "help out" (per Mendoza's deposition testimony). That continued for approximately one week, after which Patrick resumed giving Mendoza operating room assignments.[4]

After returning to work, Mendoza felt humiliated by what had occurred. She believed her coworkers and physician supervisors looked at her differently.

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[4] At times in her deposition, Mendoza indicated that the assignment to "help out" lasted only one week. At other times, she suggested it may have lasted slightly longer ("Oh, maybe more than a week"; "after ten—more than seven days" she got operating room assignments again). Her declaration states only that the assignment to "'hall duty'" "went on for several days." For simplicity, we will refer to it as an assignment to hall duty for one week, but we understand that it may have lasted a few days longer and that she did not describe it as "hall duty" in her deposition.

Mendoza also believed Patrick was harassing her. For example, when Patrick was observing Mendoza during surgery, Patrick looked at her hands; Mendoza had never noticed Patrick looking at her hands when Patrick observed her on previous occasions. Twice Patrick called her to the telephone, and when Mendoza answered, there was no one there. Mendoza thought Patrick did this to distract her from what she was doing. During Mendoza's first week back to work, Patrick listened to her interview a patient, which Patrick had never done before.

On April 12, 2010, Mendoza filed a complaint of discrimination based on perceived disability with the Department of Fair Employment and Housing (DFEH). She alleged: "On November 2, 2009 . . . I was attending to my normal official duties in the operating room when, for no apparent reason, I was forcibly taken to the emergency room upon Chris Patrick's instructions. My employer and Chris Patrick believed that I was unlawfully taking illicit drugs and engaged in drug abuse, and that my 'mental status' renders me unfit to do my nursing job of 21 years with Cedars Sinai. I was forcibly taken for psyche evaluation and drug testing." (Capitalization omitted.) At Mendoza's request, DFEH immediately issued a notice of case closure and right to sue.

On April 15, 2010, Mendoza delivered copies of her complaint and the right-to-sue notice to the Human Resources Compliance Department (HRC) at Cedars-Sinai. Deena Stone, HRC manager, interviewed Patrick and Jun on April 27, 2010. She also interviewed Mendoza regarding the November 2, 2009, incident and Mendoza's claims of subsequent harassment by Patrick. Mendoza claimed that near the end of a transplant procedure, a chart was missing and Patrick had everyone look for

the chart; Mendoza acknowledged that Patrick did not single her out for questioning regarding the missing chart. Mendoza claimed that Patrick removed a coworker and replaced her with "a problematic traveler," but Mendoza could not articulate any particular impact this had on her. Mendoza also complained of the incident in which Patrick looked at her hands and of Patrick distracting her. She acknowledged that Patrick was not the only one who caused a distraction, and Mendoza was not the only nurse affected. Stone told Mendoza to let her know if she remembered any other instances of Patrick giving her a hard time. Mendoza told Stone she was happy, liked her coworkers, and was not looking for anything to change.

Stone concluded "that Ms. Jun's decision to relieve Ms. Mendoza of her duties and take her to EHS was made in Ms. Mendoza's best interest and in the interest of patient safety in accordance with Cedars-Sinai Medical Center's Fitness for Duty policy. [Stone] also found that Ms. Mendoza was not forcibly removed from the operating room and taken to EHS based upon Ms. Mendoza's own account that she went willingly. [Stone] also found that the examples Ms. Mendoza cited regarding Ms. Patrick did not demonstrate that she had been discriminated against for any reason or harassed."

Stone acknowledged that the Fitness for Duty policy required a reasonable suspicion that the person being examined is not able to perform one or more of her essential functions. Stone could not identify a specific essential function that Mendoza was not able to perform on November 2, 2009. Rather, she relied on Patrick's and Jun's statements that Mendoza was distraught or distracted by her personal situation, which could affect her ability to focus on her work.

In August 2010, Mendoza requested that she be transferred to 3OR or the outpatient surgery center. Mendoza testified at her deposition that she "want[ed] to rest from Chris Patrick, . . . just to get away from" her. But she also testified that "[t]here was no harassment" before she went "to HR," and she could not recall having been harassed after she "went to HR."[5] Jun considered the transfer request and notified Mendoza that she would be transferred to 3OR effective October 10, 2010. Patrick prepared a favorable performance evaluation for Mendoza for the period of October 1, 2009 through October 1, 2010.

