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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

MERCEDES HERNANDEZ, Plaintiff and Appellant, v. BANK OF AMERICA et al., Defendants and Respondents.	B289499 (Los Angeles County Super. Ct. No. BC653581)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Doyle, Judge. Reversed.

Ross & Morrison and Andrew D. Morrison for Plaintiff and Appellant.

Davis Wright Tremaine, Camilo Echavarria, Evelyn F. Wang and Paul Rodriguez for Defendants and Respondents.

INTRODUCTION

Mercedes Hernandez filed this action for wrongful termination and related employment causes of action against Bank of America and her supervisor, Garnik Chamichyan. Hernandez appeals from the judgment entered in favor of Bank of America and Chamichyan after the trial court granted their motion for summary judgment. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Bank of America Investigates Hernandez*

Hernandez, a 55-year-old Hispanic woman of Mexican heritage, began work as a teller with Bank of America in 1984. On March 17, 2016 Hernandez cashed seven checks, totaling $7,418.39, at the request of a person named Cynthia, who was the assistant of a bank customer named Giacomino. Giacomino was not present at the bank, but he had endorsed the checks. Two of the checks were made payable to him personally, the others to business entities. Giacomino did not have a business account with the bank, but he did have a personal account, and although Cynthia could not provide that account number, Hernandez looked it up and used Giacomino's personal account as the recourse account for cashing all the checks.[1]

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[1] As Bank of America's written policy on use of a "recourse account" for check-cashing transactions explained, "Recourse is the ability to recover funds if a check is disputed for payment by the maker or returned to the bank unpaid. Funds are recovered by debiting the check[-]cashing customer's deposit account."

A supervisor, Michael Lopez, learned of this transaction a week later, when the bank received a request to stop payment on one of the checks. Noticing from computer records that none of the businesses to which the checks were payable had accounts with the bank and that Hernandez had "manually" entered the number of the recourse account, Lopez reported the transaction to Chamichyan. Chamichyan told Lopez he believed the transaction violated bank policies and advised him to report the matter to the human resources department, which Lopez did on March 29, 2016.

Andrea Williams, an employee relations consultant in the human resources department, received the report and spoke with Lopez and Chamichyan to learn further details. Williams referred the matter to the bank's internal investigation department, which assigned the matter to senior investigator Karen Muth. Muth conducted an investigation that included reviewing the cashed checks, documents reflecting Hernandez's teller activity, Giacomino's account information, and surveillance footage showing Giacomino did not appear at Hernandez's teller window on the day of the transactions.

Muth also interviewed Hernandez over the telephone. According to notes Muth took during the conversation, Hernandez initially stated Giacomino came into the bank on March 17, 2016 and told her he would send his assistant to cash some checks for him later in the day. Muth's notes indicated that, on further questioning, Hernandez revised her story, stating Giacomino was not in the bank that day but called her on the phone, then stating she had not spoken to Giacomino at all but had received a text message from Cynthia that she was coming in to cash the checks. Muth also noted Hernandez was "aware of

bank policy regarding cashing of third-party checks and risk," which included rules against using a personal account as a recourse account when cashing a check made payable to a business and against cashing a check for a customer who was not present.

Hernandez also gave Muth a voluntary written statement. In it Hernandez stated that on March 17, 2016 Giacomino, "a long time customer," asked if Hernandez "could cash some checks" that his assistant, Cynthia, would bring to the bank. Hernandez said she agreed because she "was trying to please the customer and couldn't say no." When Cynthia arrived, Hernandez asked whether she had brought Giacomino's identification. When Cynthia said she had not, Hernandez told her, "Just slide your I.D.[,] and I will look up his account." Then, "using [Giacomino's] account," Hernandez "continued cashing the checks that he authorized [her] to cash" and "gave [Cynthia] the money for Giacomino." Hernandez said that she had known Giacomino for more than 20 years and Cynthia for more than three years and that she had "done transaction[s] for Giacomino like these before." Hernandez also stated she did not witness him endorse the checks, did not notice some of the checks were payable to businesses, and now understood Giacomino did not have a business account with the bank. Finally, she stated she was aware of the bank's "policy of [third] party checks," its policy that "the customer must be present to be able to cash checks," and its "risk policy."

Muth reported the results of her investigation to Williams, including her concerns about Hernandez's "conduct of manipulating the system, the risk implications to the bank, [Hernandez's] ability to be honest, and the violation of policy."

When Williams asked Muth her "recommendation," Muth said she "thought it should be term[ination] due to all of the policy violations." Muth also reported that, based on her conversations with Chamichyan and Lopez, she was "not certain they want to retain [Hernandez] because they are concerned about the policy violations and trust" and "the number of times her story/explanation of this has changed."

