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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

SHERRY BUCHANAN, Plaintiff and Appellant, v. ANTHEM BLUE CROSS et al., Defendants and Respondents.	2d Civil No.B264664 (Super. Ct. No. 56-2012-00420068-CU-WT-VTA) (Ventura County)

Plaintiff brought this action against her former employer alleging causes of action for age discrimination, unlawful retaliation, breach of implied contract, defamation, failure to prevent discrimination and wrongful termination in violation of public policy. The trial court granted the former employer summary judgment. We affirm.

FACTS

Sherry Buchanan was employed by Anthem Blue Cross (Anthem) for over 15 years, from July 1, 1996, to August 1, 2011. At the time Anthem terminated her employment, she was

53 years old. She spent the entire time in customer service, answering telephone calls from Anthem members. In 2003 Buchanan was appointed to a "Lead" position. As Lead, she answered calls where others were unable to answer members' questions or where a member asked for a supervisor.

Prior to 2010 Buchanan answered only billing and enrollment inquiries. In 2010 Anthem added answering claims questions to the customer service representatives' duties. Anthem called the change the "One Call Resolution" policy. Anthem gave Buchanan training in claims.

Buchanan testified that learning to handle claims was challenging for everyone. By the time she left Anthem she was still not 100 percent confident handling claims calls; she was "probably 75 to 80 percent" confident.

In an email dated May 6, 2010, to Buchanan, her supervisor, Bruce Shiralipour, expressed his concern that "you are not where you need to be with claims calls. . . ." The email stated Shiralipour was arranging for further training for Buchanan. The email ended, "You are doing a great job . . . ."

Buchanan declared that following the implementation of the One Call Resolution policy in early 2010, Shiralipour's management style began to change for the worse. Working conditions were "so intolerable" that in May of 2010 Buchanan met with Cara Mudgett, the head of the department and Shiralipour's manager. Buchanan complained about Shiralipour's style of management, his indifference and lack of support. Buchanan said Shiralipour did not care about the stress he was causing her and other employees in the unit. Buchanan also complained that Shiralipour was showing favoritism toward a younger female employee in the unit.

The younger employee to whom Buchanan referred is Shannon Ingram. Ingram was not a Lead. Only Leads were assigned special projects. Buchanan complained that Shiralipour assigned Ingram special projects. Buchanan could not remember, however, any specific special project to which Ingram was assigned. Mudgett testified that Ingram was a "high performing associate."

Buchanan testified that Shiralipour said at least a half dozen times, "'You need to do things the new way, not the old way.'" Shiralipour made such comments in the context of training for procedures that had changed. Shiralipour used the term "old fashioned" at least once during a "huddle." A "huddle" was a meeting of her unit which the managers sometimes attended. Buchanan said she remembers Shiralipour used the term "old fashioned" because she had it in quotes in the notes she took. She said he was speaking to the entire team, not to only one or two employees.

On the same day Buchanan spoke to Mudgett, Mudgett informed Shiralipour of the substance of Buchanan's complaints. Buchanan said she feared retaliation from Shiralipour, but she did not fear retaliation from Mudgett.

In September 2010 Shiralipour sent an email to Buchanan. The email stated, "I received feedback from our WFM team that your time out of the support queue was higher than expected and you were asking questions of other OEs for information you should have already known." The email also stated that Buchanan did not follow Mudgett's instructions on returning a member's call. The email referred to "corrective action" as a consequence for not meeting expectations.

In March and April 2011 Buchanan's unit was directed to remove all electrical appliances. Buchanan claims another manager, Fran Lineberry, told Buchanan to remove a mini-refrigerator. Buchanan did so. Later Buchanan discovered that the refrigerator belonged to Lineberry. Buchanan returned it. Lineberry testified in her deposition that she did not give Buchanan permission to take the refrigerator home.

