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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

ANTOINETTE ALVAREZ, Plaintiff and Appellant, v. LIFETOUCH PORTRAIT STUDIOS, INC., et al., Defendants and Respondents.	B286910, B289910 (Los Angeles County Super. Ct. No. BC637848)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Reversed in part, affirmed in part.

Law Offices of Sima Fard, Sima Fard; Burns & Schaldenbrand and Edward W. Burns for Plaintiff and Appellant.

Jackson Lewis, Elizabeth H. Murphy, Sherry L. Swieca, Negin Iraninejadian and Philip Johnson for Defendants and Respondents.

Plaintiff Antoinette Alvarez appeals from a judgment entered after the trial court granted summary judgment in favor of defendant Lifetouch Portrait Studios, Inc. (B286910). Alvarez was a studio manager for Lifetouch, in which position she spent 20 to 25 percent of her time taking photographs. After Alvarez suffered a workplace injury to her neck and right shoulder in 2013, she provided Lifetouch a doctor's note placing restrictions on her work, but for the first two months thereafter Alvarez continued to take photographs without any accommodation or discussion with Lifetouch on how to accommodate her restrictions. When her condition worsened in 2014, Lifetouch provided Alvarez a part-time staff member to assist with Alvarez's photographic duties as an accommodation for Alvarez's injuries. But after a doctor in her workers' compensation case opined Alvarez was permanently disabled and could no longer perform photography, Lifetouch terminated Alvarez's employment. When Alvarez threatened to sue, Lifetouch reinstated her employment in a position that did not require photography, but on less favorable terms. Alvarez briefly worked in the new position before taking leave and later resigning.

Alvarez brought claims under the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.)[1] for failure to accommodate; failure to engage in a good faith interactive process; discrimination; retaliation; harassment; failure to prevent discrimination, retaliation and harassment; wrongful termination; and constructive discharge. Alvarez also alleged interference with her right to leave and retaliation in

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[1] All further undesignated statutory references are to the Government Code.

violation of the California Moore-Brown-Roberti Family Rights Act (CFRA; §§ 12945.1, 12945.2). The trial court granted summary judgment, finding Alvarez could not perform the essential job function of photography, she was not denied an accommodation or leave, and the conduct of Alvarez's supervisors was not sufficiently severe or pervasive to constitute harassment under FEHA or support a claim for constructive discharge.

We conclude there are disputed questions of fact as to Alvarez's claims for discrimination, failure to accommodate, failure to engage in the interactive process, retaliation, interference with CFRA leave, and wrongful termination. Although Lifetouch engaged in the interactive process and provided accommodations for Alvarez's injury after a flare up in the summer of 2014, its failure to take any steps during the first two-month period following Alvarez's injury raises a triable issue of fact. Similarly, Alvarez presented evidence that at the time of her termination in July 2015, she could perform photography with assistance from a second employee when necessary to perform certain tasks. Whether the photography studio where Alvarez worked was typically staffed with a second staff member who could assist Alvarez is also a disputed question of fact. As to her harassment claim, however, Alvarez has not presented evidence to show severe or pervasive harassment by her supervisor. Nor has she shown the conditions of her employment were intolerable when she resigned during her medical leave in July 2016. We reverse in part and affirm in part.

Alvarez also appeals from the trial court's denial of her motion for consideration and multiple discovery orders. We reverse the court's September 19, 2017 order allocating 50

percent of the referee's fees for certain depositions to Alvarez. In all other respects we affirm.

Alvarez separately appeals from the trial court's order awarding Lifetouch $37,188 in costs incurred following Lifetouch's offer to compromise under Code of Civil Procedure section 998, which Alvarez rejected (B289910).[2] Because we reverse the trial court's order granting summary adjudication as to eight of 12 causes of action, we summarily reverse the order granting Lifetouch its costs.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Alvarez's Employment with Lifetouch*[3]

Lifetouch operates portrait studios in retail big box stores throughout the United States. Lifetouch hired Alvarez as a photographer and salesperson in 1989. Alvarez became studio manager of Lifetouch's Montebello store in 1990 or 1991. Alvarez's duties as studio manager included photography, sales, customer service, and management, training, and scheduling of studio staff. Alvarez spent about 20 to 25 percent of her time photographing customers, and ranked photography as having a

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[2] We address both appeals in this opinion. Alvarez's appeal in case No. B289910 relates only to the trial court's award of costs. The remainder of this opinion addresses the issues raised in case No. B286910.

[3] The factual background regarding Alvarez's employment, injury, and termination is taken from evidence submitted by the parties in support of or in opposition to Lifetouch's motion for summary adjudication. We note where the facts are in dispute.

"middle or a little higher" importance in relation to her other job duties. During the holiday season, photography occupied more of Alvarez's time. The amount of time Lifetouch studio managers spent actively managing their subordinates varied from 50 to 80 percent.

In June 2013 district manager Frank Marino became Alvarez's direct supervisor. Alvarez had a good work record until September 2014 and was well-liked by fellow employees and management.

1. *Alvarez's injury*

Alvarez's photography work was "physically demanding" and required her to move heavy backgrounds and props. At some point in 2008 and again in 2010, Alvarez was injured at work when a "wand" being used to hold a photography backdrop fell and hit her in the head. Following the 2010 incident, Alvarez's supervisor Nicole Messina placed Alvarez on "light duty" without photography duties for six or seven months, having a second photographer work with Alvarez to take photographs while she recovered. This arrangement was typical for employees whose conditions limit their ability to photograph.

On October 23, 2013 Alvarez "experienced a sharp numbness and tingling pain in [her] right arm, fingers, neck and shoulder," caused by repetitive movements in arranging photography props and using a camera and computer mouse. Alvarez submitted to Lifetouch an employee incident report, describing an injury to her right hand, arm, and wrist, which limited Alvarez's ability to "hold[] [a] camera or typ[e] on [a] keyboard."

Later that day a doctor diagnosed Alvarez with right hand, right shoulder, and cervical sprains, epicondylitis of the right elbow, and cervical radiculopathy. The physician issued a work status report restricting Alvarez's use of her right hand, including "[l]imited gripping and grasping," lifting, pulling, and pushing up to five pounds. The report also required Alvarez to take hourly 10-minute stretch breaks. The report stated, "In the event that your employee has restrictions and no modified work is made available, employer must keep employee off work unless, and until, such modified work is made available."

Although the Lifetouch human resources department received the work status report, Lifetouch never discussed the restrictions with Alvarez. Marino did not engage in any interactive process with Alvarez at this time. Lifetouch told Alvarez she was on "light duty," but did not explain to her what that meant. Alvarez returned to work and "continued to photograph which caused [her] pain," and she did not take stretch breaks. Lifetouch did not offer Alvarez any time off and Alvarez was unaware she was entitled to any leave. At the time, Lifetouch's employee handbook did not address Alvarez's CFRA leave rights,[4] and she was not otherwise apprised of her rights.

Several doctors evaluated Alvarez over the next two months, each time maintaining restrictions on her work. A work status report dated January 6, 2014 lifted Alvarez's work restrictions. However, Alvarez's pain continued.

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[4] The employee handbook in effect during Alvarez's employment only mentions the CFRA on pages revised in or after July 2014. The 2013 version discusses only unpaid medical leave under federal law.

During a February 3, 2014 examination by Dr. Ronald E. Bishop, Alvarez reported feeling "much better," complaining only of experiencing numbness and tingling, without pain, in her neck and right shoulder. Dr. Bishop noted Alvarez was "working full duty" at this time. Dr. Bishop discharged Alvarez from care "with no limitations or restrictions," noting, "She has been working full duty. She should continue to work full duties."

2. *Alvarez's transfer to the Chino studio and recurrence of her injury*

In March 2014 Alvarez transferred to Lifetouch's Chino studio. It is disputed whether Marino asked Alvarez to transfer to Chino because it "was a mess," or Alvarez decided on her own to apply for a transfer. Alvarez became studio manager at Lifetouch's Chino studio. Although the Chino studio was hosted by a "top-performing" department store, its sales were lower than Montebello, and it was not showing yearly growth. According to Alvarez, she "almost always had staff" working with her in Chino.[5]

Beginning in about July 2014, Jennifer Sunbury replaced Marino as Alvarez's district manager. On August 14, 2014 Sunbury and regional manager Serenity Odom made a "surprise visit" to Alvarez's Chino studio. Alvarez was not present at the

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[5] Lifetouch disputes this point, relying on Marino's declaration that " the Chino studio typically only required one employee to be on duty at a time . . . ." However, Jennifer Sunbury, Lifetouch's person most qualified regarding efforts to accommodate Alvarez from July 2014 to January 2015, testified it was not true Alvarez was the only person working at the Chino studio.

store and had not informed Sunbury she would be out. Sunbury observed a sticky note on the register with a promotion code, which she considered evidence of discounts being improperly given to customers. She also noted there were employees who were not following required sales procedures. On August 18 or 19 Sunbury spoke to Alvarez by phone. Alvarez explained her absence was due to a family emergency, and she informed Sunbury her arm had been hurting. Sunbury reported Alvarez's pain to Lifetouch's human resources department on August 20.

On August 20 Alvarez reported to Lifetouch she had a "flare up" of her 2013 injury. Alvarez saw a doctor and was off work for two days. Alvarez reported the pain had never gone away "since she was discharged from care." A work status report from Alvarez's doctor dated August 29, 2014 again restricted Alvarez from overhead work, lifting, pushing, and pulling over five pounds, ordered hourly 10-minute stretch breaks, and stated if no modified work was available Alvarez must "keep . . . off work."

On September 2, 2014 Sunbury and human resources manager Kay Putman met with Alvarez to discuss possible accommodations for her injury. Lifetouch authorized Alvarez to schedule an additional 20 hours per week of employee time so Alvarez could take stretch breaks and would not have to perform back-to-back photography sessions. In her memorandum to Alvarez confirming their discussion, Putman wrote, "These accommodations . . . will continue as long as they remain effective and necessary and do not post an undue hardship."

On September 3, 2014 Alvarez's counsel Sima Fard e-mailed Putman and Sunbury requesting Alvarez be placed on "complete light duty" instead of "part time" light duty, which was

"making it difficult for [Alvarez] to fully recover." Lifetouch responded through counsel the next day, assuring Fard that Alvarez was on light duty with all accommodations necessary to meet her restrictions.

On September 4, 2014 Sunbury and Marino met with Alvarez to review her performance, including their concerns about the August 14 visit. According to Alvarez, during the meeting both Sunbury and Marino "star[ed] [her] down." Marino leaned toward Alvarez while telling her she should not "have borrowed an employee to assist" her at the studio. Sunbury and Marino signed and provided to Alvarez a performance improvement form (PIF). Alvarez found Sunbury and Marino's conduct at the meeting to be aggressive, and she found the meeting upsetting and humiliating.