On October 23, 2010, Mendoza filed a second complaint with the DFEH. She complained of harassment, impermissible non-job-related inquiry, retaliation, and failure to prevent discrimination or retaliation, based on age, national origin, disability, and perceived disability. She alleged: "On or about Nov[ember] 2, 2009 and after informing my supervisor Christine Patrick that I had ADHD, I was sent to the psychiatric ER Dept for unwarranted med/psyche examination, harassed, retaliated against, subjected to impermissible non-job related inquiries, and prevented from working and pursuing my profession as a cardiac surgical technician/RN, without interference, as a result of defendants [*sic*] illegal conduct. I have received excellent performance evaluations and have at all times performed my duties and responsibilities to the highest level of performance without deficiencies of any kind." (Capitalization omitted.)

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[5] The only "problem" that Mendoza could remember after she "went to HR" was that on one occasion, she was on call and was called in, but when she arrived another nurse (Millie Wico) told her not to clock in. Mendoza testified that she does not know why Wico told her not to clock in.

Mendoza continued to receive favorable performance evaluations after her transfer to 3OR. She enjoyed working in 3OR and planned to remain working at Cedars-Sinai. However, she suffered a loss in income because she could no longer work extra assignments on call in 6OR.

After Mendoza transferred out of 6OR, Patrick replaced her with a younger nurse.

In 2011, Mendoza saw a doctor for emotional distress, anxiety, and trouble sleeping caused by "the problem at work," "[a]bout that the incident . . . with Chris Patrick."

E. *Mendoza Files a Civil Action*

Mendoza filed this action against Cedars-Sinai and Patrick on November 7, 2011. Her first amended complaint contained 15 causes of action. The first four causes of action were against Cedars-Sinai for discrimination in violation of FEHA (Gov. Code, § 12940, subd. (a), hereinafter § 12940). Mendoza alleged discrimination based on disability, perceived disability, and/or medical condition, based on her ADHD; discrimination by association based on disability, perceived disability, and/or medical condition, based on her caring for a son with ADHD; discrimination based on national origin, Filipino; and discrimination based on age, over 40.

Mendoza alleged a fifth cause of action against Cedars-Sinai for retaliation in violation of FEHA (§ 12940, subd. (h)), based on her having complained about discrimination against disabled and Filipino employees. Mendoza's sixth cause of action was against Cedars-Sinai and Patrick for harassment and hostile work environment in violation of FEHA (§ 12940, subd. (j)), based on her disability, that of her son, and her national origin.

Mendoza's seventh and eighth causes of action were against Cedars-Sinai for failure to prevent harassment, discrimination, and retaliation in violation of FEHA (§ 12940, subd. (k)), and failure to take immediate corrective action in violation of FEHA (§ 12940, subd. (j)). Mendoza's ninth cause of action was against Cedars-Sinai and Patrick for aiding and abetting FEHA violations (§ 12940, subd. (i)).

The tenth and eleventh causes of action were for slander and libel per se against Cedars-Sinai and Patrick, alleging that they made "a variety of false and defamatory statements," including that Mendoza "was an incompetent Surgical Technician and employee." Mendoza's twelfth cause of action against Cedars-Sinai and Patrick was for invasion of privacy, alleging that they invaded her privacy "by seeking and obtaining her confidential medical information, disseminating her medical information to her co-workers and other members of management and forcing her to submit to psychological evaluation and drug testing without good and/or reasonable cause." On the same basis, Mendoza alleged a thirteenth cause of action for breach of medical confidentiality in violation of the Confidentiality of Medical Information Act (Civ. Code, § 56 et seq.).

Mendoza's fourteenth cause of action was against Cedars-Sinai and Patrick for intentional infliction of emotional distress. Her fifteenth and final cause of action, against Cedars-Sinai, was for unfair business practices (Bus. & Prof. Code, § 17200 et seq.), brought on behalf of herself and other similarly situated current and former employees of Cedars-Sinai.

F. *Summary Judgment*

Defendants moved for summary judgment or, in the alternative, summary adjudication. On May 14, 2014, the trial court entered an order granting defendants' summary judgment motion. In its order, which we discuss more fully below, the trial court addressed each of Mendoza's causes of action and ruled on the parties' evidentiary objections.

Judgment was entered on June 25, 2014. The judgment provided that defendants "shall recover costs of suit as authorized by law pursuant to a [m]emorandum of [c]osts to be filed by [d]efendants." Defendants filed a memorandum of costs and then a corrected memorandum of costs. Mendoza moved to tax or strike costs. The court granted Mendoza's motion in part, striking $5,065.14 of the $14,631.09 that defendants sought.