Two weeks later, there was a reorganization of the office cubicles. Another Lead, Marianne Starr, noticed that a picture had been removed from a manager's office and hung in a common area. Starr asked Buchanan about it, and Buchanan admitted she moved the picture.

On April 28, 2011, Shiralipour gave Buchanan a formal disciplinary notice called a Corrective Action Form (CAF). The form accused Buchanan of taking home a refrigerator that was not hers without permission and entering a manager's office and moving a picture without permission.

Buchanan immediately went to see Mudgett to complain about the allegations in the CAF. Buchanan believed the CAF was in retaliation for her earlier complaint to Mudgett about Shiralipour. Mudgett told Buchanan to prepare a written response to the CAF and submit it to human resources.

In Buchanan's written response, she denied she took the refrigerator without permission. She also stated that, during construction, workers removed pictures. She found some pictures on the floor and attempted to re-hang them where they had been. She said she informed Shiralipour when she re-hung the pictures.

Buchanan met with Shiralipour and human resources. After the meeting, Shiralipour amended the CAF. He eliminated the allegations about the refrigerator, but he kept the

allegations about entering a manager's office and removing a picture without permission.

It was the first CAF Buchanan received in her 15 years at Anthem. It caused her to miss receiving a bonus. Buchanan completed her two-month corrective action period, without incident, on June 28, 2011.

Toward the end of July 2011, Dorna Hill, the Lead in charge of auditing telephone calls, conducted a July audit of Buchanan's calls.

Hill gave Buchanan high scores on three calls she was able to audit. But Hill was having difficulty finding a "Claims call" to audit. Each call she listened to was disconnected within a few seconds. Hill looked at a call report for all calls on Buchanan's claims extension. Hill said, "[T]here were a lot of short calls." Hill discovered that 15 calls of nine seconds or less were disconnected in the month of July 2011. The 15 calls were verified by a computer generated call report.

Hill contacted Shiralipour, as she was required to do. She provided him with the call report showing the incoming and outgoing calls on Buchanan's extension for the month of July 2011. The call report showed 15 calls between one and nine seconds long.

Shiralipour reviewed the call report and confirmed that the other Leads were not having problems with their telephone lines in July 2011. He contacted Human Resources Manager Michelle Jordanhazy and reviewed the call report with her. They reviewed one call and confirmed the caller was disconnected after she asked Buchanan to repeat her name.

On August 1, 2011, Shiralipour and Jordanhazy met with Buchanan. They reviewed the call report and asked

Buchanan to explain each of the 15 disconnected calls. Buchanan had no explanation. Buchanan confirmed she was not experiencing and did not report problems with her telephone. Buchanan said she returned each of the dropped calls within two calls. The call report did not substantiate Buchanan's claim that she returned calls. Buchanan declared she returned the calls on a land-line that did not record calls. Buchanan said she was not aware that Anthem had a "no-tolerance" policy on disconnecting calls.

The tracking notes for a short call state that a member complained she had been hung up on by the last representative. The member's telephone number appeared as a short call on Buchanan's call report.

Buchanan testified in a deposition that in 2011 she understood it was Anthem's policy that a representative could never hang up on a caller, no matter what the caller said or how he was acting. Anthem's written policy stated: "Associates will likely be terminated if it is determined that any call(s) are being intentionally disconnected."

Shiralipour and Jordanhazy decided to terminate Buchanan's employment at the August 1, 2011 meeting. Jordanhazy signed the termination notice.

DISCUSSION

I

Summary judgment is properly granted only if all papers submitted show there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The court must draw all reasonable inferences from the evidence set forth in the papers except where such references are contradicted by

other inferences of evidence which raise a triable issue of fact. (*Ibid*.) In examining the supporting and opposing papers, the moving party's affidavits or declarations are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

The moving party has the initial burden of showing that one or more elements of a cause of action cannot be established. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) Where the moving party has carried that burden, the burden shifts to the opposing party to show a triable issue of material fact. (*Ibid*.) Our review of the trial court's grant of the motion is de novo. (*Id*. at p. 767.)