Following the meeting, Alvarez requested a transfer to another position "so that they would leave [her] alone," but Sunbury stated she did not know of any suitable job openings. At the time, Alvarez "knew there was something in Temecula," but the position was never offered to her.[6] The day of the meeting Sunbury introduced Alvarez to the store manager of the host department store. The manager told Alvarez she had "no energy" and "no personality." The manager recommended Alvarez and her employees "pound the pavement" and collaborate with the department store to increase sales. Alvarez was upset by the store manager's statements. After speaking with the store

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[6] A September 4, 2014 e-mail from Putman to Odom shows Lifetouch considered adding a position in Temecula if the store achieved a particular economic benchmark, but there is no evidence the position was created.

manager, Sunbury talked to Alvarez "in a very aggressive manner." Alvarez described Sunbury's face as red, with Sunbury's eyes "popping" as she leaned toward Alvarez saying, "This is not acceptable." After the events of September 4, Alvarez began to experience anxiety and depression.

On September 9, 2014 Putman called Alvarez to discuss Alvarez's restrictions and need for accommodation. In a followup e-mail, Putman proposed she and Alvarez talk further as part of the interactive process if Alvarez was "having difficulty performing the essential functions of [her] job with the accommodations . . . Sunbury discussed with [her] on September 2nd."

On September 24, 2014 Alvarez met with Sunbury and Putman to discuss her work restrictions and possible accommodations. In a letter memorializing their discussions, Putman wrote that Alvarez "stated there is nothing in the camera room [she could] do without pain," including taking photographs and moving props and backgrounds. Sunbury and Putman "suggested the following as possible accommodations: [¶] Team shooting in the camera room and [¶] Having another person working with you to move props and backgrounds." With regard to Alvarez's complaint her hourly 10-minute stretch breaks were often interrupted by customers, Sunbury recommended Alvarez "[h]ave another person in the studio with [her]" and "[u]se the changing room to take [her] stretch breaks since it has a locked door and [she would not] be interrupted." Alvarez did not specify any difficulty performing the rest of her job duties. The letter noted Alvarez also had met with an ergonomic specialist.

On September 25 Alvarez requested 40 hours per week for employee coverage, which Lifetouch approved. Letters from Lifetouch's human resources department memorialize nine further meetings or conversations with Alvarez to discuss accommodations from September 2014 to March 2015. During this time Lifetouch installed new office equipment at the Chino studio as an accommodation, including a phone headset, keyboard and mouse pad wrist rests, grips for writing instruments, kneeling pad, lengthened "magic wand," and wireless mouse. Lifetouch also adjusted the height of Alvarez's work computer and installed "a mono-pole in the studio . . . to help [Alvarez] with [her] photography duties." Alvarez had some success photographing customers with the mono-pole accommodation, but later reported experiencing pain while using the pole and discontinued its use.

3. *Marino again becomes Alvarez's supervisor*

In January 2015 Marino again became Alvarez's district manager. Marino called Alvarez and said, "I'm you new DM. I'm going to be harder and tou[g]her on you[] from now on as I had not been hard enough on you before." Marino called the following month and told Alvarez he was "watching [her]" and having the host department store's managers and her team members "watch [her] too" to see if she was continuing to provide discounts.

On March 25, 2015 Marino e-mailed Alvarez and said her "overtime must stop" and she was "always on double coverage [and] should be able to take a break mid shift." Once when an employee left work sick and Alvarez asked for coverage, Marino criticized her for not having enough sick coverage. Marino's tone was "sharp and aggressive." At some point prior to Alvarez's

termination, Marino "laugh[ed] and joke[d] . . . that [Alvarez] could work in Minnesota or work for another part of Lifetouch."[7] At that time Alvarez did not want to be transferred to Minnesota or another division of Lifetouch.

4. *Alvarez's termination*

On May 19, 2015 qualified medical examiner Dr. Joseph Mann evaluated Alvarez. Dr. Mann's report concluded Alvarez's injury was "permanent and stationary."[8] The report stated Alvarez could not "lift or carry at a height of 3-6 feet more than 10 pounds for more than 1 hour per day." In addition, Alvarez was "restricted from taking photographs." The report stated Alvarez "was not able to engage in previous occupation" as studio manager, and "[i]f work accommodation is not available, the patient would be a candidate for vocational rehabilitation."

On June 12, 2015 Lifetouch's claims manager Lori Hagen received Dr. Mann's report. Hagen understood the report to mean Alvarez was "permanently restricted from photography."

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[7] According to Marino, he discussed with Alvarez "relocation to another state" or "transfer to a different Lifetouch entity such as the school or church division" because "there were no available positions within the district that did not require photography as an essential function."

[8] "'Permanent and stationary status' is the point when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment." (Cal. Code Regs., tit. 8, § 9785, subd. (a)(8); see *County of Alameda v. Workers' Comp. Appeals Bd.* (2013) 213 Cal.App.4th 278, 283, fn. 3.)

On June 24, 2015 Alvarez's doctor, Dr. Evan Marlowe, also evaluated Alvarez and found she was cleared for work, but with restrictions of no bending, overhead work, lifting, pushing, or pulling, and "no camera work." The report does not state for how long the restrictions would remain in effect.[9]

In the summer of 2015 Marino met with Lifetouch employee Christine Piero, who worked at the Riverside studio. Marino told Piero he "wished [Piero] could work in Chino as [Alvarez] wasn't doing her job . . . ." Marino said Alvarez would need to end her light duty or step down from her management position and "become a regular employee," or she would be fired. Marino asked Piero to inform him if she heard Alvarez complain about pain so he would not need to speak with Alvarez.[10]

On July 2, 2015 Hagen, Marino, and Mary McPherson, human resources business partner, contacted Alvarez by conference call while Alvarez was at the Chino studio. McPherson asked whether Alvarez agreed Dr. Mann's report permanently restricted her from photography. According to McPherson, Alvarez agreed. McPherson told Alvarez she was being terminated because she could no longer perform the essential functions of her studio manager position, with or without accommodation. McPherson researched whether there

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[9] Lifetouch contends Dr. Marlowe's report concludes Alvarez was "permanently" unable to perform camera work, but the report only stated Alvarez could return to work on June 24 with restrictions and did not address her long-term prognosis.

[10] In her declaration, Piero also averred she was injured at work, and since then Marino gave her a bad performance review and "started to avoid [her]."

were other positions within the district that did not involve "photography as an essential function," but did not find any. Alvarez ended the call prematurely because she began to cry.

5. *Alvarez's reinstatement and subsequent resignation*

On July 9, 2015 Fard sent Lifetouch a letter threatening legal action if it did not reinstate Alvarez. McPherson spoke with Alvarez the same day to apologize, explaining "Lifetouch didn't train her and others on California accommodations law." Lifetouch then reinstated Alvarez's employment with full back pay. Alvarez went on paid leave while Lifetouch created a new position for her.

On July 29, 2015 Alvarez met with Marino and McPherson to discuss her reinstatement. At the meeting, Marino laughed and said, "Don't worry [Alvarez], we're not going to fire you again." Alvarez replied it was not funny, and looked to McPherson, who said nothing. Alvarez presented Marino and McPherson with a new note from Dr. Marlowe dated July 28, revising her work restriction from "no camera work" to "able to do camera work to tolerance." When asked what "camera work to tolerance" meant, Alvarez stated she did not know. Alvarez later explained in her deposition "as tolerated" meant she "could start to photograph but to stop if I felt any pain."

Lifetouch offered Alvarez the position of sales core team member, newly created by Marino and McPherson, for which Alvarez would rotate among three studio locations in Riverside, Rancho Cucamonga, and Moreno Valley. Alvarez requested she not have to report to Marino, but her request was denied, and she was told she had to stay in Marino's district. Alvarez reported to Marino, not the studio managers under whom she worked.

Alvarez was humiliated to work under "younger managers who had half [her] experience as a studio manager."

Alvarez's new duties included sales and customer service, but not management or photography. Lifetouch "anticipate[d] . . . provid[ing] [Alvarez] with an average of 30-35 hours per week at the three different studio locations," whereas Alvarez had been working 35 to 40 hours per week as studio manager. And while Lifetouch continued paying Alvarez her former hourly rate of $22.56, because that "rate [was] significantly more than the rate paid to other [c]ore [t]eam [m]embers, [Alvarez] [would] not be eligible" for any pay increase until her pay fell within the range paid to core team members in Southern California, which was then between $9.00 and $13.00 per hour.

Sometime after Alvarez's reinstatement, Marino visited the Riverside studio and informed Piero, "We are going to get a disabled worker from Chino," and he rolled his eyes. Marino complained about setting up a keyboard to accommodate Alvarez, saying he had "had a fucking bad day." Marino also told Piero to adjust items in the studio drawers "to be 'SSDI' approved."

After Alvarez assumed her new duties, on September 22, 2015 Marino gave Alvarez a negative performance review for her earlier work at the Chino studio. Around this time Alvarez attended a manager's meeting, at which Marino stated to those in attendance that Alvarez and another long-time Lifetouch employee had "over a half century with the company" between them. Alvarez felt singled out by the comment.[11]

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[11] In her declaration, Alvarez also identifies four female Lifetouch workers over 40 years of age whom Alvarez asserts

Beginning on October 31, 2015 Alvarez went on approved leave for "temporary total disability." In approving Alvarez's leave, McPherson wrote, "Please consider this letter as formal notice that the Company has designated your leave . . . as an approved leave under the Family Medical Leave Act (FMLA) and the California Family Rights Act (CFRA)." McPherson also noted Alvarez "said [she] would not mind helping out in the photography process once in a while [*sic*], suggesting that [she] could help with things like changing the backgrounds." The letter enumerated Alvarez's current restrictions and noted Alvarez's agreement with the restrictions meant she could not perform photography. Alvarez remained temporarily totally disabled and on leave through July 2016.

Alvarez had limited communication with Marino after she went on leave. Alvarez did not experience harassment by any Lifetouch employee between October 2015 and July 2016. In March 2016 Dr. Theodore Tribble evaluated Alvarez and determined she was psychologically disabled by stress and anxiety. At that point Alvarez was on medical leave but was experiencing stress because her coworkers were contacting her about problems they were experiencing at work. Alvarez also reported to Dr. Tribble she was concerned about returning to work and having to deal with Marino as her supervisor.

In June 2016 Alvarez filed a complaint against Lifetouch with the Department of Fair Employment and Housing. In July 2016 Dr. Tribble recommended Alvarez not return to work at Lifetouch because "[t]here was so much stress about her going

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"were terminated after filing a work-related complaint or [taking] time off for medical leave such as an injury . . . ."

back to that job . . . ." On July 20, 2016 Alvarez resigned from her employment with Lifetouch.