Mendoza filed her notice of appeal from the judgment on August 27, 2014. The trial court entered its order on the motion to tax costs on April 22, 2015. Mendoza did not file a separate notice of appeal from that order.

DISCUSSION

A. *Standard of Review*

Summary judgment may properly be granted if there is no question of material fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.) To secure a summary judgment, the moving defendants may show that one or more elements of each cause of action cannot be established or that there is a complete defense to the causes of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v.*

Atlantic Richfield Co. (2001) 25 Cal.4th 826, 849.) That is, the defendants must "'show that under no hypothesis is there a material issue of fact requiring the process of a trial,'" and they are entitled to judgment in their favor as a matter of law. (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 420; accord, *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 334.)

Once the moving defendants have carried their initial burden, the burden shifts to the plaintiff to show that a triable issue of fact exists as to a cause of action or a defense thereto. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, at p. 850; *Travelers Property Casualty Co. of America v. Superior Court* (2013) 215 Cal.App.4th 561, 574.)

On appeal, we exercise our independent judgment in determining whether there are no triable issues of material fact and the moving party is therefore entitled to judgment as a matter of law. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; *Travelers Property Casualty Co. of America v. Superior Court*, *supra*, 215 Cal.App.4th at p. 574.) We view the evidence and draw all reasonable inferences "in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843.) The evidence submitted by the moving party is strictly construed, and that of the opponent liberally construed. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.) "All doubts as to whether any

material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment." (*Ibid.*)

We "consider[] all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 334.) The parties must rely on admissible evidence. (Code Civ. Proc., § 437c, subd. (d); see *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1487-1488.)[6]

B. *Mendoza's Causes of Action for Discrimination and Retaliation*

1. *Applicable Law*

To establish a prima facie case of disability discrimination under FEHA, the employee must show that she (1) suffered from a disability or was perceived to suffer from a disability, (2) was otherwise qualified to do her job, and (3) was subjected to adverse employment action because of the disability or perceived disability. (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 378; *Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 159-160.) Once the employee has established a prima facie case, "'the burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action.'

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[6] There appears to be a split of authority on the issue of whether evidentiary rulings on summary judgment motions are reviewed de novo or for abuse of discretion. (See *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255, fn. 4; see also *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 [declining to decide the issue].) We need not decide that issue, because Mendoza's arguments fail regardless of the standard of review for the trial court's evidentiary rulings.

[Citation.] The employee may still defeat the employer's showing with evidence that the stated reason is pretextual, the employer acted with discriminatory animus, or other evidence permitting a reasonable trier of fact to conclude the employer intentionally discriminated. [Citation.]" (*Nealy*, *supra*, at p. 378; see *Wills*, *supra*, at p. 160.)

On summary judgment, the employer has the initial burden of negating an element of the employee's prima facie case or of establishing a legitimate, nondiscriminatory reason for its employment action. (*Wills v. Superior Court*, *supra*, 195 Cal.App.4th at p. 160.) The employee may then defeat summary judgment by "'offer[ing] 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.]" (*Ibid.*)[7]

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[7] Mendoza argues that the burden shifting analysis for FEHA cases does not apply because she provided direct evidence of discrimination, harassment, and retaliation. She relies on *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69, which states: "With direct evidence of pretext, '"a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." [Citation.] The plaintiff is required to produce "very little" direct evidence of the employer's discriminatory intent to move past summary judgment.' [Citation.]" The argument is of no consequence because, as we discuss below, there is no triable issue of fact as to whether Mendoza suffered an adverse employment action.

2. *Adverse Employment Action*

The trial court granted summary judgment on Mendoza's disability discrimination and retaliation causes of action on several grounds, including her failure to present substantial evidence that she was subjected to an adverse employment action.[8] "In order to meet the FEHA standard, an employer's adverse treatment must 'materially affect the terms, conditions, or privileges of employment.' [Citation.] '[T]he determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.' [Citation.] Such a determination 'is not, by its nature, susceptible to a mathematically precise test.' [Citation.] 'Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of sections 12940[, subdivision] (a) and 12940[, subdivision] (h).' [Citation.] FEHA not only protects against 'ultimate employment actions such as termination or demotion, but also the entire spectrum of

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[8] Mendoza makes no argument with respect to her claims of discrimination based on age and national origin. Accordingly, any such arguments are forfeited, and the summary judgment as to those claims must be affirmed. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.)

employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement . . . .' [Citation.]" (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 298-299.) An adverse employment action is likewise an element of a retaliation claim under FEHA. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