B. *Bank of America Terminates Hernandez*

In reviewing Hernandez's personnel file, Williams also learned that in November 2015 Hernandez received a written warning for violating the bank's policy and procedures against depositing cash into an account at the request of someone who was unable to provide the account number. The warning further stated Hernandez had made such a deposit despite instructions from Chamichyan not to do so. The file included a written response from Hernandez protesting that Chamichyan had not "explained correctly" his instructions.

Williams contacted Chamichyan and asked whether he "want[ed] to retain" Hernandez. He answered: "I don't think because she did this knowingly[.] I don't see a reason to keep her. This was not an accident[;] this was something she purposely did." Williams also contacted Chamichyan's supervisor, Andrew Downes, to give him the results of Muth's investigation and to request his input on whether to retain Hernandez. Downes stated that he did not trust Hernandez, that she was a "high risk associate in [a] high risk" location, and that "[t]he fact that she was not forthcoming with [Muth] until called on it is concerning in itself." On the issue whether to terminate Hernandez's employment, Downes stated, "I don't think we have

any other option because retaining her sets a preceden[t] that [the] market is unable to sustain." Williams told Downes she would review the case with a human resources executive and "circle back with [a] recommendation." Williams contacted human resources executive Rachel Rodibaugh, who, when provided details of the case, "supported" termination.

After speaking with Rodibaugh, Williams wrote Muth regarding Hernandez, "[A]ll on board with termination [with] option to resign," and asked Muth to notify Chamichyan. Muth sent an email to Chamichyan: "Per my conversation with [] Williams . . . today, the recommendation is termination with an option to resign for [Hernandez] for performance and policy violations." On May 18, 2016 Chamichyan and Lopez summoned Hernandez to a meeting in which Chamichyan informed Hernandez she was terminated for failing to follow policy and procedure in connection with the March 17, 2016 incident, unless she chose to resign. Hernandez resigned, effective immediately.[2]

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[2] The parties rightly construe this as a termination. (See *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1164, fn. 8 ["'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.'"].)

C. *Hernandez Files This Action, and the Trial Court Grants the Defendants' Motion for Summary Judgment*

On January 12, 2017 Hernandez filed a complaint with the Department of Fair Employment and Housing (DFEH) against Bank of America and Chamichyan alleging wrongful termination, harassment, discrimination, and retaliation in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).[3] In March 2017, after receiving a right-to-sue letter from the DFEH, Hernandez filed this action against Bank of America and Chamichyan.

Against Bank of America Hernandez asserted causes of action under FEHA for (1) discrimination (§ 12940, subd. (a)), (2) retaliation (§ 12940, subd. (h)), (3) harassment (§ 12940, subd. (j)), and (4) failure to prevent discrimination and harassment (§ 12940, subd. (k)), as well as causes of action for (5) wrongful termination in violation of public policy and (6) breach of contract. Against Chamichyan she asserted the cause of action for harassment. Hernandez alleged her supervisors at the bank harassed and discriminated against her based on her race, national origin, and age. She alleged that in 2016 Chamichyan made mocking and negative comments to her and some of the bank's Hispanic customers about their race and national origin, that she protested Chamichyan's conduct and the bank's failure to provide proper seating for her and her colleagues, and that these circumstances "culminated in . . . termination of [her] employment" in May 2016.

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[3] Undesignated statutory references are to the Government Code.

Bank of America and Chamichyan moved for summary judgment or, in the alternative, summary adjudication on each cause of action and Hernandez's claim for punitive damages. The trial court granted the motion for summary judgment. The court ruled Hernandez made a prima facie showing of unlawful discrimination based on age and race, citing evidence Chamichyan stated on several occasions "it's not siesta time"; asked numerous times whether Hernandez drank tequila; asked why Latino employees in Beverly Hills could not speak English; asked Latino customers, "No entiendas [*sic*]?"; and on one occasion asked Hernandez when she was going to retire. The court also ruled, however, that Bank of America sufficiently established a nondiscriminatory reason for terminating Hernandez—namely, that in performing the March 2016 check-cashing transactions she violated several bank policies—and that, in support of her contention that this reason was pretextual, Hernandez had not presented evidence sufficient to create a triable issue of fact. The court therefore granted summary adjudication on the cause of action for discrimination. Observing the cause of action for retaliation relied on the same evidence of pretext, the court granted the motion for summary adjudication on that cause of action as well.

