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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DENISE KENNEDY,

Plaintiff and Appellant,

v.

MUFG UNION BANK et al.,

Defendants and Respondents.

E070775

(Super.Ct.No. CIVDS1615472)

OPINION

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr., Judge. Affirmed.

Paul Kujawsky for Plaintiff and Appellant.

Blank Rome, Michael L. Ludwig and Taylor Morosco, for Defendants and Respondents.

I. INTRODUCTION

Plaintiff and appellant, Denise Kennedy, filed a civil action against defendants and respondents, MUFG Union Bank (Union Bank) and Vicki Gomez (collectively,

defendants), which alleged various claims arising out of her former employment with Union Bank. Plaintiff alleged that for a period of about three months, she was subject to racial discrimination and harassment because she was African-American, causing her to ultimately take disability leave due to mental stress. While on disability leave, her position was eliminated as part of a regionwide restructuring by Union Bank. Plaintiff was informed she remained an employee while on leave and would be eligible for consideration to fill alternative positions through Union Bank's job posting leave program once she was released back to work without restrictions or with permanent restrictions. Plaintiff alleged that the failure to pay her severance or allow her to return to her previous position on a modified schedule constituted disability discrimination and an effective termination.

Plaintiff's first amended complaint alleged causes of action under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.) for:

(1) discrimination based on disability; (2) discrimination based on race; (3) hostile work environment harassment; (4) retaliation; (5) failure to prevent discrimination, harassment, and retaliation; (6) failure to engage in the interactive process; and (7) failure to accommodate, as well as common law causes of action for (8) intentional infliction of emotional distress and (9) wrongful termination in violation of public policy. She appeals from a judgment entered following the trial court's order granting defendants' motion for summary judgment.

We find that plaintiff has forfeited any claim of error for failure to summarize any of the evidence before the trial court on summary judgment. We further conclude that even in the absence of forfeiture, summary judgment was properly granted, as defendants met their initial burden to produce evidence to show legitimate, nondiscriminatory reasons for the alleged adverse employment actions or to show plaintiff's inability to establish a prima facie case, and plaintiff thereafter failed to produce evidence in opposition sufficient to establish a triable issue of material fact.

II. FACTS AND PROCEDURAL HISTORY

A. *Pleadings and Allegations*

On December 20, 2016, plaintiff filed her first amended complaint against defendants. Plaintiff alleged she was an African-American woman who had been employed as a customer service manager for Union Bank for over 14 years. For a period of about three months from March 2015 through May 2015, she was subjected to a hostile work environment which consisted of “nitpicking of her work, changing her Saturday work schedule with last second notice, the deliberate undermining and hindering of her ability to do her work, increased job responsibilities, threatening her job, discussing her with other employees out of her presence, and being intrusive of her work space.” Plaintiff alleged that an interim branch manager, Vicki Gomez, once commented that she heard the “N” word in the lyrics of a song plaintiff was playing at work. Plaintiff also alleged that on another occasion, the branch manager, Nestor Rosales,¹ inquired of

¹ The first amended complaint apparently misidentified Mr. Rosales as “Nestor Morales.”

her age and how often she went to the hair salon. Plaintiff alleged that the intrusive oversight and the identified comments were evidence of racial animus.

On May 19, 2015, plaintiff took medical disability leave due to the stress, anxiety, and depression caused by her alleged hostile work environment. While she was on leave, Union Bank underwent a regionwide restructuring which resulted in the elimination of her position. During this time, other employees who had their positions eliminated received severance packages. Plaintiff was informed of the elimination of her position in October 2015, but did not receive a severance package.

In November 2015, plaintiff made multiple requests to return to work with an accommodated reduced work schedule of only four hours per day. She was informed that Union Bank could not accommodate her request because her position had been eliminated. Plaintiff alleged this constituted an “effective[] terminat[ion]” and discrimination on the basis of her disability.

Based upon these facts, plaintiff alleged FEHA causes of action for: (1) discrimination based on disability; (2) discrimination based on race; (3) hostile work environment harassment; (4) retaliation; (5) failure to prevent discrimination, harassment and retaliation; (6) failure to engage in the interactive process; and (7) failure to accommodate. Plaintiff further alleged causes of action for intentional infliction of emotional distress and wrongful termination in violation of public policy.