The trial court found Mendoza's referral to EHS did not constitute an adverse employment action. It noted that section 12940, subdivision (f)(2), permits an employer to "conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite." The section also permits the employer to "require any examinations or inquiries that it can show to be job related and consistent with business necessity." (*Ibid.*) The court found that Mendoza voluntarily went to EHS at Jun's request. She thereafter agreed to go with Lau to the emergency department. Jun stated in her declaration that Mendoza agreed to go with her to EHS, and Mendoza testified at her deposition that Jun said she could talk to someone at EHS, so Mendoza went with her. Mendoza testified that she did not know whether she had a choice about going to the emergency department from EHS, but she did not tell Lau that she did not want to go. She did not testify that she was forced to go to either place. Voluntary medical examinations are expressly authorized by FEHA and cannot constitute adverse employment actions.

On appeal, Mendoza presents no arguments against the trial court's determination that there were no triable issues of fact as to whether the EHS examination was voluntary. The trial court's judgment is presumed correct, and on appeal Mendoza

bears the burden of demonstrating reversible error. (See, e.g., *Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 535-536 [presumption of correctness applies on appeal from summary judgment].) We accordingly must presume that the EHS examination was voluntary and hence was not an adverse employment action. Consequently, we need not address Mendoza's argument that there are triable issues of fact concerning the existence of a business necessity that would be sufficient to justify a required (involuntary) medical examination.

Mendoza also lists several other incidents that she claims constituted adverse employment actions. These include: (1) Patrick's violation of Mendoza's privacy by discussing her mental state and personal problems with Paruszkiewicz, Lau, Dr. Danesh, and Dr. Revoredo; (2) Patrick humiliating and embarrassing Mendoza by pulling her out of the operating room to meet with Jun; (3) Patrick's failure to return Mendoza to her regular duties and assigning her to hall duty for one week following her return to work; (4) "[s]crutinizing, micro-managing and following Mendoza while she worked in the presence of her co-workers and other surgeons"; (5) "[h]arassing Mendoza and forcing her to request a transfer to a different operating floor (3OR) to avoid the harassment and retaliation by Patrick," which resulted in the loss of benefits associated with working on the cardiac team; and (6) giving Mendoza "the lowest increase in pay on her performance evaluation since her hire date." We address each of these in turn.

First, Mendoza cites no authority to suggest that discussing her problems with other medical personnel in the course of determining whether she was able to perform her job constituted an adverse employment action. While Mendoza asserts that

Patrick and Jun discussed her with Paruszkiewicz in violation of her privacy rights, Paruszkiewicz was one of Mendoza's supervisors, and Mendoza herself spoke with Paruszkiewicz voluntarily. Mendoza fails to establish that any of this creates a triable issue of fact as to adverse employment action.

Second, that Mendoza felt humiliated and embarrassed when pulled out of the operating room to speak to Jun does not create a triable issue of fact as to adverse employment action. As previously stated, "[m]inor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable . . . ." (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1054.) Actions that merely cause embarrassment or humiliation do not constitute adverse employment actions. (*Id.* at p. 1054, fn. 13; see *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1171 ["employers have the right to unfairly and harshly criticize their employees, to embarrass them in front of other employees, and to threaten to terminate or demote the employee"].)

Third, as the trial court found, Patrick's assigning Mendoza to hall duty for one week following her return to work did not create a triable issue of fact as to adverse employment action. The modification of Mendoza's duties was temporary and brief (see fn. 4, *ante*), and there is no evidence that it in any way affected her performance, pay, benefits, or opportunities for advancement or in any other respect was reasonably likely to have an adverse and material impact on the terms, conditions, or privileges of her employment. (See *Yanowitz v. L'Oreal USA,*

Inc., *supra*, 36 Cal.4th at pp. 1053-1054; see also *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357-358.)

Fourth, regarding Patrick's alleged scrutiny and micro-management of Mendoza, the record contains insufficient evidence to create a triable issue of fact as to whether Patrick's conduct constituted adverse employment action. Putting aside matters already discussed (e.g., pulling Mendoza out to speak to Jun; talking to Paruszkiewicz and others about Mendoza's mental state; assigning Mendoza to hall duty) and matters resulting from Mendoza's transfer to the third floor (which we discuss separately), the evidence cited by Mendoza shows the following facts:

- Some time after Mendoza returned to work, Patrick observed her during a procedure in the operating room and looked at Mendoza's hands. In the past, Patrick had observed Mendoza in the operating room "[a]lmost every day," but Mendoza had never before noticed Patrick looking at her hands. On another occasion, Mendoza spilled some coffee, and Patrick followed her to the nurses' lounge and looked at her hands but did not say anything.
- On two occasions, Patrick called Mendoza to the phone, but when Mendoza got to the phone there was no one on the line. One time Patrick said she thought it was Mendoza's son on the line; the other time, it was another nurse. Mendoza never followed up to find out if her son had in fact called.
- On two occasions, Patrick listened to Mendoza interviewing a patient. Patrick had never done that before.
- On one occasion, Patrick sat next to Mendoza at in-service. Patrick had never done that before.