B. *Alvarez's Complaint*

On October 20, 2016 Alvarez filed a complaint against Lifetouch, Marino, McPherson, and unnamed Doe defendants alleging, among other things, Lifetouch terminated her because of her disability in violation of FEHA. Alvarez alleged causes of action against Lifetouch for (1) discrimination based on disability; (2) failure to accommodate; (3) failure to engage in a good faith interactive process; (4) harassment based on disability and medical condition; (5) harassment based on age; (6) retaliation; (7) interference with rights under the CFRA; (8) retaliation in violation of the CFRA; (9) failure to prevent discrimination, harassment, and retaliation; (10) wrongful termination in violation of FEHA; (11) wrongful termination in violation of public policy; and (12) constructive discharge.[12] Alvarez's claims

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[12] The cover sheet of Alvarez's complaint identified her sixth cause of action as discrimination based on age (instead of retaliation). However, the body of the complaint does not include this claim and Alvarez does not present an argument as to age discrimination in her opening brief, thereby forfeiting any age discrimination argument. (*Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 296, fn. 7 ["Issues not raised in the appellant's opening brief are deemed waived or abandoned."]; *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 63 [argument made for the first time in reply brief is forfeited].) Alvarez's allegations included in her eighth cause of action under the Family and Medical Leave Act of 1993 (29 U.S.C. § 2601 et seq.) and violation of California's pregnancy disability leave law (Gov. Code, § 12945) are likewise forfeited

for failure to engage in the interactive process and harassment were brought against Lifetouch, McPherson, and Marino. The remaining causes of action were asserted against only Lifetouch.

C. *Lifetouch's Motion for Summary Judgment or, in the Alternative, Summary Adjudication (B286910)*

On July 14, 2017 Lifetouch filed a motion for summary judgment or, in the alternative, summary adjudication. In support of its motion, Lifetouch submitted deposition testimony, declarations, and other evidence relating to Alvarez's employment and medical condition.

Lifetouch argued Alvarez could not perform the essential functions of the job because she could not take photographs, thereby defeating Alvarez's claims for disability discrimination and failure to accommodate.[13] Lifetouch asserted Alvarez's claims for failure to engage in the interactive process and failure to accommodate failed because Alvarez had not identified an available reasonable accommodation. As to Alvarez's harassment claims, Lifetouch argued the alleged conduct was not sufficiently severe or pervasive and was not based on Alvarez's disability or age. Lifetouch sought summary adjudication of Alvarez's claims

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because Alvarez fails to address them in her opening brief. Alvarez also alleged harassment and discrimination based on her gender as part of her first and fifth causes of action, but she abandoned her gender-based claims during the summary judgment proceedings.

[13] Lifetouch also asserted Alvarez did not suffer an adverse employment action, and Lifetouch had a legitimate, non-discriminatory business reason for its actions. Further, Alvarez was never denied an accommodation.

for retaliation and wrongful termination on the basis Lifetouch reinstated Alvarez shortly after her termination for a similar position. Lifetouch contended as to Alvarez's claim for constructive discharge that Alvarez did not show her working conditions were sufficiently intolerable or aggravated at the time of her resignation.[14]

As to Alvarez's CFRA claims, Lifetouch argued Alvarez had not requested leave prior to October 2015, when her leave request was approved, and Alvarez never returned to work after she took CFRA leave in October 2015.

D. *Alvarez's Opposition*

Alvarez argued in opposition there were disputed questions of fact whether she could perform the essential functions of her job with reasonable accommodations, whether Lifetouch offered reasonable accommodations, and whether Lifetouch timely engaged in the interactive process. With respect to her disability harassment claim, Alvarez argued Marino's conduct was severe or pervasive and motivated by Alvarez's disability. Alvarez argued her termination was an adverse employment action because she was rehired for a position with inferior responsibilities, fewer hours, and less pay over time. Alvarez asserted as to her constructive discharge claim that Lifetouch's

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[14] Lifetouch also argued Alvarez could not prove her claim for punitive damages. "Although a claim for punitive damages is specifically set forth as an area which may properly be the subject of summary adjudication, in keeping with the purposes of Code of Civil Procedure section 437c, subdivision (f), a grant of summary adjudication in this area must cover the entire claim." (*Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 97.)

treatment of her exacerbated her condition and made her employment intolerable. As to the CFRA, Alvarez argued her doctors' notes placed Lifetouch on notice of her need for leave.

Alvarez did not request a continuance pursuant to Code of Civil Procedure section 437c, subdivision (h).

E. *The Trial Court's Hearing and Ruling*

After a September 29, 2017 hearing, the trial court granted summary judgment in favor of Lifetouch. The trial court found Alvarez had not established a prima facie case of disability discrimination or failure to accommodate because Alvarez could not perform the essential function of photography even with a reasonable accommodation. Further, Lifetouch's evidence showed it "provided modified work to [Alvarez]," thereby accommodating her disability. The court likewise rejected Alvarez's claim for failure to engage in the interactive process because Alvarez had failed to identify an "accommodation that was available and not provided." The trial court ruled Alvarez's retaliation and wrongful termination claims likewise failed because Lifetouch had a legitimate nondiscriminatory reason to terminate Alvarez.

The trial court found the comments of Marino, Sunbury, and McPherson were not "of sufficient frequency or duration to be severe or pervasive" and did not refer to Alvarez's medical condition. As to Alvarez's constructive discharge claim, the court found no evidence Alvarez was harassed during her nine-month leave of absence, and thus she was not subjected to intolerable conditions at the time of her resignation. The court rejected Alvarez's CFRA claims because Lifetouch had not denied any requests for leave.

The trial court did not rule on either parties' evidentiary objections.[15]

F. *Alvarez's motion for reconsideration*

On October 16, 2017 Alvarez moved for reconsideration, arguing the trial court should not have granted summary judgment until Alvarez obtained the results of her forensic discovery. Alvarez argued the results would show Lifetouch withheld and destroyed evidence that would have supported her claims. The trial court denied the motion, finding the appropriate procedure would have been for Alvarez to seek a continuance under Code of Civil Procedure section 437c, subdivision (h), which she did not. The court also found Alvarez had failed to show how the evidence she expected to obtain would change the outcome of the motion given the court's conclusion Alvarez could not perform photography, an essential function of her job.

On December 1, 2017 the trial court entered judgment in favor of Lifetouch. Alvarez timely appealed.

G. *Lifetouch's Motion for Attorneys' Fees and Costs (B289910)*

On November 16, 2017 Lifetouch filed a memorandum of costs seeking over $108,211 in costs. Lifetouch also filed a

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[15] Where the trial court fails to rule on evidentiary objections in the context of a summary judgment motion, on appeal the court presumes the objections have been overruled, with the objector having the burden to renew its objections in the Court of Appeal. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.) Neither party asserts an argument on appeal relating to its evidentiary objections.

declaration from Murphy stating on December 6, 2016 Lifetouch had made Alvarez an offer to compromise under Code of Civil Procedure section 998 for $50,000. Lifetouch took the position it was entitled to recover its reasonable and necessary costs incurred from the date of its section 998 offer through trial, which totaled $85,542. Alvarez moved to strike or tax costs on the basis Lifetouch had not shown her FEHA claims were frivolous under *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 99 (*Williams*) and the costs were excessive or not recoverable.

On March 7, 2018 the trial court denied Alvarez's motion to strike the entire memorandum, finding the requirement in *Williams* that a defendant show a plaintiff's FEHA claims are frivolous to recover costs does not apply to requests to recover costs under Code of Civil Procedure section 998. However, the court granted Alvarez's motion to tax costs in part. The court awarded Lifetouch $57,888 in costs. After Alvarez pointed out errors in the court's calculations, on May 8, 2018 the court modified its prior order and awarded Lifetouch $37,188 in costs. Alvarez timely appealed.

DISCUSSION

A. *The Trial Court Did Not Err in Deciding Lifetouch's Summary Judgment Motion While Discovery Was Pending*

Alvarez contends the trial court should have continued the hearing on the motion for summary judgment under Code of Civil Procedure section 437c, subdivision (h), to allow additional discovery to be taken that was necessary for the determination of the motion. In making this argument, Alvarez asserts "[t]his issue was briefed at length and argued at the trial level over

months." But Alvarez never requested a continuance of the summary judgment hearing. Rather, the briefing she points to was in connection with her motion for sanctions against Lifetouch and its counsel for disobeying a prior discovery order, failing to respond to discovery, and alleged spoliation of evidence; and an ex parte application filed to hold Lifetouch's workers compensation carrier in contempt for failure to respond to a subpoena.

Code of Civil Procedure section 437c, subdivision (h), provides, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." The opposing party seeking a continuance must show: """(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts."""" (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 656.) Here, Alvarez never made a request for a continuance, nor did she submit the required affidavit in compliance with Code of Civil Procedure section 437c, subdivision (h). The fact Alvarez was separately seeking discovery and sanctions does not support her argument the trial court should have continued the motion for summary judgment absent a proper request from Alvarez.

B. *Standard of Review*

Summary judgment is appropriate only if there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618 (*Regents*); *Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1085.) """"We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party."'" (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; accord, *Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1179 (*Husman*).)

A defendant moving for summary judgment has the initial burden of presenting evidence that a cause of action lacks merit because the plaintiff cannot establish an element of the cause of action or there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853; *Husman, supra*, 12 Cal.App.5th at pp. 1179-1180.) If the defendant satisfies this initial burden, the burden shifts to the plaintiff to present evidence demonstrating there is a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at p. 850; *Husman*, at pp. 1179-1180.) We must liberally construe the opposing party's evidence and resolve any doubts about the evidence in favor of that party. (*Regents, supra*, 4 Cal.5th at p. 618; *Husman*, at p. 1180.) "'[S]ummary judgment cannot be granted when the facts are susceptible [of] more than

one reasonable inference . . . .'" (*Husman*, at p. 1180, quoting *Rosas v. BASF Corp*. (2015) 236 Cal.App.4th 1378, 1392.)

C. *Triable Issues of Fact Exist as to Whether Lifetouch Failed Timely To Engage in the Interactive Process and To Accommodate Alvarez's Disability*

Alvarez contends the trial court erred in granting Lifetouch's motion as to Alvarez's claims for failure to engage in a good faith interactive process and failure to accommodate her disability. We agree. Although Lifetouch engaged in the interactive process and made efforts to accommodate Alvarez starting in August 20, 2014, its failure to take any action upon receiving Alvarez's work status report restricting her activities as of October 23, 2013 creates a triable issue of fact as to these claims.

1. *FEHA's requirements for an interactive process and reasonable accommodation*

Under FEHA, it is an unlawful employment practice for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an . . . employee" unless the accommodation would cause "undue hardship" to the employer. (§ 12940, subd. (m)(1); see *Green v. State of California* (2007) 42 Cal.4th 254, 262; *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1166 (*Featherstone*).)