The trial court granted the motion for summary adjudication on the cause of action for harassment because the court determined that only one allegedly inappropriate comment by Chamichyan was recent enough to be actionable—his asking whether Hernandez drank "'tequila' on her free time"—and that this was not sufficiently severe or pervasive to constitute harassment. The court granted the motion for summary adjudication on the causes of action for failure to prevent

discrimination and harassment and for wrongful termination because they derived from the causes of action the court had previously adjudicated.

Finally, the court granted the motion for summary adjudication on Hernandez's cause of action for breach of contract, which rested on allegations she was not an at-will employee and was terminated without cause. The court ruled that the evidence showed Hernandez was an at-will employee and that her "conclusory declaration" to the contrary did not create a triable issue of fact. Without ruling separately on the motion for summary adjudication on Hernandez's claim for punitive damages, the court granted the motion for summary judgment. Hernandez timely appealed.

DISCUSSION

A. *Applicable Law and Standard of Review*

Summary judgment is appropriate "'where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.'" (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618.) "A triable issue of material fact exists if the evidence and inferences therefrom would allow a reasonable juror to find the underlying fact in favor of the party opposing summary judgment." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1158 (*Featherstone*); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856 (*Aguilar*).)

"A defendant moving for summary judgment must make a prima facie showing either that the plaintiff cannot establish one or more elements of a cause of action or that there is a complete

defense to the action. [Citations.] A defendant . . . may satisfy this initial burden of production by presenting evidence that conclusively negates an element of the plaintiff's cause of action or by relying on the plaintiff's factually devoid discovery responses to show that the plaintiff does not possess, and cannot reasonably obtain, evidence to establish that element. [Citation.] The opposing party has no obligation to show a triable issue of material fact exists unless and until the moving party has met its burden. [Citation.] If the defendant makes such a showing, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact." (*Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1119; see, *Aguilar*, *supra*, 25 Cal.4th at p. 850.)

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

["Although an employee's evidence submitted in opposition to an employer's motion for summary judgment is construed liberally, it 'remains subject to careful scrutiny.'"].)

B. *The Trial Court Erred in Summarily Adjudicating Hernandez's Cause of Action for Discrimination*

"Under the FEHA, it is unlawful for an employer, because of a protected classification [—e.g., race, national origin, ancestry, or age—] to discriminate against an employee 'in compensation or in terms, conditions, or privileges of employment.' [Citation.] To state a prima facie case for discrimination in violation of the FEHA, a plaintiff must establish that (1) she was a member of a protected class, (2) she was performing competently in the position she held, (3) she suffered an adverse employment action, and (4) some other circumstance suggests discriminatory motive. [Citation.] Once an employee establishes a prima facie case, a presumption of discrimination arises, and the employer is required to offer a legitimate, nondiscriminatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate, nondiscriminatory reason for the adverse employment action, the presumption of discrimination drops out of the picture, and the burden shifts back to the employee 'to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive.'" (*Galvan v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 549, 558 (*Galvan*); accord, *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 355-356 (*Guz*); see § 12940, subd. (a).)

"This framework is modified in the summary judgment context: "'[T]he employer, as the moving party, has the initial burden to present admissible evidence showing either that one or

more elements of plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors.'" [Citation.] 'If the employer meets its initial burden, the burden shifts to the employee to "demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action."'" (*Galvan*, *supra*, 37 Cal.App.5th at p. 559; see *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 861.)

Bank of America does not challenge any element of Hernandez's prima facie case for discrimination, which rests on allegations of race-, national origin-, and age-related remarks by Chamichyan. Instead, Bank of America contends it terminated Hernandez for a legitimate, nondiscriminatory reason: She violated bank policies in the March 2016 check-cashing transactions. Hernandez does not deny there is admissible evidence to support that contention—for example, Muth's assessment she broke bank rules against cashing a check for a customer who was not present and using a personal account as a recourse account when cashing a check—but argues the evidence of pretext and discriminatory animus was sufficient to create a triable issue on whether her employer engaged in intentional discrimination. We agree the evidence of discriminatory animus relating to race and national origin was sufficient to create a triable issue of fact.[4]

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[4] We do not reach Hernandez's additional contentions there were factual issues regarding pretext and age-based animus. Bank of America does not argue we should treat Hernandez's

In her declaration in opposition to the motion for summary judgment, Hernandez stated that throughout 2015 and in 2016 Chamichyan told her, on occasions when she was sitting down, "it's not siesta time"; on multiple occasions suggested or questioned whether she drank tequila; made disparaging comments about bank customers who were Hispanic; and mocked Hernandez's Spanish-speaking clients for their inability to speak or understand fluent English. Hernandez stated she repeatedly asked Chamichyan to stop making such comments because she found them offensive, but he refused. Hernandez's deposition testimony was to the same effect. Hernandez argues Chamichyan's "siesta" and "tequila" comments, which she testified he did not make to other tellers, evoke offensive stereotypes relating to race and national origin and, together with his disparagement of Hispanic and Spanish-speaking customers, "evince a discriminatory animus against Hispanics" sufficient to raise a triable issue of fact.[5]

Several important principles of California law support Hernandez's position. First, "[p]roof of discriminatory intent

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discrimination cause of action as containing multiple causes of action that can be summarily adjudicated.