II

Buchanan contends the trial court erred in granting summary adjudication on her age discrimination cause of action.

The Fair Employment and Housing Act (FEHA) makes it an unlawful employment practice for an employer to discharge an employee over the age of 40 on the ground of age. (Gov. Code, §§ 12926, subd. (b); 12940, subd. (a).) A prima facie case of age discrimination requires plaintiff to provide evidence that (1) she is a member of a protected class, (2) she was performing competently in the position she held, (3) she suffered an adverse employment action, such as termination, and (4) the circumstances suggest discriminatory motive. (*Guz v. Bechtel National*, *Inc.* (2000) 24 Cal.4th 317, 355.) If plaintiff establishes a prima facie case, a rebuttable presumption of discrimination arises. (*Ibid*.) The burden shifts to the employer to show the

action was taken for a legitimate, nondiscriminatory reason. (*Id.* at pp. 355-356.)

Here Buchanan has failed to show there is a triable issue of material fact on the second element of her prima facie case: that she was performing competently in the position she held. The undisputed evidence shows that in July 2011 she had 15 calls that were disconnected between one and nine seconds. During that period, she reported no problem with her telephone. Even adopting the assumption that the 15 calls were somehow unintentionally disconnected or that they were disconnected by customers, the evidence stills shows incompetence.

Buchanan attacks the evidence by challenging aspects of Hill's deposition testimony and affidavits. Hill testified that she started the audit of Buchanan's calls on July 29, 2011. But Hill sent an email to Buchanan on July 28, giving her high marks on three audited calls. Buchanan concludes Hill's testimony is false. But the date Hill started the audit is immaterial. Whenever Hill started the audit, the undisputed fact, is that Buchanan had 15 calls that lasted between one and nine seconds during July 2011.

Buchanan next challenges Hill's statement that Hill was having trouble finding a claims call to audit because each call was disconnected within a few seconds. Buchanan argues the statement was contradicted by Hill's July 28 email to Buchanan giving her high grades on three calls. Buchanan also points out that when asked why Hill was starting an audit on July 29, 2011, when she had already done her audit and sent an email on July 28, Hill replied, "I don't remember." Hill added maybe July 29 is the wrong date.

Hill's statement that she was having difficulty finding a claims call to audit is not contradicted by her email giving Buchanan high grades on three calls. Buchanan's job required her to answer calls concerning billing and membership in addition to claims calls. Whether Hill started the audit on July 28 instead of July 29, or completed the audit on July 28 and reopened the audit on July 29, for whatever reason, is immaterial. That Buchanan had 15 disconnected calls lasting nine seconds or less remains an uncontradicted fact.

Buchanan points to Hill's deposition testimony that there was a 16th call lasting 10 seconds. That does not contradict Hill's statement that there were 15 calls lasting nine seconds or less. Moreover, that there were 16 instead of 15 disconnected calls hardly helps Buchanan's case.

Finally Buchanan points out that she was not the only representative who had short calls during July 2011. She cites a call report showing one other representative had three short calls during July 2011. That is far less than 15. If anything, the evidence shows how far from competent Buchanan's work performance was.

The undisputed evidence of the 15 short calls alone would be sufficient to show Buchanan was not performing competently in her position. But, in addition, Buchanan admitted in her deposition that, at the time her employment was terminated, she was not 100 percent confident in handling claims calls; she was "probably 75 to 80 percent" confident. Buchanan's position was not that of an ordinary representative; she was a Lead who was required to answer claims questions that others were unable to answer. It is true that in Buchanan's declaration, submitted in opposition to the motion for summary judgment, she

declared she initially found claims calls challenging, but did not find them challenging for the entire remainder of her employment. We disregard a declaration prepared for purposes of a summary judgment motion to the extent it conflicts with the deposition testimony of the declarant. (*Jacobs v. Fire Ins. Exchange* (1995) 36 Cal.App.4th 1258, 1270.)