The elements of a failure to accommodate claim are "'(1) the plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff's

disability.'" (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 969; accord, *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 971.) The plaintiff employee bears the burden of showing he or she was able to do the job with a reasonable accommodation. (*Green v. State of California, supra*, 42 Cal.4th at p. 262; *Lui*, at p. 971.)

"An employer's duty to reasonably accommodate an employee's disability is not triggered until the employer knows of the disability." (*Featherstone, supra*, 10 Cal.App.5th at pp. 1166-1167; accord, *Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 938 (*Cornell*) ["'[t]he employee bears the burden of giving the employer notice of his or her disability'"].)

FEHA also requires the employer to participate in a good faith interactive process with the disabled employee in order "to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee," to identify or formulate a reasonable accommodation crafted for that employee. (§ 12940, subd. (n).) The employer must engage in this process "to explore the alternatives to accommodate the disability. . . . Failure to engage in this process is a separate FEHA violation independent from an employer's failure to provide a reasonable disability accommodation, which is also a FEHA violation." (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424, citations omitted; accord, *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 600 (*Soria*).)

2. *Alvarez presented evidence Lifetouch failed to engage in the interactive process and accommodate her injury starting in October 2013*

Lifetouch does not dispute Alvarez was physically disabled within the meaning of FEHA as a result of her October 23, 2013 injury.[16] Nor does Lifetouch dispute Alvarez was capable of performing the essential functions of her job during the initial period from October 23, 2013 to August 20, 2014. During this period Alvarez performed her job responsibilities, but with pain. for at least two months Alvarez worked full time without any accommodation or efforts to accommodate her restrictions.

Lifetouch relies on McPherson's testimony Lifetouch was "able to accommodate" the restrictions in the October 23 work status report to enable Alvarez to continue working, but she does not provide any details as to accommodations made during the initial two-month period. Alvarez avers she continued to "take photographs, back to back with no breaks" and had "continued pain . . . each time [she] worked after the 2013 injury." According to Alvarez, no one from Lifetouch discussed with her during this initial period any options to accommodate her. Alvarez acknowledges Lifetouch classified her as "light duty," but no one

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[16] FEHA defines a physical disability to include a physiological condition that affects the "neurological" or "musculoskeletal" bodily systems (§ 12926, subd. (m)(1)(A)) and "[l]imits a major life activity" (*id.*, subd. (m)(1)(B)). A physiological condition "limits a major life activity if it makes the achievement of the major life activity difficult." (*Id.*, subd. (m)(1)(B)(ii).) Working is a major life activity. (*Id.*, subd. (m)(1)(B)(iii).)

at Lifetouch explained what this meant or changed her job responsibilities.

In his deposition, Marino stated he believed Alvarez received 20 hours per week during this initial period to provide coverage for Alvarez's photographic duties, but he admitted he did not engage in an interactive process with Alvarez, instead assuming Hagen in human resources did. Although Hagen averred she "assisted [Alvarez] in obtaining treatment through workers' compensation for her injury," Hagen never stated she engaged in the interactive process with Alvarez or provided extra hours to cover Alvarez's photographic duties during this period.

Viewing this evidence in the light most favorable to Alvarez, as we must, we conclude Alvarez has raised a triable issue of fact as to whether Lifetouch failed to engage in the interactive process or accommodate Alvarez's injury from at least October 23, 2013 until January 6, 2014. The fact Lifetouch later engaged in the interactive process and provided accommodations does not defeat Alvarez's claims for violation of FEHA during the initial period of her disability. (See *Swanson v. Morongo Unified School Dist., supra*, 232 Cal.App.4th at p. 969 ["A single failure to reasonably accommodate an employee may give rise to liability, despite other efforts at accommodation."].)

D. *Triable Issues of Fact Exist as to Alvarez's Disability Discrimination Claim*

FEHA prohibits an employer from terminating an employee based on the employee's protected status, including his or her physical disability. (§ 12940, subd. (a).) To prevail on her FEHA discrimination claim, Alvarez needed to show she "(1) suffered from a disability or was regarded as suffering from a disability,

(2) could perform the essential duties of a job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability." (*Glynn v. Superior Court* (2019) 42 Cal.App.5th 47, 53, fn. 1 (*Glynn*); accord, *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 744; *Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 159.)

"By its terms, section 12940 makes it clear that drawing distinctions on the basis of physical or mental disability is not forbidden discrimination *in itself*. Rather, drawing these distinctions is prohibited only if the adverse employment action occurs because of a disability *and* the disability would not prevent the employee from performing the essential duties of the job, at least not with reasonable accommodation. Therefore, in order to establish that a defendant employer has discriminated on the basis of disability in violation of the FEHA, the plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation." (*Green v. State of California, supra*, 42 Cal.4th at p. 262; accord, *McCormick v. Public Employees' Retirement System* (2019) 41 Cal.App.5th 428, 440 ["[A] plaintiff suing an employer for disability discrimination [under FEHA] must establish that he or she can, with or without reasonable accommodation, perform the essential duties of the job."].) The plaintiff bears the ultimate burden to prove she was qualified for the position she held "in the sense that . . . she is able to perform the essential duties of the position with or without reasonable accommodation." (*Green*, at p. 267; accord, *McCormick*, at p. 440; *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 716.)

There is no dispute Alvarez suffered from a disability and was terminated because of her disability. Rather, Lifetouch contends summary adjudication of Alvarez's discrimination claim was proper because Alvarez could not perform photography, an essential function of her job, with or without accommodation. We agree photography was an essential function of Alvarez's job, but Alvarez raised a triable issue of fact as to whether she could perform this function with a reasonable accommodation.

1. *Photography was an essential function of Alvarez's studio manager position*

Alvarez contends photography was not an essential function of her position at Lifetouch, arguing her duties as studio manager were "primarily management of staff, sales and guest safety," and "excluding photography [would] not render the job title meaningless." The evidence is to the contrary.

Section 12926, subdivision (f)(2) provides, "Evidence of whether a particular function is essential includes, but is not limited to, the following: [¶] (A) The employer's judgment as to which functions are essential. [¶] (B) Written job descriptions prepared before advertising or interviewing applicants for the job. [¶] (C) The amount of time spent on the job performing the function. [¶] (D) The consequences of not requiring the incumbent to perform the function. [¶] (E) The terms of a collective bargaining agreement. [¶] (F) The work experiences of past incumbents in the job. [¶] (G) The current work experience of incumbents in similar jobs."

Considering these factors, we agree with Lifetouch that Alvarez has not raised a triable issue whether photography was an essential function of her position. The undisputed evidence

reflects the following: Lifetouch considered photography to be an essential function of the studio manager position; photography was listed as a duty in the written job description for Alvarez's position; Alvarez spent 20 to 25 percent of her time (or more during the holidays) photographing; photography was part of Alvarez's position throughout her long tenure in the position of studio manager, including at different studios; and other Lifetouch studio managers performed photography duties. Alvarez's emphasis on her job title as "studio manager" does not alter the fact her studio manager position, as described and practiced, included photography.

2. *Alvarez Raised a Triable Issue of Fact Whether She Could Perform Photography with an Accommodation*

Alvarez contends she raised a triable issue whether she could perform photography with a reasonable accommodation. We agree. Because Alvarez has presented direct evidence Lifetouch was motived by her disability in its decision to terminate her, the typical *McDonnell Douglas*[17] burden-shifting framework does not apply here. (*Glynn, supra*, 42 Cal.App.5th at p. 53 ["[I]n disability discrimination cases, the threshold issue is 'whether there is direct evidence that the motive for the employer's conduct was related to the employee's physical or mental condition.'"]; *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 123 (*Wallace*) [where a disability discrimination case "involve[s] direct evidence of the role of the employee's actual or perceived disability in the employer's

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[17] *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802 (*McDonnell Douglas*).

decision to implement an adverse employment action," the analysis "focus[es] on whether the employee was able to perform essential job functions, whether there were reasonable accommodations that would have allowed the employee to perform those functions, and whether a reasonable accommodation would have imposed an undue hardship on the employer"].)

"'[A] plaintiff alleging disability discrimination can establish the requisite employer intent to discriminate by proving (1) the employer knew that plaintiff had a physical condition that limited a major life activity, or perceived him to have such a condition, and (2) the plaintiff's actual or perceived physical condition was a substantial motivating reason for the defendant's decision to subject the plaintiff to an adverse employment action.'" (*Glynn, supra*, 42 Cal.App.5th at p. 53, quoting *Wallace, supra*, 245 Cal.App.4th at p. 129.)

Lifetouch argues "Alvarez's injury permanently prevented her from being able to take photos (even with accommodations), which was necessary because [Alvarez] often worked at the Chino studio by herself." Lifetouch further asserts "there were no local positions that did not include photography as an essential job function," and that "Alvarez previously had indicated that she was unwilling to transfer" out of the local area.

Although Dr. Mann described Alvarez's disability as permanent as of May 19, 2015, Dr. Marlowe imposed temporary restrictions on Alvarez in his June 24, 2015 report. Further, Alvarez introduced a July 28, 2015 note from Dr. Marlowe[18]

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[18] Although Dr. Marlowe's note postdated Alvarez's termination by nearly a month, it is relevant to whether

indicating she could perform "camera work to tolerance," which Alvarez explained in her deposition meant she could take photographs until she "felt any pain." Further, Alvarez and Lifetouch dispute the extent to which Alvarez worked alone at the Chino studio, and hence the extent to which Alvarez could rely on others to assist in photographic duties (for example, pushing and pulling) when she began to experience pain. Indeed, Sunbury, as Lifetouch's person most knowledgeable regarding attempts to accommodate Alvarez from July 2014 to January 2015, testified Alvarez did not work alone at the Chino studio, and it was not true Alvarez was the only person working at the studio. Likewise, Alvarez declared she "almost always had staff" working with her in the Chino studio.

Further, to the extent the limited workload at the Chino studio made it impractical to schedule a second employee to assist Alvarez during episodes of pain, Alvarez has raised a triable issue of fact whether Lifetouch failed to consider transferring her to another studio where such an accommodation could be achieved. For example, Alvarez presented evidence Lifetouch arbitrarily limited its search of open positions upon her reinstatement to those supervised by Marino. Lifetouch has presented evidence only that "there were no local positions that did not include photography as an essential job function." But this did not mean there were no local positions involving photography where there was a second staff member who could assist with photographic duties and enable Alvarez to take required stretch breaks.

Alvarez's disability was total and permanent as claimed by Lifetouch.

E. *Alvarez Raised a Triable Issue as to Her FEHA Retaliation Claim*

The three-step *McDonnell Douglas* burden shifting framework applies to a retaliation claim under FEHA. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042; *Glynn, supra*, 42 Cal.App.5th at p. 55; *Cornell, supra*, 18 Cal.App.5th at p. 942.) "'[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.' [Citation.] If the plaintiff establishes a prima facie case, the burden shifts to the employer to identify 'a legitimate, nonretaliatory reason for the adverse employment action.' [Citation.] The burden then 'shifts back to the employee to prove intentional retaliation.'" (*Cornell*, at p. 942.)