[5] There is uncertainty among courts concerning whether "Hispanic" is a category of race or national origin for purposes of the laws against employment discrimination. (See, e.g., *Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 852-855; *Alonzo v. Chase Manhattan Bank, N.A.* (S.D.N.Y. 1998) 25 F.Supp.2d 455, 459.) Because FEHA prohibits discrimination on the basis of either category (§ 12940, subd. (a)) and the parties here have treated "Hispanic" as referring to the two categories interchangeably, we do not distinguish between the categories in discussing the discriminatory animus in this case.

often depends on inferences rather than direct evidence. [Citation.] And because it does, 'very little evidence of such intent is necessary to defeat summary judgment.' [Citation.] Put conversely, summary judgment should not be granted unless the evidence cannot support any reasonable inference for plaintiff." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 283 (*Nazir*); see *Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1386 [""Because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant.""].)

Second, derogatory remarks relating to race, national origin, or ancestry, even those "not made directly in the context of an employment decision or uttered by a non decision maker[,] may be relevant, circumstantial evidence of discrimination." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 539 (*Reid*); see *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 145, 154, fn. 15 [employer's "derogatory comments about Mexicans" and negative remarks about "Hispanics [who] spend 20 to 30 years in this country and do not bother to learn English" supported an inference of discrimination based on "national origin and ancestry"].) And finally, we do not consider each of Chamichyan's alleged remarks in isolation, but all of them together. (See *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 758 ["matters which *by themselves*" may not constitute substantial evidence of discriminatory animus may do so "*when taken together*"].)

Given the low evidentiary threshold necessary to defeat a motion for summary judgment in this kind of case, and the number and persistence of the derogatory remarks by

Chamichyan, Hernandez met her burden of offering "'evidence the employer acted with a discriminatory animus . . . such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.'" (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 966; see *Batarse v. Service Employees Internat. Union, Local 1000* (2012) 209 Cal.App.4th 820, 836 ["Once the employer makes its showing of a legitimate reason for the employment action, to "'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.'"'"].)

Bank of America argues the alleged "siesta" and "tequila" comments were neutral regarding race and national origin because "siesta" has become "commonplace" in "English vernacular" and many non-Hispanic people, including Chamichyan, enjoy tequila. Perhaps. People of many backgrounds and ethnicities rest during the day and drink tequila at night (although Bank of America may have more difficulty explaining how disparaging Hispanic customers and mocking Spanish-speaking clients are race- and national origin-neutral). But "'the task of disambiguating ambiguous utterances is for trial, not for summary judgment.'" (*Reid*, *supra*, 50 Cal.4th at p. 541; see *ibid.* ["[d]etermining the weight of discriminatory or ambiguous remarks is a role reserved for the jury"]; *Featherstone*, *supra*, 10 Cal.App.5th at p. 1158 [in reviewing an order granting summary judgment, an appellate court resolves all evidentiary

ambiguities in favor of the nonmoving party].) Whether Chamichyan used terms from a contemporary urban dictionary or evidencing discriminatory animus is for the jury, not the court on summary judgment.

Quoting the court's statement in *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426 that the plaintiff's "evidence must relate to the motivation of the decision makers to prove, by nonspeculative evidence, an actual causal link between prohibited motivation and termination" (*id.* at pp. 433-434), Bank of America argues the evidence did not establish a causal link between Chamichyan's remarks and the termination of Hernandez's employment because Chamichyan was not "the decision maker" in Hernandez's termination. However, "showing that a significant participant in an employment decision exhibited discriminatory animus is enough to raise an inference that the employment decision itself was discriminatory." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 551; accord, *Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 743.) There was ample evidence Chamichyan was "a significant participant" in the decision to terminate Hernandez's employment. Williams, "the decision maker" according to Bank of America, sought Chamichyan's opinion on whether to retain Hernandez or terminate her employment. In addition, Williams testified in her deposition Chamichyan had "a say" in the decision to terminate her employment, and more than once she described that decision as a "partnership" between the human resources department and Hernandez's supervisors, which included Chamichyan.