Even if Buchanan had established a prima facie case, Anthem presented undisputed evidence that establishes her employment was terminated for a legitimate, nondiscriminatory reason.

Most importantly, the evidence of 15 short calls in a month shows Buchanan was not competently performing her job. Nevertheless, Buchanan argues the evidence simply provided a pretext for employment termination based on age discrimination.

Buchanan argues that Shiralipour made age-related statements. Buchanan claims Shiralipour stated at least a half a dozen times, "You need to do things the new way, not the old way." He also used the term "old fashioned." But Buchanan admitted he made such comments in the context of training employees on new procedures. They cannot reasonably be interpreted as age-related comments.

Buchanan claims Shiralipour showed preference for a younger employee by giving her special assignments. But Buchanan could not point to even a single special assignment that was given to the younger employee.

Buchanan claims Anthem's investigation of the short calls was so inadequate as to indicate her termination was pretextual. But when Buchanan was confronted with evidence of 15 calls lasting nine seconds or less, she had no explanation. When an employee who is confronted with evidence of

incompetence has no explanation, there is no need for further investigation. Buchanan's claim that she returned the disconnected calls on a line that does not record calls may be sufficient to raise a triable issue of fact on whether she returned the calls. But it does not explain why they were disconnected in the first place.

Finally, it was Hill who discovered and reported the evidence of incompetence and Jordanhazy who signed Buchanan's termination notice. Buchanan presents no evidence that either Hill or Jordanhazy harbored any age-related or other bias against Buchanan.

III

Buchanan contends the trial court erred in granting summary adjudication on her cause of action for violating Labor Code section 232.5.

Labor Code section 232.5, subdivision (c) prohibits an employer from discharging, formally disciplining, or otherwise discriminating against an employee "who discloses information about the employer's working conditions."

Buchanan argues her complaints to Mudgett about her working conditions resulted in Shiralipour retaliating against her. She claims the phrase "employer's working conditions" includes complaints about Shiralipour's uncaring and competitive attitude.

But neither party cites any authority interpreting the phrase "employer's working conditions" as used in Labor Code section 232.5. At best, Buchanan cites *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 300, for the general proposition that ""statutes governing

conditions of employment are construed broadly in favor of protecting employees.'"'"

We doubt the Legislature intended to protect all employee complaints of whatever nature. (See, e.g., *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344 [FEHA does not guarantee a stress-free workplace nor does it shield an employee against harsh treatment].) There is simply no public policy reason to interpret Labor Code section 232.5, subdivision (c) so broadly. The general rule that statutes governing conditions of employment are to be construed broadly does not justify an irrational interpretation. Buchanan concedes as much when she states in her opening brief that she "is not suggesting that complaints about any and all possible work-related matters are encompassed by this statute." Without suggesting where the line should be drawn, Buchanan argues her complaints about Shiralipour are protected.

But Buchanan's complaint that Shiralipour is uncaring, stress-inducing and overly competitive is the sort of complaint that may be made about any manager in any work place. They were not intended to be protected by Labor Code section 232.5.

We interpret the phrase "employer's working conditions" as used in Labor Code section 232.5, subdivision (c) as applying only to unlawful working conditions. Buchanan's complaint to Mudgett about Shiralipour favoring a younger worker may be construed as a complaint about age discrimination. As such, the complaint would fall within the protection of Labor Code section 232.5, subdivision (c).

But it is not enough for Buchanan to show her complaint to Mudgett is protected under the Labor Code. She

must also show her complaint was the cause of an adverse employment action. (See *Arteaga v. Brink's, Inc.*, *supra*, 163 Cal.App.4th at p. 353 [employee failed to prove causation where employer's investigation into employee's performance began before employee disclosed medical issues].) Here Buchanan presents no direct evidence of causation. Instead, she relies on a showing that the adverse employment action occurred after she complained to Mudgett about Shiralipour.