- After Mendoza submitted her complaint to HRC, "[t]here was no harassment," except for one incident in which Mendoza was on call, was called in to work, and upon arrival was told not to clock in. Millie Wico (another nurse) is the one who told Mendoza not to clock in; Wico did not explain why.
- Patrick testified that when "an irregular situation occurred," if it was not serious enough to warrant formal discipline but she wanted to keep "an informal record" for herself in case something similar happened again, she would make such a record and keep it in a file in her office. She could not recall having generated any such records concerning Mendoza.
- At 5:32 p.m. on June 18, 2010, Patrick emailed Jun that Mendoza was scheduled for work that day but did not show up and did not call in. Patrick had called Mendoza at 8:30 a.m. and left a message but did not receive a call back. Patrick arranged for another nurse to cover call for Mendoza that night and the following day.
- On August 11, 2010, Patrick emailed Jun that when she called Mendoza and another nurse to notify them of a schedule change for a heart transplant, she did not receive a return call from Mendoza. Patrick subsequently discovered by accident that Mendoza had gotten someone else to cover for her but without notifying anyone or securing the proper approval. Later the same day, Patrick learned that Mendoza had asked to be transferred to the third floor.

There is no triable issue of fact as to whether the foregoing incidents, taken individually or together, materially affected the

terms, conditions, or privileges of Mendoza's employment. "Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable . . . ." (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1054.) The actions Mendoza describes were a handful of isolated incidents that range in severity from minor to trivial. Moreover, Patrick was Mendoza's supervisor. She was therefore entitled to observe Mendoza's work at least occasionally, and she had repeatedly done so in the past. Sitting next to Mendoza once at in-service and calling her to the phone twice when there was no one on the line are likewise far too trivial and infrequent to create a triable issue on adverse employment action. "'"A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." . . . "'[W]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.' . . . If every minor change in working conditions or trivial action were a materially adverse action then any 'action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.' . . ." . . . The plaintiff must show the employer's . . . actions had a detrimental and substantial effect on the plaintiff's employment.' [Citations.]" (*Malais v. Los Angeles City Fire Dept.*, *supra*, 150 Cal.App.4th at pp. 357-358.)

Fifth, the trial court found "the undisputed evidence is that [Mendoza] voluntarily requested the transfer" to the third floor.

Mendoza contends that she was "forc[ed]" to request the transfer "to avoid the harassment and retaliation by Patrick," so the transfer was not really voluntary. Mendoza cites no authority concerning the legal standard for evaluating this argument, but her contention is analogous to a claim of constructive discharge.

"Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245; see also *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [constructive discharge constitutes adverse employment action]; *Thompson v. Tracor Flight Systems, Inc.*, *supra*, 86 Cal.App.4th at pp. 1166-1167 [same].) Similarly, if defendants' conduct effectively forced Mendoza to request the transfer, then the transfer was actually involuntary even though Mendoza requested it. (See *Deleon v. Kalamazoo County Rd. Comm'n* (6th Cir. 2014) 739 F.3d 914, 920-921 [applying constructive discharge analysis to determine whether a requested transfer was actually involuntary and hence an adverse employment action]; *Simpson v. Borg-Warner Auto., Inc.* (7th Cir. 1999) 196 F.3d 873, 876-877 [same]; *Sharp v. City of Houston* (5th Cir. 1999) 164 F.3d 923, 933-934 [same].)

In order to show constructive discharge under California law, an employee must show "that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize

that a reasonable person in the employee's position would be compelled to resign." (*Turner v. Anheuser Busch, Inc.*, *supra*, 7 Cal.4th at p. 1251.) Mendoza's evidence does not create a triable issue of fact as to whether she was subjected to such working conditions. The putative harassment by Patrick was minor or trivial and was sporadic at most. Moreover, Mendoza testified at her deposition that from the time she submitted her complaint to HRC to the time she requested the transfer, she could not recall any harassment other than the one occasion on which she was on call, was called in to work, and on arrival was told not to clock in. That is not sufficient to create a triable issue of fact as to whether a reasonable employee in Mendoza's position would have felt compelled to request a transfer.