Alvarez relies on Fard's September 3, 2014 e-mail to Putman and Sunbury "demanding that [Alvarez] be placed on light duty," Fard's July 9, 2015 letter threatening to sue Lifetouch if it did not reinstate her, and Alvarez's complaints to Lifetouch about her injury as evidence of protected activity. Lifetouch does not dispute Alvarez engaged in protected activity prior to her termination. Instead, Lifetouch contends Alvarez has not shown Lifetouch subjected her to any adverse employment action because Alvarez was reinstated shortly after termination "with full back pay, and received the same pay, hours, and

benefits."[19] We agree with Alvarez there is a triable issue of fact whether her position upon reinstatement constituted a demotion with inferior responsibilities, hours, and pay.

Both termination and demotion are adverse employment actions. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355; *Simers v. Los Angeles Times Communications LLC* (2018) 18 Cal.App.5th 1248, 1279 (*Simers*) ["[A] job reassignment may be an adverse employment action when it entails materially adverse consequences."]; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1004.) Lifetouch has provided no authority for the proposition a termination does not constitute an adverse employment action if the employee is later reinstated. Moreover, Alvarez presented a triable issue whether her reinstatement was itself an adverse employment action because Lifetouch changed the conditions of her employment. The job description and accompanying letter from McPherson show Alvarez's new position entailed no management duties, fewer hours, and no foreseeable raise in pay.[20] This is sufficient evidence of """materially adverse consequence""" to raise a triable

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[19] Although Lifetouch also moved for summary adjudication of Alvarez's retaliation claim based her inability to show she engaged in protected activity, it has abandoned this argument on appeal, instead only arguing there was no adverse employment action, and, even if there was, it terminated Alvarez for a legitimate, nondiscriminatory reason.

[20] Because Alvarez raised a triable issue whether her termination and reinstatement constituted adverse employment actions, we do not address her contentions the negative performance reviews she received and Sunbury's "surprise visit" were also adverse actions.

issue whether Alvarez's reassignment was an adverse employment action. (*Simers, supra*, 18 Cal.App.5th at p. 1280 [substantial evidence supported jury finding employee's reassignment was an adverse employment action where new position involved "'a change in status [and] a less distinguished title,'" and a "'significant change in job responsibilities'"].)

Lifetouch also contends any adverse employment action was done for a legitimate, nondiscriminatory purpose—because Alvarez "was unable to perform the essential job function of photography." However, as discussed, Alvarez has raised a triable issue whether she was able to perform photography with an accommodation. If Alvarez succeeds in proving she could perform photography with a reasonable accommodation, Lifetouch's articulated reason for Alvarez's termination and demotion would not be legitimate and nondiscriminatory. (*Glynn, supra*, 42 Cal.App.5th at p. 56 [employer's mistaken determination employee was "completely disabled and unable to work with or without an accommodation" did not constitute a legitimate, nondiscriminatory reason for his termination]; *Wallace, supra*, 245 Cal.App.4th at p. 115 ["an employer's mistaken belief that an employee is unable to . . . perform a job's essential functions should be borne by the employer, not the employee . . ."].)

F. *Alvarez Failed to Raise a Triable Issue of Fact as to Her Harassment Claims*

On appeal, Alvarez contends she has raised triable issues whether Marino harassed her due to her disability and age.[21] Lifetouch argues Alvarez failed to present evidence sufficient to demonstrate Marino's conduct was severe and pervasive under FEHA. We agree with Lifetouch.

Under FEHA, it is unlawful "[f]or an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition[, etc.,] to harass an employee . . . ." (§ 12940, subd. (j)(1).) "Actionable harassment consists of more than 'annoying or "merely offensive" comments in the workplace,' and it cannot be 'occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature.' [Citation.] Whether the harassment is sufficiently severe or pervasive to create a hostile work environment 'must be assessed from the "perspective of a reasonable person belonging to [same protected class as] the plaintiff."' [Citation.] In making this assessment, we consider several factors, including '"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."'"

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[21] Alvarez has abandoned her appeal of the trial court's judgment "with respect to . . . McPherson as to the claim of harassment." Further, Alvarez did not allege in her complaint Sunbury harassed her. We therefore limit our analysis to whether Marino harassed Alvarez.

(*Cornell, supra*, 18 Cal.App.5th at p. 940; accord, *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283 (*Lyle*); *Caldera v. Department of Corrections & Rehabilitation* (2018) 25 Cal.App.5th 31, 38 (*Caldera*).)[22] Whether the alleged conduct is sufficiently severe or pervasive is judged by the totality of circumstances. (*Caldera*, at p. 38.)

"'"[H]arassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for 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. . . . These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. . . . This significant distinction underlies the differential treatment of harassment and discrimination in the FEHA."'" (*Roby v. McKesson Corp.*

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[22] Effective January 1, 2019, the Legislature amended the Government Code to add section 12923, which in part altered the standard for unlawful harassment under FEHA. (See § 12923, subds. (b) [stating "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment" and rejecting Ninth Circuit decision to the contrary] & (d) [stating standard "should not vary by type of workplace" and rejecting as contrary *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191].) The parties do not address whether the amendment applies to this case, and neither party contends the amendment alters the applicable standard as relevant to the issues on appeal. Under either the pre-amendment or post-amendment standard, Alvarez's harassment claims do not survive.

(2009) 47 Cal.4th 686, 707; accord, *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1407 ["A disciplinary suspension does not constitute harassment under FEHA as a matter of law."]; *Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 879 ["The [employer's] statements and personnel decisions concerning Thompson do not create a material factual dispute as to harassment because '[h]arassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job.'"].)

There is no dispute Marino's conduct caused Alvarez emotional distress, but the evidence does not show behavior that a reasonable person working under the same conditions """would [have found] severely hostile or abusive."""" (*Lyle, supra*, 38 Cal.4th at pp. 283, 284 ["[A] plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception."].)

Alvarez relies on Marino's conduct at the September 4, 2014 meeting "staring [Alvarez] down," giving her the PIF in "an aggressive manner," and scolding her for borrowing an employee from the wrong studio to assist with sales. After Marino resumed supervision of Alvarez in January 2015, he told her he was "going to be harder and tou[g]her on [her]," that he was "watching [her]," and that he told the department store's managers and Alvarez's team members "to watch [her] too." Marino also criticized Alvarez for the amount of overtime her studio was using and for not having enough coverage when an employee went home sick. Marino "yelled" at Alvarez and took a "sharp

and aggressive" tone. After her reinstatement Marino gave Alvarez a negative review based on her performance at the Chino studio.

There is no evidence Marino's conduct on these occasions was motivated by Alvarez's disability; rather, the evidence suggests Marino was dissatisfied with the performance of the Chino studio, for which Alvarez was manager. Alvarez does not meaningfully dispute the basis of the PIF or Marino's negative review. Moreover, ""'[c]ommonly necessary personnel management actions . . . do not come within the meaning of harassment.'"" (*Roby v. McKesson Corp., supra*, 47 Cal.4th at p. 707.) Here, the issuance of the PIF, the negative review, and Marino's criticisms regarding sales, overtime, and employee coverage all constitute commonly necessary personnel management actions, which, even if delivered in a harsh or rude manner, do not support Alvarez's claim for disability harassment.

Alvarez identifies other conduct by Marino suggesting a nexus between his actions and her disability. Before Alvarez was terminated, Marino "laugh[ed] and joke[d] . . . that [Alvarez] could work in Minnesota or work for another part of Lifetouch." Marino also told Piero "[Alvarez] wasn't doing her job," said Alvarez might be fired if she did not end her light duty, and asked Piero to inform him if she heard Alvarez complain about pain. At the July 29, 2015 meeting to discuss Alvarez's reinstatement, Marino laughed and said, "Don't worry [Alvarez], we're not going to fire you again." When preparing for Alvarez to assume her new position, Marino informed Piero, "We are going to get a disabled worker from Chino," rolled his eyes, said he had

"had a fucking bad day," and told Piero to adjust items in the studio drawers "to be 'SSDI' approved."[23]

Although Marino may have acted based on Alvarez's disability on these occasions, these events do not constitute severe or pervasive conduct under FEHA. Marino's statements may have been boorish and hurtful to Alvarez, but "[FEHA] is not a civility code and is '"not designed to rid the workplace of vulgarity."'" (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 92; accord, *Lyle, supra*, 38 Cal.4th at p. 295 [FEHA "does not outlaw . . . language or conduct that merely offends."].) None of Marino's comments was "explicitly derogatory or threatening." (*Cornell, supra*, 18 Cal.App.5th at p. 940 ["Four comments over several months does not establish a pattern of routine harassment creating a hostile work environment, particularly given that the comments were not extreme."].) "[W]hen the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions." (*Lyle*, at p. 284.) Alvarez has not raised a triable issue whether Marino's conduct was sufficiently severe or persuasive to constitute harassment based on her disability.

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[23] Alvarez also contends that after her performance review, Marino "ignored [Alvarez's] emails and calls to get time off to see [her] chiropractor." She does not say when or how many times this occurred or whether it prevented her from seeing the chiropractor. "Her vagueness about this point and the circumstances surrounding the incident[] d[oes] not aid in showing" Marino's actions in this regard "contributed to an objectively abusive or hostile work environment." (*Lyle, supra*, 38 Cal.4th at p. 291.)

Summary adjudication of Alvarez's age harassment claim was also proper. Alvarez forfeited her claim of harassment based on age by failing to argue it in her opposition to Lifetouch's motion for summary judgment. (*Venice Coalition to Preserve Unique Community Character v. City of Los Angeles* (2019) 31 Cal.App.5th 42, 54 [party forfeited issue by failing to "include the underlying facts to support [the] allegation in their separate statement of facts opposing summary judgment"]; *LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 Cal.App.4th 977, 983 [Concluding in affirming grant of summary judgment, "Appellant is not entitled to raise for the first time on appeal a theory that involves a controverted factual situation not put in issue below."].) Even if Alvarez had not forfeited this claim, it fails because the asserted behavior was not severe or pervasive. Marino's single age-related statement at a manager's meeting to those in attendance that Alvarez and another long-time Lifetouch employee had "over a half century with the company" between them, even if taken in the worst light, does not rise to the level of harassment, and there is no evidence any other conduct by Marino was motivated by Alvarez's age. Though Alvarez relies on her general testimony that four over-40-year-old Lifetouch workers were terminated after injury-related complaints, Alvarez does not identify any harassing conduct involved in those cases, nor does she aver that Marino was involved in those employment actions.