B. Defendants' Summary Judgment Motion and Evidence

On December 27, 2017, defendants moved for summary judgment or, in the alternative, summary adjudication of each cause of action alleged in the first amended complaint. The notice of motion identified the inability of plaintiff to establish a prima facie case, as well as the existence of legitimate, nondiscriminatory reasons for any alleged adverse employment actions as alternative bases for summary judgment.

1. Plaintiff's Deposition Testimony

In support of the motion, defendants produced excerpts from the transcript of plaintiff's deposition testimony. Plaintiff confirmed that her racial discrimination and harassment claims were based upon a time period from March 2015 through May 2015 and further confirmed that the interim branch manager, Ms. Gomez, and the branch manager, Mr. Rosales, were the only individuals who she believed harassed her due to race.

When asked to identify the actions upon which her allegations against Ms. Gomez were based, plaintiff stated that Ms. Gomez directed plaintiff to process transactions differently, assigned plaintiff additional work responsibility, "nitpick[ed]" the methods plaintiff used to look up information on the computer system, took responsibility from plaintiff for branch scheduling, required plaintiff to create logs for transactions, and changed plaintiff's Saturday hours to begin at 8:30 a.m. instead of 8:45 a.m. She identified one incident in which Ms. Gomez commented that a song plaintiff was listening to while working contained the "N word."

When asked to identify the actions upon which her allegations against Mr. Rosales were based, plaintiff testified that Mr. Rosales also criticized the manner in which plaintiff processed transactions, also changed her Saturday working hours to begin at 8:30 a.m., and also took steps to supervise plaintiff's work in a way that plaintiff felt was overly intrusive. On one occasion, plaintiff recalled Mr. Rosales inquiring about plaintiff's age and the frequency with which she went to the hair salon.

Plaintiff admitted that during the time period of alleged harassment, she received verbal and written counseling regarding incidents in which her managers believed she mishandled bank transactions. She confirmed at least one incident in which she was found to have left in excess of \$2,000 of cash unattended on a bank counter, which formed the basis of the written counseling.

Plaintiff acknowledged that while she was out on disability leave, she was informed by Union Bank's return to work coordinator, Mario Lepe, that her position had been eliminated, along with all other bank services officer positions in her region. Mr. Lepe informed her that she would be eligible for consideration to fill alternative positions with Union Bank through its job posting leave program upon being released back to work without restriction or with permanent restrictions. Plaintiff admitted she never reviewed Union Bank's severance policy and never asked anyone to explain the severance policy to her.

Finally, plaintiff admitted that in December 2015, she was determined "totally disabled" and initiated a workers' compensation claim on that basis. She admitted that

she settled her workers' compensation claim in July 2016 and agreed to submit a voluntary resignation from employment as part of that settlement. She stated that it was her understanding that she remained an employee of Union Bank until the time of her resignation.

2. Declaration of Mario Lepe

In addition to plaintiff's deposition testimony, defendants presented the declaration of Mr. Lepe. Mr. Lepe explained that he was the return to work coordinator in Union Bank's Leave Administration and Workers' Compensation Department at the time of plaintiff's disability leave.

According to Mr. Lepe, plaintiff remained an employee of the bank while on disability leave despite the elimination of her position during restructuring. In response to her requests to return to work on a modified basis, Mr. Lepe informed plaintiff that her position had been eliminated, but that she would be eligible for consideration to fill alternative positions through Union Bank's job posting leave program upon being released back to work without restrictions or with permanent restrictions. Mr. Lepe stated that plaintiff would not confirm whether her work restrictions were temporary or permanent, even after follow-up inquiries. Instead, plaintiff informed Mr. Lepe that she had hired an attorney. Despite hiring an attorney, plaintiff contacted Mr. Lepe on December 4, 2015, to again request an accommodation to return to work on a restricted basis, but again did not respond to a request to clarify whether her restrictions were temporary or permanent.

Mr. Lepe explained that plaintiff could not return to her prior position on a restricted basis because the position had been eliminated in restructuring. He further explained that determination of whether plaintiff's work restrictions were temporary or permanent impacted the process for identifying potential new positions for her through Union Bank's job posting leave program. Union Bank's job posting leave program provided only a 60-day period to determine whether an employee could fill a different position. It was Mr. Lepe's understanding that as long as plaintiff's work restrictions were temporary, she was entitled to additional disability leave and the 60-day period would not run against her. Thus, it was his belief that waiting until plaintiff was cleared to return to work without restrictions or with permanent restrictions would allow her to maximize the benefit of the job posting leave program.