Sixth and finally, Mendoza argues that "[g]iving Mendoza the lowest increase in pay on her performance evaluation since her hire date" constituted an adverse employment action. Mendoza cites four pieces of evidence in support of this argument: (1) a sentence in her declaration, which we do not consider—the trial court sustained defendants' objection to that sentence, and Mendoza does not challenge that ruling on appeal; (2) a document that appears to show she received a 6 percent merit increase in October 2008; (3) an undated document that nonetheless appears to show she received a 2.5 percent merit increase in October 2009; and (4) a document that appears to show she received a 2 percent merit increase in October 2012. She cites no authority for the proposition that a merit increase can be considered an adverse employment action. The trial court ruled that it cannot ("any merit increase is a reward for good performance and cannot legitimately be deemed a harmful act"), but the court too did not cite any authority on the issue.

We assume for the sake of argument that it is in principle possible for a merit increase to constitute an adverse employment action—it might be adverse if, for example, it were materially lower than those received at the same time by other employees doing comparable work and receiving comparable performance evaluations. (See *Harrington v. Harris* (5th Cir. 1997) 118 F.3d 359, 366 [if a merit increase "were so small as to be simply a token increase which was out of proportion to the merit pay increases granted to others," it might constitute an adverse employment action].) But even given that assumption, the evidence that Mendoza cites does not create a triable issue of fact as to whether she received a merit increase that constituted an adverse employment action. Her evidence shows that she received a 2.5 percent increase in October 2009, which was the month *before* any of the incidents giving rise to this lawsuit. Her evidence shows that she then received a 2 percent increase in October 2012. She cites no evidence concerning her merit increases in the intervening years or any other employees' merit increases during the same time period. On this record, it would therefore be impossible for a reasonable jury to conclude that her 2 percent increase in 2012 was an adverse action—a jury could only speculate about whether Mendoza's 2 percent increase in 2012 was lower than, the same as, or actually higher than the increases received that year by other nurses doing comparable work and receiving comparable performance evaluations. In addition, the decrease from 2.5 percent in October 2009 to 2 percent in October 2012 is too small to constitute adverse employment action.

For all of these reasons, we conclude that Mendoza has not shown that the trial court erred when it determined that there

was no triable issue of fact as to whether Mendoza suffered an adverse employment action. Summary judgment on the disability discrimination and retaliation claims was therefore proper.[9]

C. *Exclusion of Evidence*

Mendoza also argues with respect to her discrimination and retaliation claims that the trial court erred by excluding admissible evidence that would create triable issues of fact as to pretext and discriminatory intent. We need not address those arguments, because even if the evidence in question was erroneously excluded, the discrimination and retaliation claims still fail as a matter of law for lack of evidence of an adverse employment action, as discussed *ante*.

D. *Mendoza's Causes of Action Based on Harassment*

Mendoza argues that she presented sufficient evidence to create triable issues of fact as to harassment because "Patrick refused to return [Mendoza] to her work assignment, an action visible for all to see; [and] began monitoring her every move, following her around the floor, reporting incidents to Jun that began only after she filed her DFEH complaint." We disagree.

"'"[H]arassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for

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[9] This point also disposes of Mendoza's argument that because she engaged in various forms of protected activity and subsequently suffered adverse employment actions, "[t]he temporal sequence of events . . . is highly suspect, and the timing alone will raise an inference of retaliation." Because there is no evidence of adverse employment action, the argument fails.

personal gratification, because of meanness or bigotry, or for other personal motives. . . . [¶] . . . [¶] . . . [C]ommonly necessary personnel management actions . . . do not come within the meaning of harassment. . . .'"" (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707.) To constitute harassment under FEHA, conduct must be ""'sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment.'" [Citations.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1043.) In determining whether conduct constitutes harassment, the court must "[t]ake[] into account . . . the surrounding circumstances, such as the ""'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" [Citation.] Thus, "'. . . isolated incidents (unless extremely serious) will not amount to discriminatory changes'" in employment conditions. [Citations.]" (*Id*. at p. 1042.)