G. *Alvarez Raised a Triable Issue Whether Lifetouch Interfered with Her CFRA Rights*

Alvarez contends she raised a triable issue whether Lifetouch interfered with her CFRA rights by failing to inform

her of the availability of CFRA leave upon receiving notice of her work restrictions. Lifetouch responds there is no evidence Alvarez made a request that Lifetouch denied. Alvarez's contention has merit.

The CFRA "'is intended to give employees an opportunity to take leave from work for certain personal or family medical reasons without jeopardizing job security.'" (*Soria, supra*, 5 Cal.App.5th at p. 600; accord, *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 233 (*Moore*).) The CFRA provides that a qualified employee of an employer with 50 or more employees may take up to 12 weeks of family care and medical leave in any 12-month period. (§ 12945.2, subd. (a).) The act prohibits an employer from taking any adverse employment action against an individual because of his or her exercise of the right to family care and medical leave. (*Id.*, subd. (*l*)(1);[24] *Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 560 (*Bareno*); *Soria*, at pp. 600-601.)

"A CFRA interference claim "'consists of the following elements: (1) the employee's entitlement to CFRA leave rights; and (2) the employer's interference with or denial of those rights.'"" (*Soria, supra*, 5 Cal.App.5th at p. 601; accord, *Moore, supra*, 248 Cal.App.4th at p. 250.) "An interference claim under CFRA does not invoke the burden shifting analysis of the *McDonnell Douglas* test." (*Moore*, at p. 250; accord, *Faust v.*

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[24] Section 12945.2, subdivision (*l*), provides, "It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of . . . [¶] (1) [a]n individual's exercise of the right to family care and medical leave . . . ."

California Portland Cement Co. (2007) 150 Cal.App.4th 864, 879 (*Faust*) ["'[T]here is no room for a *McDonnell Douglas* type of pretext analysis when evaluating an "interference" claim under [CFRA].'"].) "Rather, such a claim requires only that the employer deny the employee's entitlement to CFRA-qualifying leave." (*Moore*, at p. 250; accord, *Faust*, at p. 879.)

Under regulations promulgated pursuant to the CFRA, "to request CFRA leave an employee 'shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA . . . ; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. . . . The employer should inquire further of the employee if necessary to determine whether the employee is requesting CFRA leave and to obtain necessary information concerning the leave (i.e., commencement date, expected duration, and other permissible information).'" (*Soria, supra*, 5 Cal.App.5th at p. 602, quoting Cal. Code Regs., tit. 2, § 11091, subd. (a)(1).)

"Employers subject to the CFRA are required to provide notice to their employees of the right to request CFRA [leave]." (*Faust, supra*, 150 Cal.App.4th at p. 879; see Cal. Code Regs., tit. 2, § 11095 ["Every employer covered by the CFRA . . . is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Department of Fair Employment and Housing."].)

Lifetouch does not dispute Alvarez was entitled to CFRA leave due to her injury. Rather, Lifetouch contends Alvarez failed to raise a triable issue of fact whether Lifetouch interfered with her rights because there is no evidence Lifetouch ever denied a request for leave. Alvarez asserts Lifetouch was placed on notice of her need for leave on October 23, 2013, when Lifetouch received the work status report restricting Alvarez's ability to work and providing, "In the event that your employee has restrictions and no modified work is made available, employer must keep employee off work unless, and until, such modified work is made available." Alvarez contends that because Lifetouch did not modify Alvarez's work, she was entitled to CFRA leave, and Lifetouch interfered with her rights by failing "to inquire further to determine whether the absence was likely to qualify for CFRA protection."

We agree that at least from October 23, 2013 to January 6, 2014, when Alvarez's restrictions were lifted, Lifetouch had notice that, in the absence of modified work, Alvarez was to stay off work. The work status report also "state[d] the reason the leave [was] needed" (Cal. Code Regs., tit. 2, § 11091, subd. (a)(1)), namely the diagnosed injuries to Alvarez's neck and right arm and shoulder. Lifetouch's argument "[n]either Alvarez nor her physician indicated that she needed medical leave until October 2015" is belied by the October 23, 2013 work status report. Further, an employee need not directly request leave from her employer in order to trigger an employer's duties under the CFRA. (See *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1257 ["In a case involving a medical emergency, notice on a hospital's preprinted form that an employee was hospitalized and unable to work may be sufficient

to inform an employer that the employee might have suffered a serious medical condition under CFRA, and of the timing and duration of the necessary leave."].)

Moreover, Lifetouch failed as of October 23, 2013, upon learning of Alvarez's restrictions but failing to provide modified work, to inquire further of Alvarez to determine her needs. (See *Soria, supra*, 5 Cal.App.5th at p. 603 [triable issue precluded summary judgment where employee's "statements concerning time off for surgery were sufficient to trigger [employer's] obligation to inquire further into the details of [employee's] request"]; Cal. Code Regs., tit. 2, § 11091, subd. (a)(1) ["The employer should inquire further of the employee if necessary to determine whether the employee is requesting CFRA leave and to obtain necessary information concerning the leave (i.e., commencement date, expected duration, and other permissible information)."].)

Under these circumstances, Alvarez has raised a triable issue whether Lifetouch interfered with her CFRA leave rights.

H. *Alvarez Failed To Raise a Triable Issue Whether Lifetouch Retaliated Against Her for Exercising Her CFRA Rights*

Alvarez asserts she raised a triable issue whether Lifetouch retaliated against her for exercising her CFRA rights. She did not.

In order to prove a cause of action for retaliation in violation of CFRA, the plaintiff must prove: """(1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA [leave]; (3) the plaintiff exercised [his or] her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such

as termination, fine, or suspension, because of [the] exercise of [his or] her right to CFRA [leave].'"' (*Bareno, supra*, 7 Cal.App.5th at p. 560; accord, *Soria, supra*, 5 Cal.App.5th at p. 604.)

The *McDonnell Douglas* burden-shifting analysis applicable to discrimination claims applies to a CFRA retaliation claim. (*Bareno, supra*, 7 Cal.App.5th at p. 560; *Soria*, *supra*, 5 Cal.App.5th at p. 604; *Moore*, *supra*, 248 Cal.App.4th at pp. 239, 248, 250; *Faust, supra*, 150 Cal.App.4th at p. 885.) As with FEHA claims, an employer may move for summary adjudication of a CFRA retaliation claim by presenting evidence that it acted for a legitimate, nonretaliatory reason. (*Bareno*, at p. 560; *Faust*, at p. 885.) If the employer satisfies this burden, the burden shifts to the employee to show that the employer's stated reasons were untrue or pretextual and the employer's decision was retaliatory. (*Bareno*, at p. 560; *Faust*, at p. 885.)

On appeal, Alvarez only mentions CFRA retaliation in the heading for the legal section discussing retaliation under FEHA. Because she fails to provide any legal argument or citation to the record to support this argument, she has forfeited this issue on appeal. (*Martine v. Heavenly Valley Limited Partnership* (2018) 27 Cal.App.5th 715, 729 [appellant's arguments were "forfeited for failure to supply cogent and supported argument with citations to the record affirmatively demonstrating error"]; *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074 ["'We are not required to search the record to ascertain whether it contains support for [appellant's] contentions.'"].)

Even if Alvarez had not forfeited this argument, it fails on the merits. Alvarez did not exercise her CFRA leave rights until October 2015. Alvarez has not identified any adverse

employment action subsequent to her exercise of her rights. Thus, she has not raised a triable issue whether she ""suffered an adverse employment action . . . because of [the] exercise of her right to CFRA [leave]."" (*Bareno*, *supra*, 7 Cal.App.5th at p. 560.)

I. *Summary Adjudication of Failure To Prevent Discrimination, Harassment, and Retaliation*

Section 12940, subdivision (k), provides it is an unlawful employment practice for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." Further, "retaliation is a form of discrimination actionable under section 12940, subdivision (k)." (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1239, disapproved of on another ground by *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158.)

To prove a claim for failure to prevent, a plaintiff must show (1) plaintiff was subjected to discrimination, retaliation, or harassment; (2) the defendant failed to take all reasonable steps to prevent discrimination, retaliation, or harassment; and (3) the failure caused plaintiff to suffer injury, damage, loss, or harm. (*Caldera, supra*, 25 Cal.App.5th at pp. 43-44 [setting forth elements as to failure to prevent harassment claim].)

Alvarez contends she complained about Marino's conduct, but Lifetouch failed to take steps to prevent his discriminatory, retaliatory, and harassing conduct. Lifetouch argues in response Alvarez's claim fails because it is derivative of her other claims, which lack merit. Lifetouch is correct a claim for failure to prevent discrimination, retaliation, or harassment is derivative of a claim for the underlying violation. (See *Okorie v. Los Angeles*

Unified School Dist. (2017) 14 Cal.App.5th 574, 597; *Featherstone, supra*, 10 Cal.App.5th at p. 1166.) However, because there are triable issues of fact as to Alvarez's claims for discrimination and retaliation, her claim for failure to prevent (as to discrimination and retaliation) likewise survives summary adjudication. (See *Caldera, supra*, 25 Cal.App.5th at p. 44 [upholding jury verdict because defendants' conduct was severe or pervasive and employer failed to take all reasonable steps to prevent harassment].)

J. *Triable Issues of Fact Exist as to Alvarez's Wrongful Termination Claims*

Alvarez contends Lifetouch terminated her employment in violation of public policy in retaliation for her complaints about Lifetouch's failure to accommodate Alvarez's disability in 2014 and 2015. Neither Alvarez nor Lifetouch separately addresses the wrongful termination claims. For the same reason the trial court erred in granting summary adjudication of Alvarez's retaliation claim, it erred in granting summary adjudication of Alvarez's wrongful termination claims.[25]

"The elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public

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[25] Alvarez's 10th cause of action for wrongful termination in violation of FEHA is based on FEHA's public policy not to discriminate on the basis of a disability. There are also material issues of fact relating to this claim as discussed with respect to Alvarez's disability discrimination claim.

policy, and (4) the discharge caused the plaintiff harm." (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154 (*Yau*); accord, *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 641.) "The central assertion of a claim of wrongful termination in violation of public policy is that the employer's motives for terminating the employee are so contrary to fundamental norms that the termination inflicted an injury sounding in tort." (*Roby v. McKesson Corp., supra*, 47 Cal.4th at p. 702; see *Tameny v. Atlantic Richfield Co*. (1980) 27 Cal.3d 167, 176.) Protected conduct includes exercising a statutory right or privilege. (*Yau*, at p. 155.) As discussed, there is a question of fact whether Lifetouch terminated Alvarez in retaliation for her exercise of her right under FEHA to accommodate her injuries.