3. Union Bank Documents

Finally, defendants submitted a copy of Union Bank's antidiscrimination, retaliation, and harassment policies in place at the time of plaintiff's employment; a copy of Union Bank's general severance plan in effect at the time of the 2015 restructuring; a copy of the workers' compensation settlement documents executed by plaintiff; and a copy of the correspondence between plaintiff and Mr. Lepe.

C. Plaintiff's Opposition Evidence

In opposition to the summary judgment motion, plaintiff presented largely the same excerpts of her own deposition testimony submitted by defendants. Additionally, plaintiff submitted excerpts from the deposition transcript of Melba Armstrong-Fort.

Ms. Armstrong-Fort testified that she worked as an assistant manager in the same Union Bank branch as plaintiff. Ms. Armstrong-Fort believed that she was also harassed because Ms. Gomez would “hover” over her work and ask other employees to monitor what she was doing. Ms. Armstrong-Fort was asked to monitor plaintiff’s work performance by keeping track of her time spent at work and completion of assignments, but admitted that these were included in her responsibilities as an assistant manager. Ms. Armstrong-Fort recalled one occasion where Ms. Gomez expressed a belief that “[B]lack people wear wigs.”

Plaintiff also presented an excerpt from the deposition testimony of Dannette Cooper, a regional manager for Union Bank, who testified that there were currently no African-Americans working in bank services manager or bank services officer positions within her region.

Finally, plaintiff presented a copy of her 2014 year-end review which set forth that she “Fully [Met] Expectations,” but also contained some comments regarding concern over her ability to multitask.

D. Hearing on Motion for Summary Judgment

On April 10, 2018, the trial court held a hearing on defendants’ motion for summary judgment. The trial court did not announce any tentative decision and asked counsel whether they had any additional information to add or draw to the trial court’s attention with respect to the motion. Plaintiff made only one comment regarding the fact that she informed Union Bank her restrictions were temporary during her

communications with Mr. Lepe. Following the hearing, the trial court issued a written ruling granting the motion for summary judgment.

III. DISCUSSION

A. *Plaintiff Has Forfeited Her Challenge by Failing to Present the Facts*

As an initial matter, plaintiff takes the position that because her appeal arises from an order granting summary judgment, she need only state the facts most favorable to her. We disagree. While it is true that an appellate court reviews the evidence in the light most favorable to the party opposing summary judgment, it does not follow that the opposing party may ignore its obligation to fairly summarize the evidence and record on appeal. “On review of a summary judgment, the appellant has the burden of showing error, even if he [or she] did not bear the burden in the trial court. [Citation.] . . . ‘[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues.’” (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 230; see *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 372.) A plaintiff violates this rule when he or she makes “no effort to summarize all of the evidence presented in the summary judgment proceeding, and frequently ignore[s] the evidence presented by [defendants]. A summary judgment motion triggers a procedure in which the parties pierce the pleadings to determine whether there are disputed facts Thus, when a summary judgment is challenged, a reviewing court must examine the facts presented by the parties to determine whether summary judgment or summary adjudication was warranted. By

failing to describe all of the evidence proffered in the proceedings, [plaintiff] [does] not satisfy her appellate burden.” (*Silva v. See’s Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 260.)

In her opening brief, plaintiff provides only a brief summary of the background facts which appear to omit any facts unfavorable to her. More importantly, she makes no effort to summarize any of the evidence submitted in support of and in opposition to the summary judgment motion, stating only that a motion was brought, opposed, and granted. In the context of summary judgment, “an issue of fact can only be created by a conflict of evidence.” (*Horn v. Cushman & Wakefield Western* (1999) 72 Cal.App.4th 798, 807; *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525.) Thus, plaintiff does not meet her burden on appeal to demonstrate error where she makes no attempt whatsoever to summarize any of the evidence presented or specifically set forth the evidence which she believes demonstrates a triable issue of material fact. The failure to meet her burden alone warrants affirmance of the judgment.

B. Plaintiff’s Challenge Fails on the Merits

Notwithstanding plaintiff’s forfeiture, our independent review of the record leads us to conclude that plaintiff’s challenge also fails on the merits. As explained below, defendants presented sufficient evidence to meet their initial burden to negate each of the adverse employment actions alleged in the pleading or, alternatively, provide a legitimate, nondiscriminatory reason for those actions, and plaintiff failed to produce any evidence creating a triable dispute in opposition.