C. *The Trial Court Erred in Summarily Adjudicating Hernandez's Cause of Action for Retaliation*

FEHA "declares it to be an unlawful employment practice '[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.'" (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 90-91 (*Light*); see § 12940, subd. (h).) "[T]o establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ""drops out of the picture,"" and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*); accord, *Light*, at p. 91.) The employee's burden at that point is to "offer evidence sufficient to allow a trier of fact to find either the [employer's] stated reasons were pretextual or the circumstances "'as a whole support[ ] a reasoned inference that the challenged action was the product of . . . retaliatory animus.'"" (*Light*, at p. 94; accord, *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1226.)

In her cause of action for retaliation under FEHA, Hernandez asserts Bank of America terminated her employment

in retaliation for her complaints to Chamichyan about the race- and national origin-related comments he directed at her and made about bank customers in her presence. Bank of America argues Hernandez failed to make a prima facie showing that any such complaints were protected activity or that there was a causal link between her complaints and the termination of her employment.

Bank of America, however, ignores the statements in Hernandez's declaration that Chamichyan made the remarks in question "[t]hroughout 2015 and into 2016" and that, finding the comments offensive, she "repeatedly requested that Chamichyan stop, but he continued." Such complaints are protected activity under FEHA. (See *Nazir*, *supra*, 178 Cal.App.4th at p. 287 [employee's complaints to his supervisor "about numerous things," including that co-workers called him racially derogatory names, were "sufficient opposition to trigger the prohibition against retaliation"]; *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1018 (*Gemini*) ["[i]nformal complaints to management about discriminatory employment practices are considered sufficient opposition to trigger the prohibition against retaliation"]; *Garcia v. Los Banos Unified School Dist.* (E.D. Cal. 2006) 418 F.Supp.2d 1194, 1224 [complaining to a supervisor about a "sexually derogatory" remark was a protected activity under FEHA].) And especially given the length of Hernandez's employment, the proximity in time between her complaints and the process that culminated in the termination of her employment sufficed to make a prima facie showing of a causal link. (See *Light*, *supra*, 14 Cal.App.5th at p. 91 ["[t]he requisite 'causal link' may be shown by the temporal relationship between the protected

activity and the adverse employment action"]; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 478 (*Flait*) [evidence an employee of four years was terminated "only a few months" after engaging in protected activity was a sufficient prima facia showing of a causal link]; see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1020 (*Scotch*) [following *Flait*].)

Bank of America also contends Hernandez cannot demonstrate the retaliatory animus required to carry her burden in the face of the legitimate, nonretaliatory reason the bank presented for terminating her employment. Bank of America first argues that no "decision maker" (a label it now suggests might apply to Muth as well as Williams) knew of Hernandez's complaints to Chamichyan. (See *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 70 [evidence "the employer was aware that the plaintiff had engaged in the protected activity" is essential to establish retaliation].) But, again, there was evidence Chamichyan participated significantly in the decision to terminate Hernandez's employment, and that evidence was sufficient to support an inference the termination of her employment was the product of retaliatory animus. (See *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 421 ["a decision maker's ignorance does not 'categorically shield the employer from liability if other substantial contributors to the decision bore [retaliatory] animus'"].)

Bank of America next argues "timing alone" is insufficient to raise a triable issue of fact on whether the termination of Hernandez's employment was the product of retaliatory animus. (See *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353

["temporal proximity alone is not sufficient to raise a triable issue . . . once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination"].) True enough, but Hernandez pointed to more than "timing alone." She presented evidence that she worked at the bank for more than 30 years, during which time she received promotions and favorable performance reviews; that the investigation resulting in the termination of her employment (as well as the November 2015 written warning she received) coincided with her complaints to Chamichyan about his remarks; and that Chamichyan ignored her complaints and continued to make the remarks, suggesting a recalcitrant attitude on his part consistent with retaliatory animus. These circumstances supported a reasonable inference Hernandez's termination was the product of retaliatory animus. (See *Scotch*, *supra*, 173 Cal.App.4th at p. 1020 ["[c]lose proximity in time of an adverse action to an employee's resistance or opposition to unlawful conduct is often strong evidence of a retaliatory motive"]; *Arteaga*, at pp. 353-354 [where "an employee has worked for the same employer for several years, has a good or excellent performance record, and then, after engaging in some type of protected activity . . . is suddenly accused of serious performance problems, subjected to derogatory comments about the protected activity, and terminated[,] . . . temporal proximity, together with the other evidence, may be sufficient" to raise a triable issue of retaliatory animus," italics omitted].)