But in order to raise the inference that an adverse employment action was caused by protected activity, the temporal proximity must be "'very close.'" (*Clark County Sch. Dist. V. Breeden* (2001) 532 U.S. 268, 273-274.)[1] Three or four months have been held insufficient to prove causation. (*Ibid.*) Here it was over one year between Buchanan's complaint to Mudgett and the termination of her employment.

Buchanan relies on *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 421, for the proposition that there may be a causal connection in spite of a long period between an adverse employment action and the employee's protected activity if "the employer engages in a pattern of conduct consistent with retaliatory intent . . . ."

Here, after Buchanan's complaint to Mudgett, Shiralipour sent Buchanan an email in September 2010 threatening corrective action that was not imposed and a CAF in April 2011. That does not represent a "pattern of conduct."

The undisputed evidence that Buchanan was not performing her job competently also militates against her claim

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[1] California courts often rely on federal cases because of the similarities between state and federal discrimination laws. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 354.)

of retaliatory action. Anthem did not need a pretext to take action against Buchanan.

IV

Buchanan contends the trial court erred in granting Anthem's motion for summary adjudication on her cause of action for breach of implied contract.

All employment in California is presumed to be at-will. (Lab. Code, § 2922.) In addition, in 1998 Buchanan signed a document acknowledging receipt of the WellPoint employee handbook. The handbook expressly states that she is an at-will employee. WellPoint later merged with Anthem. A document signed by an employee stating the employment is at-will defeats an implied breach of contract cause of action. (*Dore v. Arnold Worldwide*, *Inc.* (2006) 39 Cal.4th 384, 389.)

Buchanan argues, without citation to authority, that the WellPoint employee handbook does not apply to her after the merger with Anthem. But the burden is on Buchanan, as appellant, to show error. (*In re Marriage of Behrens* (1982) 137 Cal.App.3d 562, 575.) By not citing authority to support her argument, Buchanan has failed to carry her burden on appeal.

In any event, even if Buchanan has an implied contract that her employment will not be terminated without good cause, Anthem has demonstrated good cause.

V

Buchanan contends the trial court erred in granting Anthem's motion for summary adjudication on her cause of action for defamation.

Buchanan claims defamatory statements were contained in the CAF. The original document stated that she had taken home a refrigerator that was not hers and that she was

insubordinate. The trial court ruled the statements were not libelous because they were not published to a third party. A libelous statement is not actionable until it has been published to a third person. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 535, p. 786.)

Anthem argues the only people who saw the CAF were Buchanan, Shiralipour and human resources managers. Anthem claims publication between and among such "interested persons" is privileged under Civil Code section 47, subdivision (c).

Buchanan counters that her own disclosure of the CAF to Mudgett qualifies as a publication.

Buchanan relies on *Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277. There the court held that an exception to the rule that publication must be by the defendant applies where it is foreseeable that the person defamed will be under a "strong compulsion" to disclose the contents of the defamatory statement to a third person. (*Id*. at p. 1284.)

But Buchanan points to no evidence that Shiralipour or the human resources managers would foresee she would be under a "'strong compulsion'" to disclose the contents of the CAF to Mudgett. Buchanan went to Mudgett seeking advice and support.

Davis v. Consolidated Freightways (1994) 29 Cal.App.4th 354, 373, is a case with a similar issue. There plaintiff's employment was terminated for theft. He voluntarily told other employees in an effort to garner support. The Court of Appeal affirmed the trial court's grant of summary judgment in favor of plaintiff's employer on the ground there was no evidence plaintiff was under a strong compulsion to publish the alleged defamatory matter.

Buchanan argues that the communications between interested persons are not privileged. Civil Code section 47, subdivision (c) protects only those communications made between interested parties that are made without malice. The privilege is lost if the publication is motivated by hatred or ill will toward plaintiff or any other improper motivation. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 945.)