K. *Summary Adjudication of Alvarez's Constructive Discharge Claim Was Proper*

Alvarez contends she was constructively discharged in July 2016, when her working conditions became intolerable. She supports this contention with the testimony of Dr. Tribble that during her medical leave she was experiencing stress and anxiety resulting from her concern about returning to work with Marino as her supervisor. Lifetouch argues this claim fails because Alvarez cannot point to any interaction with Lifetouch that made her working conditions intolerable. We agree with Lifetouch.

Constructive discharge occurs "when the employer coerces the employee's resignation, either by creating working conditions that are intolerable under an objective standard, or by failing to remedy objectively intolerable working conditions that actually are known to the employer." (*Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 737; accord, *Turner v. Anheuser-Busch,*

Inc. (1994) 7 Cal.4th 1238, 1245 (*Turner*); *Simers, supra*, 18 Cal.App.5th at p. 1269.) "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job . . . ." (*Turner*, at p. 1246.)

At the time of Alvarez's asserted constructive discharge in July 2016, she was on medical leave. She does not point to any interaction with Marino during that period that made her working conditions intolerable. Rather, it appears her argument is that returning to work would be intolerable because she would need to continue to report to Marino. Although the record reflects Marino was insensitive and made statements that upset Alvarez a year earlier (including at the July 29, 2015 meeting), Marino's conduct did not rise to the level of disability harassment. Nor were they objectively "extraordinary and egregious" to a degree "a reasonable employee in [Alvarez's] position ""would have felt compelled to resign."""" (*Turner, supra*, 7 Cal.4th at pp. 1246-1247.)

L. *The Trial Court Did Not Abuse Its Discretion in Denying Alvarez's Motion for Reconsideration*

Alvarez contends on appeal the trial court erred in failing to grant her motion for reconsideration given pending discovery at the time of Lifetouch's summary judgment motion and Alvarez's presentation of new evidence. Alvarez's contention lacks merit.

We review the trial court's ruling on a motion for reconsideration for an abuse of discretion. (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1338; *New York Times Co. v.*

Superior Court (2005) 135 Cal.App.4th 206, 212.) The trial court did not abuse its discretion in concluding the proper procedural mechanism for Alvarez to have requested a continuance of the hearing on Lifetouch's motion for summary judgment while discovery was pending would have been to request a continuance under section 437c, subdivision (h), which Alvarez did not do.[26] Further, in the context of Code of Civil Procedure section 437c, subdivision (h), "'[t]he party seeking the continuance must justify the need, by detailing both the particular essential facts that may exist and the specific reasons why they cannot then be presented.'" (*Chavez v. 24 Hour Fitness USA, Inc*. (2015) 238 Cal.App.4th 632, 643; accord, *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.) As the trial court found, Alvarez failed to set forth the essential facts she believed existed and how the facts would bolster her claims.

In addition, Alvarez has failed to show on appeal how her motion for reconsideration was properly "based upon new or different facts, circumstances, or law." (Code Civ. Proc., § 1008, subd. (a).) Rather, in a conclusory manner Alvarez asserts "[t]here was additional new evidence to justify reconsideration such as many job postings in 2015, Chino employees and CCMI produced internal emails." Alvarez fails to cite to any specific evidence that was "new or different" that would have bolstered

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[26] Section 437c, subdivision (h), provides, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just."

her claims. Nor does she clarify her argument as to "Chino employees" or describe what internal e-mails were relevant. Instead, Alvarez cites generally to the more than 300 pages of evidence she attached to her motion for reconsideration.

"'"To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.]' [Citation.] 'Mere suggestions of error without supporting argument or authority other than general abstract principles do not properly present grounds for appellate review.' [Citation.] 'Hence, conclusory claims of error will fail.'" (*Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1457 (*Multani*); accord, *Rojas v. Platinum Auto Group, Inc.* (2013) 212 Cal.App.4th 997, 1000, fn. 3 (*Rojas*).) Alvarez's conclusory claim of error fails.

M. *The Trial Court Abused Its Discretion by Requiring Alvarez To Pay 50 Percent of the Court-ordered Discovery Referee's Fees*

Alvarez appeals from the trial court's April 7, April 13, and September 19, 2017 orders allocating 50 percent of the discovery referee's fees to Alvarez despite her inability to pay the fees given her financial condition.[27] Alvarez is correct as to some of the fees

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[27] Alvarez also states in conclusory terms she is appealing the April 7, 2017 order appointing the discovery referee and a later order that depositions be taken in Minnesota with the referee, but she fails to provide any legal argument or citation to the record. We therefore decline to reach the question whether the court should have appointed the referee, instead focusing on

allocated in the court's September 19, 2017 order, but we affirm the court's April 7 and 13, 2017 orders.

1. *The trial court's rulings*

On March 15, 2017, following two days of Alvarez's deposition, Lifetouch moved the court to appoint a private discovery referee for all purposes in light of asserted disruption in the deposition by Alvarez's attorney, Fard, including by her taking Alvarez out of the deposition room while questions were pending, interrupting the questions and Alvarez's answers, objecting to questions on inappropriate grounds, and repeatedly instructing Alvarez not to answer. Alvarez opposed the motion and submitted a declaration stating, "I object to appointment of a referee due to my financial hardship and lack of funds." On April 7, 2017 the court granted the motion, but set the matter for a continued status hearing on April 13 to address the scope of the appointment. The court found Alvarez failed to meet her burden to demonstrate financial hardship based on the single conclusory statement in her declaration. It instructed the parties to nominate potential referees and to estimate the number of hours of depositions that would be needed.

Before the April 13, 2017 status hearing, Alvarez filed a supplemental opposition requesting the court allocate no more than five percent of the referee fees to her, up to a maximum of $3,000. Alvarez submitted a declaration stating she had been unemployed for nine months and was still looking for work. Further, she had job interviews for positions that would pay $12

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allocation of the costs. (See *Multani, supra*, 215 Cal.App.4th at p. 1457; *Rojas, supra*, 212 Cal.App.4th at p. 1000, fn. 3.)

per hour. Alvarez stated her husband earned approximately $27,000 the previous year. She added that if she were ordered to pay a greater amount of referee fees, she might have to mortgage her home to continue prosecuting the case.[28]

At the hearing on April 13 the court inquired as to the percentage share Lifetouch was prepared to pay, and Lifetouch's attorney, Elizabeth Murphy, responded 50 percent. The court appointed retired superior court judge, Suzanne Bruegera, whom Alvarez had proposed, to serve as the referee. The court ordered a 50-50 split of Judge Bruegera's fees for one additional day of Alvarez's deposition, reasoning the significantly limited scope of Judge Bruegera's involvement would keep Alvarez's share of fees under $3,500, close to what Alvarez had indicated she could pay. The trial court stated its hope the parties would not need a referee for the additional depositions. When Fard objected to the split, the court noted Alvarez failed to provide specifics about her financial condition in her initial motion.

On June 5, 2017, after Fard took Sunbury's deposition, Alvarez moved ex parte for an order appointing Judge Bruegera to referee all the remaining depositions in the case based on argued disruption by Murphy, with Lifetouch to bear 90 percent of the referee fees. Alvarez referenced Alvarez's prior declaration, stating she "cannot afford the expense of a private

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[28] Alvarez purported to quote two paragraphs of her prior declaration to show she had previously provided detail on her financial condition, including that she was unemployed for nine months. However, Alvarez's March 22, 2017 declaration did not contain the detail Alvarez claimed she had included as to her financial condition.

referee." Lifetouch supported Bruegera's appointment but argued for a 50-50 split. The court granted Alvarez's application in part, ordering Judge Bruegera to referee the three scheduled depositions of Lifetouch's designated persons most qualified (PMQ), but the court ordered a 50-50 allocation of the referee fees, reasoning the attorneys for both parties were responsible for the deposition problems. The court found, "[T]here's enough fault going both ways that I agree that a discovery referee may be necessary to just get through these things in an expeditious way . . . ." The court noted Fard had in part caused the need for a referee by the manner in which she asked questions, including by asking the same question seven times, which the court described as "harassment."[29]

During subsequent wrangling over the schedule and scope of the depositions of Lifetouch's three PMQ witnesses, Lifetouch agreed at Judge Bruegera's suggestion to pay 80 percent of the cost for the three witnesses. Lifetouch refused, however, to pay more than half of Bruegera's fees for the McPherson deposition, which Lifetouch considered cumulative, and for Lifetouch witness Deb Cross. Alvarez ultimately deposed McPherson and Cross in Minnesota on August 22 and 23, 2017.[30] Judge Bruegera

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[29] On July 5, 2017 Alvarez filed another ex parte application to schedule the depositions of McPherson and Deb Cross and to reallocate 90 percent of the referee fees to Lifetouch. The court denied the application for lack of exigent circumstances. Alvarez does not challenge the trial court's denial of this ex parte application.

[30] On August 18, 2017 the trial court granted Alvarez's ex parte application to advance her motion to reapportion the

attended the deposition in person. She did not charge the parties for her travel time; however, she billed $9,900 for the travel costs and deposition time.

On August 25, 2017 Alvarez filed a motion for reapportionment of $26,025 of referee fees and costs to Lifetouch as part of a proposed 75-25 allocation of fees, including fees charged by Judge Bruegera for six depositions that had been taken and two that were scheduled.[31] Alvarez highlighted an e-mail from Judge Bruegera to counsel referencing Lifetouch's prior agreement to an 80-20 fee split and proposing a 75-25 split for the upcoming depositions. Alvarez argued her share of referee fees by the date of the motion was $13,000, she was expecting an additional $5,000 bill for depositions Alvarez had taken in Minnesota, and Lifetouch had refused to deviate from the court's prior order of a 50-50 split. On September 19, 2017 the trial court denied Alvarez's motion.[32]

2. *Governing law*

Code of Civil Procedure section 639, subdivision (a)(5), provides the trial court may appoint a referee to hear and decide

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referee fees. However, the McPherson and Cross depositions proceeded prior to the hearing on the motion.

[31] Alvarez does not clarify in her motion for which depositions she sought to reallocate the referee fees, for example, whether it included her initial payment of half of the fees for her own deposition. Likewise, Alvarez does not explain how she calculated the $26,025 she requested Lifetouch pay as part of a revised allocation.

[32] The record does not contain a transcript of this hearing.

discovery motions and to apportion payment of the referee's fees among the parties. Code of Civil Procedure section 639, subdivision (d)(6)(A), requires the trial court to determine whether any party "has established an economic inability to pay a pro rata share of the referee's fee." "[I]n determining whether a party has established an inability to pay the fees, [the court] shall consider, among other things, the estimated cost of the referral and the impact of the proposed fees on the party's ability to proceed with the litigation." (Code Civ. Proc., § 639, subd. (d)(6)(B).) In addition, Code of Civil Procedure section 645.1, subdivision (b), provides the court, in appointing a referee under section 639, "may order the parties to pay the fees of referees . . . in any manner determined by the court to be fair and reasonable, including an apportionment of the fees among the parties."