D. *The Trial Court Erred in Summarily Adjudicating Hernandez's Cause of Action for Harassment*

FEHA makes it "an unlawful employment practice for 'an employer . . . or any other person, because of race . . . [or] . . . national origin . . . to harass an employee. . . . Harassment of an employee . . . shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. . . .' [¶] The law prohibiting harassment is violated '[w]hen the workplace is permeated with discriminatory intimidation, ridicule and insult that is "'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."'" [Citations.] This must be assessed from the 'perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.' [Citation.] And the issue of whether an employee was subjected to a hostile environment is ordinarily one of fact." (*Nazir*, *supra*, 178 Cal.App.4th at pp. 263-264; see § 12940, subd. (j)(1).) Indeed, "[h]arassment cases are rarely appropriate for disposition on summary judgment," and "hostile working environment cases," in particular, "involve issues 'not determinable on paper.'" (§ 12923, subd. (e); see *Nazir*, at p. 286 ["many employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper"].)[6]

In her cause of action for harassment against Bank of America and Chamichyan, Hernandez asserts the race- and

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[6] In their brief, filed in December 2018, Bank of America and Chamichyan state that section 12923, which Hernandez cited in her opening brief, "is not yet effective." That is no longer true, section 12923 having become effective January 1, 2019. (Stats.

national origin-related remarks Chamichyan made to and around her created a hostile work environment. Bank of America and Chamichyan argue this cause of action fails because (a) only one alleged remark—a reference to "tequila"—occurred within the one-year limitations period for the DFEH complaint Hernandez filed,[7] (b) that remark did not constitute harassment as a matter of law, and (c) they cannot be liable for any of the remaining alleged remarks under the continuing violation doctrine. Even assuming Bank of America and Chamichyan are right about (a), which Hernandez does not dispute, and (b), a question arguably

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2018, ch. 955, § 1.) Bank of America and Chamichyan do not argue section 12923, subdivision (e), "changed the law" in a way that raises "the question of retroactivity." (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472; see *id.* at pp. 471-472 [a statute has retroactive effect when it "'substantially changes the legal consequences of past events'"].) Notably, section 12923, subdivision (e), does not "'increase a party's liability for past conduct'" (*id.* at p. 472); it merely provides a party's liability for harassment is generally not suitable for determination on summary judgment. Thus, "no question of retroactivity is presented." (*Id.* at p. 471; see, e.g., *Ortiz v. Dameron Hospital Association* (2019) 37 Cal.App.5th 568, 582-583 [applying the provisions of section 12923 without addressing whether they are retroactive and reversing summary judgment in favor of the employer on a cause of action for harassment].)

[7] "Before filing a lawsuit for harassment or retaliation, a party must file an administrative complaint with the DFEH. [Citation.] The administrative complaint must be filed within one year of the date on which the unlawful practice occurred." (*Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319, 323; see § 12960, subd. (d).)

"'not determinable on paper'" (§ 12923, subd. (e)), they are wrong about (c).

The continuing violation doctrine "allows liability for unlawful employer conduct occurring outside the statute of limitations if it is sufficiently connected to unlawful conduct within the limitations period." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802; see *Yanowitz*, *supra*, 36 Cal.4th at p. 1058 [continuing violation doctrine applies to harassment causes of action].) Bank of America and Chamichyan argue the doctrine does not apply here because no unlawful harassment occurred within the limitations period.

But Bank of America and Chamichyan appear to assume that, for the continuing violation doctrine to apply, the unlawful conduct occurring within the limitations period must, by itself, constitute actionable harassment. That is not the rule. "Provided that *an act contributing to the claim* occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." (*National Railroad Passenger Corp. v. Morgan* (2002) 536 U.S. 101, 117 (*Morgan*), italics added; see *Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 879 [for the continuing violation doctrine to apply, "at least one act 'that is part of the hostile work environment' must occur within the limitations period"].) This is because "[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. [Citation.] The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. [Citation.] Such claims are based on the

cumulative effect of individual acts." (*Morgan*, at p. 115; see *Nazir*, *supra*, 178 Cal.App.4th at p. 270 ["'hostile environment harassment . . . by its nature involves an ongoing course of conduct rather than a single discrete act'"].) "Because a harassment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice,' . . . it does not matter that some of the component parts fall outside the statutory time period." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1057; see *Morgan*, at p. 120 ["[a] court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period"]; *Mandel v. M & Q Packaging Corp.* (3d Cir. 2013) 706 F.3d 157, 165 ["Under the continuing violation doctrine, discriminatory acts that are not individually actionable may be aggregated to make out a hostile work environment claim; such acts 'can occur at any time so long as they are linked in a pattern of actions which continues into the applicable limitations period.'"]; *Guessous v. Fairview Property Investments, LLC* (4th Cir. 2016) 828 F.3d 208, 222 ["even if most of the harassing conduct on which a plaintiff relies to establish her hostile work environment claim occurred outside the statutory period, the claim will be considered timely if at least one act continuing the violation occurred within the statutory period"]; *Gilliam v. South Carolina Dept. Of Juvenile Justice* (4th Cir. 2007) 474 F.3d 134, 141-142 [district court erred in ruling the continuing violation doctrine did not apply to hostile work environment claim because acts within the limitations period did not, by themselves, constitute actionable harassment].)[8]