In support of her argument that she presented sufficient evidence of harassment, Mendoza cites eight pages of the appellant's appendix. The only evidence on those eight pages that relates to Mendoza's harassment claim is her deposition testimony that (1) "[t]here was no harassment" before she went "to HR," and (2) she "can't remember" whether there were "any problems" after she "went to HR," except that (3) there was one incident in which she was on call, was called in, and on arrival was told by another nurse that she should not clock in, but (4) she does not know why the nurse told her that. A single incident of being told not to clock in, for an unknown reason, is the kind of isolated incident that cannot possibly constitute harassment. (*Hughes v. Pair*, *supra*, 46 Cal.4th at p. 1042.)

As for the other conduct that Mendoza describes ("Patrick refused to return [Mendoza] to her work assignment," monitored "her every move, follow[ed] her around the floor, report[ed] incidents to Jun") we agree with the trial court that it did not create a triable issue of fact as to whether Mendoza was harassed or subjected to a hostile work environment. The assignment to hall duty was a one-time occurrence. Thereafter, Mendoza was returned to her regular duties. The other incidents of which Mendoza complains occurred only a few times, not on a regular basis. These isolated and minor incidents were not nearly severe or pervasive enough to create a triable issue of fact as to actionable harassment. (*Roby v. McKesson Corp.*, *supra*, 47 Cal.4th at pp. 708-709; *Hughes v. Pair*, *supra*, 46 Cal.4th at p. 1042.)[10]

E. *Defamation*

In her complaint, Mendoza alleged that defendants defamed her by stating that she "was an incompetent Surgical Technician Registered Nurse." In its ruling on the summary

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[10] The trial court reasoned that because Mendoza failed to establish a triable issue of material fact as to discrimination, harassment, or retaliation, she also failed to establish a triable issue of fact as to her causes of action for the failure to prevent harassment, discrimination, and retaliation and the failure to take immediate corrective action. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288-289.) Mendoza's arguments on appeal concerning those causes of action do not address the trial court's reasoning, so she has again failed to carry her burden of demonstrating error. (*Swigart v. Bruno*, *supra*, 13 Cal.App.5th at pp. 535-536.) In any event, the trial court's reasoning was correct and dispositive.

judgment motion, the trial court found that Mendoza failed to "present any evidence that any such statement was made." On appeal, Mendoza presents no argument to the contrary.

The trial court also considered various other statements as possible bases for the defamation claims but concluded that Mendoza had failed "to raise a triable issue of material fact that any communications were false." On appeal, Mendoza presents no argument to the contrary. The falsity of the alleged defamatory statement is an element of a claim for defamation. (*J-M Manufacturing Company, Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97; *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 652; *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1140.) Accordingly, Mendoza has again failed to carry her burden of showing that the trial court erred. (*Swigart v. Bruno*, *supra*, 13 Cal.App.5th at pp. 535-536.)

F. *Invasion of Privacy and Breach of Medical Confidentiality*

"'[A] plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.'" (*Garrett v. Young* (2003) 109 Cal.App.4th 1393, 1410.) According to the trial court, (1) Mendoza did not present any evidence that defendants "obtained her confidential medical information and disseminated it"; (2) "[t]here is no evidence that Jun or Patrick had access to her medical information"; and (3) "[a]ny information known by Jun and Patrick was provided by [Mendoza]." In her opening brief on appeal, Mendoza's discussion of the invasion of privacy and breach of medical confidentiality

claims, which is copied verbatim from her discussion of the same claims in her opposition to the summary judgment motion, contains no argument that Jun and Patrick obtained any of Mendoza's medical information from any source other than Mendoza's voluntary disclosures. She has therefore failed to show error in the trial court's determination that there was no invasion of privacy and no triable issue of fact on that claim.

The trial court similarly found that both because Mendoza "voluntarily disclosed information regarding her 'disability' to Patrick" and because defendants "are not healthcare providers as to [Mendoza]," the Confidentiality of Medical Information Act does not apply. Again, Mendoza does not argue to the contrary, so again she has failed to show error.

G. *Intentional and Negligent Infliction of Emotional Distress*

"The elements of a cause of action for intentional infliction of emotional distress are: "'(1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress.'" [Citation.]" (*Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 70, 87-88.) Negligent infliction of emotional distress ""'is not an independent tort but the tort of *negligence* . . . ." [Citation.] "The traditional elements of duty, breach of duty, causation, and damages apply.'" [Citation.]" (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 729.)

The trial court found that Mendoza "fail[ed] to present any evidence to raise a triable issue of material fact. There is no evidence that defendants' conduct was negligent or extreme and outrageous."