Here Buchanan alleges that Shiralipour was motivated by a desire to retaliate for her complaints to Mudgett. But there is no such evidence. The uncontradicted evidence is that the allegations contained in the CAF were reported to Shiralipour by other employees. Buchanan admitted she took the refrigerator. Lineberry testified in her deposition that she did not give Buchanan permission to take the refrigerator home. Starr reported that Buchanan entered into a manager's office, removed a picture and hung it in a common area. There is no evidence that Lineberry or Starr harbored any hatred or ill will toward Buchanan. The uncontradicted evidence is that Shiralipour was simply acting on complaints from other employees. There is no evidence of malice.

VI

Buchanan contends the trial court erred in granting summary adjudication on her cause of action for failure to prevent discrimination and termination in violation of public policy.

Buchanan's contention is based on the theory that the trial court erred in granting summary adjudication on her causes of action for age discrimination and violation of Labor Code section 232.5. Suffice it to say, the trial court did not err in granting summary adjudication on those causes of action.

VII

Buchanan contends the trial court abused its discretion in ruling on objections to evidence.

Buchanan argues that her application for employment with a temporary employment agency showing her to be an at-will employee should have been excluded. The evidence is unnecessary to the case. Thus error, if any, was harmless.

Buchanan argues that certain statements made by Shiralipour should have been excluded as directly contradicted by his subsequent declaration and deposition and as based on hearsay. Buchanan does not expressly set forth the statements she claims should have been excluded. Neither does she show how the statements are contradicted by a subsequent declaration and deposition, nor does she explain why the statements should be excluded as hearsay. It is not our task to do so for her. She has failed to carry her burden of showing error on appeal.

Finally, Buchanan argues the trial court erred in sustaining Anthem's objection to a paragraph in her declaration. Buchanan declared: "It was later discovered that the mini-refrigerator had actually belonged to Lineberry, and so I then promptly brought it back. Shiralipour, Lineberry and I had a very brief conversation about the mix-up, during which Lineberry acknowledged that she had directed me to remove the mini-refrigerator. This conversation with Lineberry and Shiralipour was *not* any type of 'counseling' or reprimand for me having done anything wrong. I presumed nothing further would come of this."

Buchanan claims Lineberry's acknowledgment that she had directed her to remove the mini-refrigerator shows Shiralipour did not have a good faith belief that disciplinary

action was warranted. The trial court excluded the statement as hearsay that does not qualify as an admission of a party opponent.

Lineberry is not a party to the action. But Buchanan argues that Lineberry is an Anthem manager and that statements of a corporate manager are admissible against the corporation. (Citing *Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 524.)

But it is not enough simply to show that a statement was made by a corporate manager. For a statement to be admitted into evidence as an admission of a corporate party, the person making the statement must have the express or implied authority to make that kind of statement for the corporation. (Evid. Code, § 1222, subd. (a); 1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 122, p. 954; see *Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 756 [supervisor not authorized to make statement about preference for younger workers]; *O'Neill v. Novartis Consumer Health*, *Inc*. (2007) 147 Cal.App.4th 1388, 1403 [no evidence director of regulatory affairs has authority to make statement on behalf of corporation; title without more not sufficient].)

Buchanan presents no evidence Lineberry was authorized by Anthem to make the alleged statement on its behalf. The trial court could reasonably conclude that if Lineberry made the alleged statement she was speaking on her own behalf about a matter in which she had a personal interest. The refrigerator belonged to Lineberry. In any event, her statement has no effect on the outcome.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Vincent J. O'Neill, Judge

Superior Court County of Ventura

Tron & Tron, Terry L. Tron and Lanny M. Tron for Plaintiff and Appellant.

Ross & Silverman, Melanie C. Ross and Autumn E. Love for Defendants and Respondents.