We review the trial court's order allocating discovery referee fees for an abuse of discretion. The courts have found an abuse of discretion where the trial court fails to consider a party's financial inability to pay the costs of the referee. (See *McDonald v. Superior Court* (1994) 22 Cal.App.4th 364, 370 [trial court abused discretion in apportioning referee's fees equally despite plaintiff's declaration stating she was homeless and trying to find employment]; *Solorzano v. Superior Court* (1993) 18 Cal.App.4th 603, 617 [trial court abused discretion in requiring indigent plaintiffs to share equally in costs of discovery referee].)

However, a court should consider other alternatives if only one party has the ability to pay the costs of a discovery referee. (*Taggares v. Superior Court* (1998) 62 Cal.App.4th 94, 105 (*Taggares*); *DeBlase v. Superior Court* (1996) 41 Cal.App.4th 1279, 1285 (*DeBlase*).) As the Court of Appeal cautioned in *Taggares*, "[I]f only one party pays for the reference, there is a

chilling effect on the exercise of that party's discovery rights and a corresponding disincentive on the opposing party to cooperate in resolving disputes among themselves with a modicum of outside intervention." (*Taggares*, at p. 105; accord, *DeBlase*, at p. 1285 ["[B]efore ordering the nonindigent party provisionally to bear more than half of a referee's fee, a court should consider the inappropriateness, as a general proposition, of a court's requiring one litigant to subsidize another merely because the latter needs a subsidy."].)

The *Taggares* court suggested other options where only one party has an ability to pay referee costs include: "(1) If the parties agree, permitting them to select from a panel of attorneys who have agreed to serve pro bono in matters of this nature, or from a court-approved list of mediators and/or arbitrators willing to serve without charge; (2) require the parties to select from a court-approved list of retired judges willing to volunteer services in indigent cases; or (3) refer to the presiding judge for assignment to an available department or assigned judge." (*Taggares, supra*, 62 Cal.App.4th at p. 106; accord, *DeBlase, supra*, 41 Cal.App.4th at p. 1286 [court should consider cost-free alternatives, including transferring discovery disputes to another judicial officer].)

3. *The trial court abused its discretion in ordering a 50-50 allocation of fees in its September 19, 2017 order*

With respect to the trial court's April 7, 2017 order apportioning the costs of the discovery referee evenly between the parties, the court did not abuse its discretion because at the time the court only had before it Alvarez's conclusory statement that she objected to the appointment of the referee due to her

"financial hardship and lack of funds." Nor was the court's April 13, 2017 order confirming the 50-50 split but limiting the appointment of the referee to a single day of Alvarez's deposition an abuse of discretion. By this date Alvarez had submitted a supplemental declaration with more details about her financial condition, but the trial court acted within its discretion in concluding this information was not included in her initial motion and the costs of a single day of deposition were within Alvarez's means.[33]

However, the trial court abused its discretion in not considering Alvarez's ability to pay in ruling on Alvarez's August 25, 2017 motion to reapportion referee fees. Although Alvarez's motion did not clarify which eight depositions were the subject of the motion, the motion specifically referenced the McPherson and Cross depositions that had taken place and two scheduled depositions. The court denied Alvarez's request to deviate from its prior 50-50 split of referee costs despite additional information detailing Alvarez's dire financial condition, including that she was unemployed and her husband had only earned $27,000 the previous year. Although the trial court could properly consider the extent to which Fard by her conduct contributed to the number of hours of depositions in making its determination of an allocation that is "fair and reasonable" (Code Civ. Proc., § 645.1), the court was required to

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[33] Alvarez does not appeal from the June 5, 2017 order denying her request to impose 90 percent of the costs of the referee on Lifetouch for the three upcoming Lifetouch PMQ depositions. Further, Lifetouch subsequently agreed to pay 80 percent of the costs of the three witnesses.

determine Alvarez's ability to pay a pro rata share of the referee's fee and the impact of the fees on Alvarez's ability to proceed with the litigation.[34] (Code Civ. Proc., § 639, subd. (d)(6)(B); see *McDonald v. Superior Court, supra*, 22 Cal.App.4th at p. 370; *Solorzano v. Superior Court, supra*, 18 Cal.App.4th at p. 617.)

We reverse the trial court's September 19, 2017 order to the extent the court denied Alvarez's request to apportion a greater share of the McPherson and Cross depositions and the two depositions scheduled after August 25, 2017. We remand to the trial court to consider a fair and reasonable allocation in light of the detailed declaration Alvarez provided showing her inability to pay a significant amount of fees. However, with respect to other depositions that were taken before Alvarez filed her August 25 motion, Alvarez forfeited any challenge to the allocation of referee fees for those depositions by not objecting prior to the depositions. Had Alvarez objected to the 50-50 allocation prior to the date the depositions were taken, the court could have fashioned a remedy other than requiring Lifetouch to pay 80 percent of the costs of the referee, including appointing a referee who would be willing to serve without charge or having another

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[34] As a result of Alvarez's failure to provide a transcript on appeal, we cannot discern the trial court's reasoning in requiring Alverez to pay 50 percent of the referee's fees. It is Alvarez's burden on appeal to produce an adequate record to support her claim of error. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141; *Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 935.) However, the trial court's refusal to deviate from its prior order that Alvarez pay 50 percent of the referee costs shows the court was not adequately considering her inability to pay.

judicial officer monitor the deposition. (See *Taggares, supra*, 62 Cal.App.4th at p. 106; *DeBlase, supra*, 41 Cal.App.4th at p. 1286.)

N. *The Trial Court Did Not Abuse Its Discretion by Requiring Alvarez To Pay for Her Own Forensic Imaging*

Alvarez contends the trial court abused its discretion in denying her request to impose on Lifetouch the cost of forensic imaging of Lifetouch's computers and electronic devices because there was evidence Lifetouch's witnesses had deleted or concealed documents. On the record before us, we find no abuse of discretion.

1. *Procedural background*

On August 10, 2017 Alvarez filed a motion to compel Lifetouch and multiple individuals to produce their laptop computers and all electronic devices to enable Alvarez to perform forensic imaging. Alvarez argued production of the computers and other devices was necessary because Lifetouch and the individual witnesses deleted e-mails from the relevant periods, refused to produce required documents or produced documents that were not in a usable format, and destroyed or concealed relevant data. Alvarez also argued that because Lifetouch had destroyed evidence, it should pay for the imaging as a sanction.

In its opposition, Lifetouch responded that it had produced over 8,000 pages of documents, including hundreds of e-mails, and had not concealed or destroyed any documents. It submitted a declaration from Murphy outlining extensive discovery provided by Lifetouch and a declaration from a Lifetouch systems engineer stating he had confirmed litigation holds had been placed on the principal witnesses' e-mail accounts in 2013 (and as

to Marino in 2015) to prevent them from deleting any e-mails from the relevant time periods. Lifetouch also indicated it had offered to produce the requested computers and electronic devices upon agreement on a third party forensic expert and forensic protocol, but it objected to paying for the costs of forensic imaging.

On September 5, 2017 the trial court granted Alvarez's motion to compel production of forensic imaging of Lifetouch's computers, but it denied Alvarez's request that Lifetouch pay for the forensic expert.

2. *Alvarez has failed to show an abuse of discretion*

"We review the trial court's grant or denial of a motion to compel discovery for an abuse of discretion. [Citation.] The statutory scheme vests trial courts with "'wide discretion'" to allow or prohibit discovery." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 540; accord, *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186.) In support of her argument the trial court abused its discretion in refusing to require Lifetouch to pay for her forensic imaging expert, Alvarez simply states, "Despite the overwhelming evidence the court forced [Alvarez] to pay for all such costs which she could not afford." Alvarez lists the record pages she presumably expects this court to scour to assess whether Lifetouch concealed evidence, without discussing the evidence she contends supports her position.[35] Alvarez also fails to provide any legal authority to support her position, which runs

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[35] Alvarez notes McPherson handed thousands of pages of personnel files to Lifetouch's in-house counsel, but it is unclear how this supports her argument.

counter to the general rule that "[w]hen a party demands discovery involving significant 'special attendant' costs beyond those typically involved in responding to routine discovery, the demanding party should bear those costs." (*San Diego Unified Port Dist. v. Douglas E. Barnhart, Inc.* (2002) 95 Cal.App.4th 1400, 1405.)

As discussed, "'suggestions of error without supporting argument or authority other than general abstract principles do not properly present grounds for appellate review.'" (*Multani, supra*, 215 Cal.App.4th at p. 1457; accord, *Rojas, supra*, 212 Cal.App.4th at p. 1000, fn. 3.) On the record before us we do not find an abuse of discretion.

O. *We Reverse the Trial Court's Award of Costs (B289910)*

Code of Civil Procedure section 998, subdivision (c)(1), provides, "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer." Alvarez contends the trial court erred in failing to apply the holding in *Williams, supra*, 61 Cal.4th at page 99, 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," to costs sought under Code of Civil Procedure section 998. In light of our reversal of the judgment granting summary adjudication as to eight of 12 causes of action, we summarily reverse the trial court's order awarding costs and do not reach

Alvarez's argument the trial court erred in failing to apply the *Williams* standard.[36]

DISPOSITION

The judgment is affirmed in part and reversed in part (B286910). The trial court is ordered to vacate its order granting Alvarez's motion for summary judgment and to enter an order denying summary adjudication as to Alvarez's first (disability discrimination), second (failure to accommodate), third (failure to engage in interactive process), sixth (FEHA retaliation), seventh (interference with CFRA rights), ninth (failure to prevent), 10th (wrongful termination in violation of FEHA), and 11th (wrongful termination in violation of public policy) causes of action. The trial court is to enter an order granting Alvarez's motion for summary adjudication as to the fourth and fifth (harassment), eighth (CFRA retaliation), and 12th (constructive discharge) causes of action.

We reverse the trial court's September 19, 2017 discovery order and remand for the trial court to make a fair and reasonable allocation of the referee's fees for the McPherson and Cross depositions and the two depositions that were scheduled at

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[36] However, we note the persuasive reasoning in *Scott v. City of San Diego* (2019) 38 Cal.App.5th 228, 243, in which the Fourth Appellate District concluded the Legislature's amendments to section 12965, subdivision (b), clarified "existing law by expressly stating that, notwithstanding [Code of Civil Procedure] section 998, a prevailing defendant may not recover attorney fees and costs against a plaintiff asserting and pursuing a nonfrivolous FEHA lawsuit."

the time Alvarez filed her August 25, 2017 motion in light of Alvarez's financial condition at the time she filed the motion. In all other respects the judgment is affirmed.

We summarily reverse the trial court's May 8, 2017 order awarding costs to Lifetouch (B289910).

The matter is remanded for further proceedings not inconsistent with this opinion. The parties are to bear their own costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

ZELON, J.