Mendoza argues that defendants' "conduct in forcing [Mendoza], a [25-]year veteran, with an impeccable work record, into an Unjustified Fitness for Duty Exam was inherently outrageous and egregious and precludes summary judgment at this stage. [Cedars-Sinai] knew of Patrick's intolerance for minorities, persons of color, older nurses and those that were disabled or perceived to be disabled." She claims that "[d]iscrimination and harassment based on disability and/or perceived disability, and forcing a 25[-]year employee into a fitness for duty exam based on those disabilities alone," constitutes outrageous conduct. She does not present a separate argument that defendants were negligent.

As we have already discussed, Mendoza has presented no evidence of unlawful discrimination, harassment, or retaliation. Her EHS examination was voluntary and does not constitute outrageous conduct by defendants. We agree with the trial court there was "no evidence that defendants' conduct was negligent or extreme and outrageous" under the circumstances, so there was no triable issue of material fact as to Mendoza's emotional distress causes of action.

H. *Unfair Business Practices*

The unfair competition law prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (Bus. & Prof. Code, § 17200.) Unlawful business acts or practices include """"anything that can properly be called a business practice and that at the same time is forbidden by law."""" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.)

The trial court found that Mendoza presented "no evidence of any unlawful and unfair business practices" and "cannot show any entitlement to any remedy." In her opening brief on appeal, Mendoza's entire argument concerning this claim consists of the following two sentences (unaccompanied by any citations to the record): "Whether or not injunctive relief is warranted in this case is for the trier of fact. Whether or not [Cedars-Sinai] disgorged monies by their discriminatory conduct is also a question for the trier of fact and thus must preclude summary judgment." The argument fails to show that the trial court erred, because it fails to identify any evidence that would create a triable issue of fact. Moreover, because Mendoza's discrimination, harassment, retaliation, defamation, invasion of privacy, and emotional distress claims all fail as a matter of law, they cannot serve as a basis for her unfair business practices claim.

I. *Motion To Tax Costs*

The judgment entered on June 25, 2014, provided that defendants "shall recover costs of suit as authorized by law pursuant to a [m]emorandum of [c]osts to be filed by [d]efendants." Defendants filed a memorandum of costs for $13,411.66 and then a corrected memorandum of costs for $14,631.09. Mendoza filed a motion to tax or strike costs, arguing that no costs should be awarded or, in the alternative, that defendants should not recover the full amount sought. On April 22, 2015, the court entered an order granting Mendoza's motion in part and striking $5,065.14 from the $14,631.09 award that defendants sought. Mendoza did not file a separate notice of appeal from the order on her motion to tax, but on appeal from

the judgment we may review the determination of both the entitlement to costs (in the judgment) and the amount awarded (in the order on the motion to tax). (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1316-1317.)

Two weeks after the trial court entered its order on Mendoza's motion to tax costs, the Supreme Court decided *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97 (*Williams*). The court held that "Government Code section 12965, subdivision (b), governs cost awards in FEHA actions, allowing trial courts discretion in awards of both attorney fees and costs to prevailing FEHA parties." (*Id.* at p. 99.) The court further held that "an unsuccessful FEHA plaintiff should not be ordered to pay the defendant's fees or costs unless the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit." (*Id.* at pp. 99-100; see also *id.* at p. 115 [a prevailing defendant in a FEHA action "should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so"].)

Because *Williams* was decided after entry of both the judgment and the order on Mendoza's motion to tax, the trial court did not determine defendants' entitlement to costs under the rule announced in *Williams*—the parties did not discuss, and the trial court did not decide, whether Mendoza brought or continued litigating this action without an objective basis for believing it had potential merit. Accordingly, we vacate the costs award. If defendants wish to pursue the issue on remand, they may do so by moving for an award of costs under Government Code section 12965, subdivision (b), and the standard articulated in *Williams*. (See *Roman v. BRE Properties, Inc.* (2015) 237

Cal.App.4th 1040, 1058 [application of the *Williams* standard "is a question that should be addressed by the trial court in the first instance"].) We further note that in ruling on such a motion, "the trial court has discretion to deny or reduce a cost award to a prevailing FEHA defendant when a large award would impose undue hardship on the plaintiff—the financial circumstances of the losing plaintiff and the impact of the award on that party are relevant circumstances in determining whether the costs to be awarded are 'reasonable in amount' . . . ." (*Id.* at p. 1062.)

DISPOSITION

The award of costs is vacated. In all other respects, the judgment is affirmed. The matter is remanded for further proceedings consistent with this opinion. Defendants shall recover their costs on appeal.

MENETREZ, J.*

We concur:

ZELON, Acting P. J. SEGAL, J.

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