1. Summary Judgment Standard

“On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) “In undertaking our independent review, we apply the same three-step analysis used by the trial court. First, we identify the issues framed by the pleadings. Second, we determine whether the moving party has established facts justifying judgment in its favor. Finally, in most cases, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable issue of material fact.” (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 858-859.) “[W]e view the evidence in a light favorable to the losing party . . . , liberally construing her evidentiary submission while strictly scrutinizing the moving party’s own showing and resolving any evidentiary doubts or ambiguities in the losing party’s favor.” (*Id.* at p. 859.)

Additionally, “[i]n analyzing claims of discrimination under FEHA, California courts have long used the three-stage burden-shifting approach established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 . . . for the analysis of title VII (42 U.S.C. § 2000e et seq.) employment discrimination claims.” (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1181; see *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 354.) Under this test, “an employer may satisfy its initial [summary judgment] burden of proving a cause of action has no merit by

showing either that one or more elements of the prima facie case ‘is lacking, or that the adverse employment action was based on legitimate nondiscriminatory factors.’”

(*Husman v. Toyota Motor Credit Corp.*, *supra*, at p. 1181.) Once the employer makes such a showing, ““an employee claiming discrimination must offer substantial evidence that the employer’s stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.”” (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 160.)

Thus, plaintiff’s repeated argument that “[t]he Bank did not sustain its burden to conclusively negate” her causes of action is misplaced. In the context of FEHA claims, a defendant may satisfy its burden to establish facts justifying judgment in its favor either by negating the plaintiff’s prima facie case or by presenting legitimate, nondiscriminatory reasons for any alleged adverse employment action.² Either showing is sufficient to shift the burden on summary judgment, requiring a plaintiff to produce evidence showing a triable issue of material fact.

² It should also be noted that this is not the standard applied to summary judgment generally. “Summary judgment law in this state no longer requires a defendant moving for summary judgment to conclusively negate an element of the plaintiff’s cause of action. . . . Instead, a defendant may simply show the plaintiff cannot establish an essential element of the cause of action ‘by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence.’” (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1102; see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.)

2. Issues Framed by the First Amended Complaint

The first amended complaint here employs the “shotgun” or “chain letter” style of pleading wherein each claim for relief incorporates by reference all preceding paragraphs and allegations, regardless of whether such allegations are relevant to the theories of liability or causes of action alleged. This type of pleading is disfavored because it creates ambiguity and redundancy, as well as masks the true causes of action which are the subject of the parties’ dispute. (*Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, 605; see *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1179.) We therefore conduct our own independent reading of the pleading in order to identify the issues presented by its factual allegations. In doing so, we identify four areas of “adverse employment actions” which underpin all of plaintiff’s causes of action: (1) wrongful termination; (2) alleged discrimination based upon disability;³ (3) alleged harassment or discrimination based upon race; and (4) intentional infliction of emotional distress.

³ The use of the disfavored “shotgun” method of pleading suggested that plaintiff also alleged harassment as a result of her disability. However, the factual allegations alleged that Ms. Gomez and Mr. Rosales harassed her while at work, resulting in her mental disability. The pleading alleged no interaction with these individuals subsequent to plaintiff taking disability leave, the first time she informed her employer of the existence of a disability. We therefore decline to interpret the first amended complaint as stating a cause of action for harassment based upon disability. (See *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 876, fn. 4 [summary judgment properly granted on disability harassment claim because “[o]bviously, harassment that results in disability is very different from harassment of an employee because of the employee’s disability.”].)

3. Summary Judgment Was Properly Granted on Wrongful Termination Claims

(a) *Issue as Framed by the Pleading*

Plaintiff's first cause of action for discrimination based on disability, second cause of action for discrimination based on race, fourth cause of action for retaliation, and ninth cause of action for wrongful termination are all partially based on the existence of an alleged termination. Specifically, plaintiff alleged that the failure to accommodate her requests to return to work on a modified schedule in November 2015 constituted an "effective[] terminat[ion]." Plaintiff then incorporated this allegation by reference as a factual basis for all of these identified causes of action.