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[8] As the California Supreme Court has repeatedly stated, "[b]ecause of the similarity between state and federal

Because the "tequila" remark occurred within the limitations period and contributed to Hernandez's claim of a hostile work environment, the court may consider the other remarks for purposes of determining liability. (See *Morgan*, *supra*, 536 U.S. at p. 115 [nonactionable use of an offensive epithet may contribute to hostile work environment claim].) Those remarks, taken together, raise a triable issue of material fact on whether Hernandez was subjected to a hostile work environment.

E. *The Trial Court Erred in Summarily Adjudicating Hernandez's Cause of Action for Failure To Prevent Discrimination and Harassment*

FEHA makes it an unlawful employment practice "[f]or an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (§ 12940, subd. (k).) Bank of America contends Hernandez's cause of action under this provision fails because she failed to raise a triable issue on the discrimination and harassment causes of action on which it relies. But because she did, Bank of America's contention fails.

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employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz, supra*, 24 Cal.4th at p. 354; accord, *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 218; see *Yanowitz*, *supra*, 36 Cal.4th at p. 1057 [United States Supreme Court's decision in *Morgan*, applying the continuing violation doctrine to hostile work environment claims, is pertinent federal precedent]; *Thompson v. City of Monrovia*, *supra*, 186 Cal.App.4th at p. 879 [same].)

Bank of America also argues it presented evidence establishing it "took reasonable steps" to prevent the discrimination and harassment, including establishing anti-discrimination and anti-harassment policies and implementing procedures to complain about instances of discrimination and harassments. But "[a]n employer must take *all* reasonable steps necessary to prevent discrimination" and harassment. (*Gemini*, *supra*, 122 Cal.App.4th at p. 1025; see § 12940, subd. (k).) One such step is "prompt investigation" of employee complaints about discriminatory or harassing conduct. (*Gemini*, at p. 1024; see *Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035.) Where, as here, there is a triable issue of fact concerning whether an employer retaliated against an employee for complaining of discriminatory and harassing conduct, the employer cannot establish as a matter of law that it took all reasonable steps to prevent discrimination and harassment. (See *Gemini*, at p. 1024 ["[a]n employer's claim that its procedures are effective in addressing discrimination is negated by proof of retaliation"].)

F. *The Trial Court Erred in Summarily Adjudicating Hernandez's Cause of Action for Wrongful Termination*

"[A] discharged employee may . . . recover in tort for wrongful termination if the termination of her employment violated an established public policy" delineated in either a constitutional or statutory provision. (*Henry v. Red Hill Evangelical Lutheran Church of Tustin* (2011) 201 Cal.App.4th 1041, 1050; see *Estes v. Monroe* (2004) 120 Cal.App.4th 1347, 1355 ["'FEHA's provisions prohibiting discrimination may

provide the policy basis for a claim for wrongful discharge in violation of public policy'"].) Hernandez bases her cause of action for wrongful termination on her allegations Bank of America terminated her employment in violation of FEHA's prohibitions against discrimination and retaliation, as discussed, and on additional allegations Bank of America terminated her in retaliation for complaining about lack of proper seating.

Bank of America concedes Hernandez's cause of action for wrongful termination "stands or falls with her discrimination and retaliation" causes of action. We agree, and because the latter causes of action stand, so does the former.

G. *The Trial Court Erred in Summarily Adjudicating Hernandez's Cause of Action for Breach of Contract*

In her cause of action for breach of contract, Hernandez alleges Bank of America breached the employment agreement by terminating her employment without good cause. Bank of America argues it was entitled to judgment as a matter of law on this cause of action because it rests on the false premise that Hernandez was not an at-will employee and could not be terminated without good cause. Hernandez concedes the viability of her cause of action depends on whether she was an at-will employee, but contends she raised a triable issue on that question. She is correct.