(b) *Defendants Met Their Burden on Summary Judgment*

In moving for summary judgment, defendants presented the declaration of Union Bank's return to work coordinator who declared that plaintiff remained an employee while on disability leave, as well as the written correspondence to plaintiff informing her of that status. Defendants also presented excerpts from plaintiff's own deposition testimony in which she admitted filing a worker's compensation claim against her employer claiming a temporary and total disability; admitted settling the claim in July of 2016; admitted executing a voluntary resignation from her employment as part of that settlement; and confirmed her understanding that she remained an employee until the date of her resignation. Defendants produced a copy of the application for compromise and release submitted to the Workers' Compensation Appeals Board and a copy of the executed voluntary resignation dated July 2016. Clearly, this evidence was sufficient to

negate any claims premised upon the existence of a termination, as it showed that plaintiff was not terminated and instead voluntarily resigned her employment with Union Bank. Absent a threshold factual showing of a termination, there can be no claim for wrongful termination and no claim that plaintiff was “terminated” due to discriminatory motives or impermissible retaliation. This showing was sufficient to shift the burden on summary judgment and required plaintiff to produce evidence to show a triable issue of material fact.

(c) *Plaintiff Failed to Produce Evidence to Show a Triable Dispute*

In opposition, plaintiff did not dispute the fact she submitted a written resignation as part of her workers’ compensation settlement, but expressed the subjective belief that she had “no other . . . choice” but to resign in order to obtain a settlement of her workers’ compensation claim. Plaintiff argues that this created a triable dispute regarding whether “forcing” her to resign constituted a “constructive termination.”⁴ We disagree that this created a dispute sufficient to warrant denial of summary judgment.

“To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. [Citation.] If the opposing party’s evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that

⁴ Plaintiff also argues that the “entire judgment is . . . built on a false foundation” because the trial court referred to a “termination” in its order granting summary judgment. We need not address this argument, as “it is well settled that on appeal following summary judgment the trial court’s reasoning is irrelevant, and the matter is reviewed on appeal de novo. [Citations.] We exercise our independent judgment as to the legal effect of the undisputed facts” (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140.)

party should seek leave to amend the pleadings before the hearing on the summary judgment motion.” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253.) A plaintiff is not permitted to expand the issues by way of declaration alone. (*Id.* at pp. 1253-1258.) Here, the first amended complaint alleged that plaintiff was “effectively terminated” when her job was eliminated while she was on leave and her request to return to work was denied. The pleading does not allege a “forced termination” as a factual basis for her discrimination claim and does not allege any acts or omissions related to her workers’ compensation proceeding as the basis of her alleged termination. Plaintiff cannot create a material dispute by seeking to change the entire factual basis of her claim by way of declaration in opposition to summary judgment.⁵ In the absence of a proper request to amend the pleading, plaintiff was required to produce evidence to show a factual dispute regarding the termination alleged in the pleading. She did not do so here and the trial court did not err in granting summary judgment with respect to claims based upon the allegation of a wrongful termination.

⁵ It is highly doubtful that plaintiff could prevail on the merits even if she had properly raised this claim in her pleadings. Generally, the doctrine of judicial estoppel precludes a plaintiff from claiming the inability to work as a basis for obtaining payment in workers’ compensation while simultaneously claiming she is entitled to civil damages for a “constructive discharge” under the FEHA because her employer refused to allow a return to work. (See *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950, 955-960.)

4. Summary Judgment Was Properly Granted on Disability Discrimination Claims

(a) *Issue as Framed by the Pleading*

Plaintiff's first cause of action for discrimination based on disability; fifth cause of action for failure to prevent discrimination, harassment, and retaliation; sixth cause of action for failure to engage in the interactive process; and seventh cause of action for failure to accommodate all arise from the same operative set of facts. Plaintiff alleged that she took disability leave due to stress and anxiety beginning in May 2015; that while on leave Union Bank eliminated her position, along with other positions in her region; that she was informed of the elimination in October 2015, but was not offered severance; and that her request to return to work on a modified schedule in November 2015 was denied.

(b) *Defendants Met Their Burden on Summary Judgment*

In moving for summary judgment, defendants produced evidence that all bank services officer positions in plaintiff's region had been eliminated due to restructuring while plaintiff was on disability leave. They informed plaintiff that she remained an employee while on leave and that she would be eligible for consideration to fill alternative positions through Union Bank's job posting leave program once she was released back to work without restrictions or with permanent restrictions. Finally, defendants produced the declaration of Union Bank's return to work coordinator who explained plaintiff was not offered severance because she remained an employee receiving disability benefits; plaintiff's request to return to work on a modified schedule

could not be accommodated because her position no longer existed; and that the motivation for making plaintiff wait until she was fully released from disability leave to be considered for the job posting leave program was to afford her the maximum benefit of that program.

This was sufficient to meet defendants' burden in moving for summary judgment, as the evidence provided legitimate reasons unrelated to plaintiff's disability for the alleged adverse employment actions of denying severance and denying plaintiff's request to return to work on a modified schedule.⁶ The burden therefore shifted to plaintiff to produce evidence to establish a triable issue of material fact on her claims of disability discrimination.

(c) *Plaintiff Failed to Produce Evidence to Show a Triable Dispute*

“Once an employer satisfies its initial burden of proving the legitimacy of its reason . . . the . . . employee seeking to avert summary judgment must present specific and substantial responsive evidence that the employer's evidence was in fact insufficient or that there is a triable issue of fact material to the employer's motive.” (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433; *Wills v. Superior Court, supra*,

⁶ In oral argument, plaintiff argued that the burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, should not apply to this issue because a corporate policy that precludes temporarily disabled employees from participating in a job posting leave program is facially discriminatory and, therefore, direct evidence of discrimination. However, the record discloses no evidence of Union Bank's official policies with respect to participation in the job posting leave program. Instead, the allegations and evidence focused solely on the communications and decisions made by Mr. Lepe in responding to plaintiff's request for accommodation. It is therefore entirely appropriate to apply the traditional burden shifting analysis in order to determine whether there was evidence of discriminatory animus in motivating Mr. Lepe's actions.

195 Cal.App.4th at p. 160.) This evidence “must relate to the motivation of the decision makers to prove, by nonspeculative evidence, an actual causal link between prohibited motivation and [the adverse action].” (*King v. United Parcel Service, supra*, at pp. 433-434; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1007 [the evidence must show a ““causal connection’ between the employee’s protected status and the adverse employment decision.””]; *Husman v. Toyota Motor Credit Corp., supra*, 12 Cal.App.5th at pp. 1185-1186 [“[T]he relevant inquiry devolves to a showing of some discriminatory animus.”].)

Here, the evidence established that plaintiff’s only point of contact at Union Bank with respect to the issue of severance and her request to return to work was Mr. Lepe. Yet the record does not indicate that plaintiff presented any direct or circumstantial evidence on the issue of Mr. Lepe’s motivations in opposition to summary judgment and plaintiff has not identified any such evidence in her briefing on appeal. Thus, the only evidence on the issue was Mr. Lepe’s declaration. While slight evidence of a discriminatory motive may be sufficient to create a triable issue, plaintiff’s failure to identify any evidence on the issue, whether direct or circumstantial was fatal to her claims.

On appeal, plaintiff argues that a triable issue exists because the bank’s severance policy “makes no sense on its own terms”; that Mr. Lepe’s interpretation of Union Bank’s policies is not supported by the language of the written policy; or that Mr. Lepe’s decisions were ad hoc in nature. However, these arguments miss the point. “[A] plaintiff

in a discrimination case must show discrimination, not just that the employer's decision was wrong, mistaken, or unwise." (*Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 21; *Horn v. Cushman & Wakefield Western, supra*, 72 Cal.App.4th at p. 807; *Nakai v. Friendship House Assn. of American Indians, Inc.* (2017) 15 Cal.App.5th 32, 39.) The fact that plaintiff believes Union Bank's policies were irrational, incomplete, or mistakenly applied in an ad hoc fashion does not create a triable issue of material fact. Even if true, liability under the FEHA is not based upon the existence of poorly formulated policies, poorly drafted corporate documents, or incompetent management.

To create a triable issue of material fact, plaintiff was required to present some evidence from which it could be inferred that the true motive for an adverse employment action was discriminatory animus. She cannot do so simply by attacking the credibility of an otherwise uncontested declaration. (See Code Civ. Proc., § 437c, subd. (e) [trial court may not deny summary judgment on grounds of credibility of witnesses furnishing declarations]; *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1453 [raising consistency and credibility issues in declaration insufficient to show triable issue of fact absent conflicting evidence]; *Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at pp. 360-361 [alleging company lied about nondiscriminatory reasons insufficient to create triable issue absent evidence supporting a rational inference that true reasons were discriminatory].)

Thus, setting aside the fact that the severance policy was not relevant in the absence of a termination,⁷ plaintiff cannot overcome summary judgment simply by attacking the wisdom or implementation of Union Bank's policies. Plaintiff was required to produce evidence from which a discriminatory motive could be inferred in order to avoid summary judgment. Absent such, the trial court did not err in granting summary judgment with respect to claims based upon disability discrimination.