"Labor Code section 2922 establishes a statutory presumption of at-will employment. However, an employer and an employee are free to depart from the statutory presumption and specify that the employee will be terminated only for good cause, either by an express, or an implied, contractual agreement. [Citation.] 'Generally, the existence of an implied-in-

fact contract requiring good cause for termination is a question for the trier of fact.'" (*Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 380 (*Stillwell*); see *Guz*, *supra*, 24 Cal.4th at p. 335 ["[w]hile the statutory presumption of at-will employment is strong, it is subject to several limitations"].) "[T]he existence and content of an implied agreement restricting an employer's right to terminate an at-will employee may arise from ""the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.'" [Citation.]' [Citation.] "'[T]he totality of the circumstances" must be examined to determine whether the parties' conduct, considered in the context of surrounding circumstances, gave rise to an implied-in-fact contract limiting the employer's termination rights.'" (*Stillwell*, at p. 380; see *Guz*, at pp. 339-340, 345.)

In support of its contention Hernandez was an at-will employee, Bank of America cites excerpts of Hernandez's deposition testimony in which she answered "yes" when asked whether she thought she "could quit at any time for any reason during [her] employment with Bank of America" and whether she understood "that the bank could end [her] employment for any legal reason." Bank of America also points to a passage in its employee handbook stating employees "remain employed at will, and the at-will employment relationship can only be changed by an authorized company representative in writing."

As Hernandez explains, however, her deposition testimony about her understanding of her employment status was unclear. Indeed, immediately prior to the exchanges cited by Bank of America, Hernandez answered "no" when asked, "During your

employment with Bank of America, did you understand that your employment was at will?" and "Did you understand that you could quit at any time if you wanted to, without giving the bank a reason?" Hernandez also maintains the employee handbook policy regarding at-will employment "was not given to her or communicated to her at any time." For support she cites her deposition testimony that she could not remember ever having received the employee handbook and did not know she was required to be familiar with it—statements Bank of America does not address, despite the fact Hernandez cites them in her opening brief.

Moreover, Hernandez stated in her declaration that "[a]t various times throughout my employment managers assured me that I would remain employed so long as I continued to perform my job, and that I could only be fired for good cause." (See *Stillwell*, *supra*, 167 Cal.App.4th at p. 381 [""oral assurances of job security"" are relevant in determining the existence of such an implied agreement," italics omitted].) She also points to the length of her employment—more than 30 years—as supporting her assertion of an implied agreement that she was not an at-will employee. (See *ibid.* ["long and successful service"" can be relevant to the existence of an implied agreement].) Considering the totality of these circumstances, Hernandez created a triable issue of fact regarding whether Bank of America had impliedly agreed not to terminate her employment without good cause.

Bank of America also argues that, even if Hernandez was not an at-will employee, Bank of America had good cause to terminate her employment because she violated the bank's policies. This argument lacks merit. "'[G]ood cause'" means """a fair and honest cause or reason, regulated by good faith . . ."'

[citation], as opposed to one that is "trivial, capricious, unrelated to business needs or goals, or pretextual."" (*Guz*, *supra*, 24 Cal.4th at p. 336.) As discussed in connection with Hernandez's causes of action for discrimination and retaliation, the evidence supported a reasonable inference Bank of America did not terminate Hernandez's employment for a "fair and honest" reason, but from discriminatory and retaliatory animus.

H. *Triable Issues Remain on Hernandez's Claim for Punitive Damages*

"Punitive damages generally may be awarded to a plaintiff in a civil action only if 'the defendant has been guilty of oppression, fraud, or malice . . . .' [Citation.] Corporations may be held liable for punitive damages through the malicious acts or omissions of their employees but only for the acts or omissions of [officers, directors, or] those employees with sufficient discretion to determine corporate policy," i.e., "'managing agents.'" (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 365; see Civ. Code, § 3294, subd. (b).)

Bank of America and Chamichyan contend they are entitled to judgment as a matter of law on Hernandez's claim for punitive damages because she did not present "any evidence showing that Ms. Muth, Ms. Williams[,] or anyone else was a 'managing agent' of the Bank" or any evidence of "'oppression, fraud, or malice'" (italics omitted). But Hernandez was not required to present such evidence in opposition to the motion for summary adjudication unless Bank of America and Chamichyan, as the moving parties, met their initial burden of producing evidence "sufficient to support the[ir] position." (*Aguilar, supra*, 25 Cal.4th at p. 851.) Bank of America and Chamichyan have not

cited or produced any evidence to support their position. (Cf. *Davis*, *supra*, 220 Cal.App.4th at p. 367 [employer met initial burden on "managing agent" issue with separate statement of undisputed material facts and supporting declarations].) Therefore, they were not entitled to summary adjudication on Hernandez's claim for punitive damages.

DISPOSITION

The judgment is reversed. Hernandez is to recover her costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.