5. Summary Judgment Was Properly Granted on Racial Harassment and Discrimination Claims

(a) *Issue as Framed by the Pleading*

Plaintiff's second cause of action for discrimination based on race; third cause of action for harassment creating a hostile work environment; and fifth cause of action for failure to prevent discrimination, harassment and retaliation are premised on one set of factual allegations. Plaintiff alleged she was harassed while at work due to her race between March 2015 and May 18, 2015, by Ms. Gomez and Mr. Rosales. Specifically, plaintiff alleges that she was subject to nitpicking of her work, modifications to her work schedule, deliberate hindering of her ability to do work, increased job responsibilities, discussions regarding her work performance outside of her presence, and intrusions into her work space. She alleged that on one occasion she heard Ms. Gomez make a comment regarding her choice of music, stating that a song plaintiff was playing contained the "N"

⁷ As we have already discussed in the context of the wrongful termination allegations, the undisputed evidence before the trial court at the time of summary judgment showed that plaintiff voluntarily resigned and was not terminated.

word, and that on a separate occasion Mr. Rosales inquired about her age and the frequency with which she went to the hair salon, both of which plaintiff interpreted to be racially charged.

(b) *Defendants Met Their Burden on Summary Judgment*

“In the FEHA, the terms ‘discriminate’ and ‘harass’ appear in separate provisions and define distinct wrongs. [Citations.] . . . [¶] . . . [T]he FEHA’s discrimination provision addresses only *explicit* changes in the ‘terms, conditions, or privileges of employment’ [citation] In the case of an institutional or corporate employer, the *institution or corporation itself* must have taken some official action with respect to the employee, such as hiring, firing, failing to promote, adverse job assignment, significant change in compensation or benefits, or official disciplinary action.” (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 705-706.) “By contrast, harassment often does not involve any official exercise of delegated power on behalf of the employer . . . [and] focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee.” (*Id.* at p. 706.)

As explained by our Supreme Court, “‘commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come

within the meaning of harassment.” (*Reno v. Baird* (1998) 18 Cal.4th 640, 646-647, quoting *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 64-65; see *Roby v. McKesson Corp.*, *supra*, 47 Cal.4th at p. 707.) Additionally, for harassing conduct to be actionable, it must be severe and pervasive and be based on more than “occasional, isolated, sporadic, or trivial” incidents. (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 466; *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 131 [“[P]laintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature.”]; *Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 877 [same].)

In moving for summary judgment, defendants presented plaintiff’s own deposition testimony in which she identified only one instance in which Ms. Gomez made any comment perceived as racially insensitive and only one instance in which Mr. Rosales made any comments which she interpreted as racially insensitive. Plaintiff confirmed that other than those comments, her allegations of harassment were based upon what she perceived to be increased oversight and intrusive management of her work. This evidence was sufficient to meet defendants’ burden to show that plaintiff could not establish a prima facie case of harassment. A harassment claim cannot be based on commonly necessary personnel management decisions. Even if we were to view these otherwise ambiguous statements in the light most favorable to the plaintiff and interpret them as racially insensitive, the identification of only two isolated incidents of racially insensitive comments is insufficient to support the claim.

Furthermore, defendants presented evidence that plaintiff was subject to counseling for failure to properly perform functions of her job, including the admission that plaintiff was reprimanded for improperly leaving in excess of \$2,000 of bank cash unattended. This evidence showed a legitimate, nondiscriminatory reason for increased supervision and oversight of plaintiff and was therefore sufficient to meet defendants' initial burden on summary judgment with respect to any claims that the increased or intrusive oversight was motivated by discriminatory animus. Thus, defendants presented evidence sufficient to shift the burden to plaintiff to produce evidence of a triable issue of material fact with respect to her racial harassment or discrimination claims.

(c) Plaintiff Failed to Produce Evidence to Show a Triable Dispute

In opposition to defendants' motion, plaintiff presented excerpts from the deposition testimony of Ms. Armstrong-Fort, which confirmed that Ms. Armstrong-Fort was asked to monitor plaintiff's job performance and recounted one instance in which Ms. Armstrong-Fort was subject to a racially insensitive remark made by Ms. Gomez. Plaintiff also produced an excerpt from the deposition testimony of a Union Bank regional manager confirming there were currently no African-Americans working in bank services manager or bank services officer positions within her region. This was insufficient to meet plaintiff's burden to show a triable issue of material fact.

First, Ms. Armstrong-Fort's testimony of one additional racially insensitive comment by Ms. Gomez does not advance plaintiff's harassment claim. Generally, harassment directed at others cannot be the basis for liability unless it was personally

witnessed by the plaintiff in her immediate work environment. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 285 [“[I]f the plaintiff does not witness the incidents involving others, ‘those incidents cannot affect . . . her perception of the hostility of the work environment.’”].) Thus, while Ms. Armstrong-Fort testified to an additional instance in which Ms. Gomez made a racially insensitive comment, there was no testimony that this occurred in plaintiff’s presence. Such evidence therefore had no bearing on whether plaintiff could establish a prima facie case of racial harassment.

Second, the brief testimony that Union Bank had no African-Americans working within certain positions in the region is not, on its own, sufficient to establish a triable dispute as to racial discrimination. As explained by our Supreme Court, an inference of discrimination can arise from evidence that a protected group suffers disproportionately from an employment action, but only where there is evidence to establish the statistical significance of such a fact. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 367 [“[C]ourts have rejected any consequent inference of intentional bias on grounds . . . that the sample was too miniscule to demonstrate a statistically reliable discriminatory pattern.”].) Here, the statement that no African-Americans currently work as bank services officers or bank services managers in the region was provided with no context. The trial court had no evidence to indicate the number of branches, the number of employees, or the number of bank services officer or manager positions in existence within the region. There was therefore no context and no basis upon which the trial court

could conclude that such evidence gave rise to a reasonable inference of intentional racial discrimination.

Plaintiff's opposition evidence did not create a triable issue of material fact showing either harassment or discrimination based upon race and the trial court did not err in granting summary judgment on claims premised on alleged racial animus.

6. Summary Judgment Was Properly Granted on Intentional Infliction of Emotional Distress Cause of Action

Finally, plaintiff alleged a common law claim for intentional infliction of emotional distress. “[T]o state a cause of action for intentional infliction of emotional distress a plaintiff must show: (1) outrageous conduct by the defendant; (2) the defendant’s intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff’s suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.” (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832.) Plaintiff argues the question of whether conduct is sufficiently outrageous to support a claim for intentional infliction of emotional distress is necessarily a fact question that should be left to a jury and therefore the trial court erred in granting summary judgment based upon its conclusion that there was insufficient evidence of outrageous conduct.

We disagree that the determination of whether conduct was sufficiently outrageous to support a cause of action for intentional infliction of emotional distress is one which

always requires resolution by the trier of fact.⁸ However, we need not address this argument in detail, because, even assuming the conduct alleged by plaintiff was sufficiently outrageous to support a cause of action, plaintiff cannot pursue a civil action for recovery of emotional distress damages in the absence of a viable claim for wrongful termination or violation of the FEHA.

““[S]evere emotional distress” arising from “outrageous” conduct that occurred ‘at the worksite, in the normal course of the employer-employee relationship’ is the type of injury that falls within the exclusive province of workers’ compensation.” (*Vasquez v. Franklin Management Real Estate Fund, Inc.*, *supra*, 222 Cal.App.4th at pp. 832-833; see *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 902.) Plaintiff correctly notes that an exception to the exclusivity rule has been recognized for claims of intentional infliction of emotional distress where the actionable conduct also forms the basis for a FEHA violation or wrongful termination. (See *Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 97-98.) However, we have already explained that summary judgment was properly granted on plaintiff’s wrongful termination claim and FEHA based claims. Absent a viable claim under the FEHA or for wrongful termination, the exception to the exclusivity provisions of the worker’s compensation law does not exist. Plaintiff was not entitled to independently pursue a claim for intentional

⁸ ““[I]t is for the court to determine, in the first instance, whether the defendant’s conduct may reasonably be regarded as so extreme and outrageous as to permit recovery.”” (*Fowler v. Varian Associates* (1987) 196 Cal.App.3d 34, 44; see *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 [upholding summary judgment on intentional infliction of emotional distress claim]; *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1377 [same].)

infliction of emotional distress in a civil tort action and we affirm the grant of summary judgment on this ground.

IV. DISPOSITION

The judgment is affirmed. Defendants are to recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

MILLER
Acting P. J.

MENETREZ
J.