TENTATIVE RULINGS: CIVIL LAW & MOTION **UPDATE #1**

Wednesday, March 12, 2025 at 3:00 p.m.
Courtroom 18 – Hon. Kenneth G. English
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument, **YOU MUST NOTIFY** the Judge's Judicial Assistant by telephone at **(707) 521-6604**, and all other opposing parties of your intent to appear, **and whether that appearance is in person or via Zoom**, no later 4:00 p.m. the court day immediately preceding the day of the hearing.

If the tentative ruling is accepted, no appearance is necessary unless otherwise indicated.

TO JOIN ZOOM ONLINE:

Department 18:
Meeting ID: **160—739—4368**
Password: **000169**
https://sonomacourtorg.zoomgov.com/j/1607394368?pwd=aW1JTWlIL3NBeE9LVHU2NVVpQlVRUT09

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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1. SCV-272228, Institute of Imaginal Studies v. Lyman: Motion for Protective Order Limiting Scope of Defendant's Deposition

Defendant Asher Lyman's motion for protective order limiting the scope of his deposition is CONTINUED to June 25, 2025 at 3:00 p.m. in Department 18. Defendant James Garrison filed an Anti-SLAPP Motion to Strike on February 27, 2025, that is set for hearing on June 4, 2025. Accordingly, all discovery proceedings are stayed until notice of entry of the order ruling on the motion. (CCP § 425.16(g).)

2. SCV-270586, Cliver v. Kearney: Motion for Summary Judgment, or in the alternative, Summary Adjudication

Defendants' motion for summary judgment is DENIED. Defendants' alternative motion for summary adjudication is GRANTED in part and DENIED in part. Summary adjudication is GRANTED as to all of Plaintiff's causes of action, except for the Fifth Cause of Action for

Interference with CFRA Leave. Summary adjudication is DENIED as to that cause of action. Summary adjudication is DENIED as to Plaintiff's request for punitive damages because the motion is procedurally deficient, as explained below.

Plaintiff's objections to Defendants' evidence are OVERRULED. Defendants' objections numbers 12, 56, 64, 80, 86, 98, to the Declaration of Gina Cliver are SUSTAINED. Defendants' objections numbers 1 and 8 to the declaration of Maria Bourne are SUSTAINED. All other objections by Defendants are OVERRULED. Defendants' request to strike Plaintiff's opposition for being served 12 minutes past the statutory deadline is DENIED. Defendants' counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Defendants General Dynamics Ordnance and Tactical Systems, Inc. and General Dynamics OTS (Niceville), Inc. will be collectively referred to as "GD." Defendant Erica Kearney will be referred to as "Kearney." Plaintiff alleges each of her causes of action against GD, but only the Seventh Cause of Action against Kearney as well.

Plaintiff alleges causes of action arising out of alleged discrimination, retaliation, harassment, wrongful termination, and fraud against the defendants. Plaintiff was employed by GD as HR Administrator 3, which she had been promoted to over time during her 17-year tenure with GD. (Undisputed Material Fact "UMF," 1-5.) Kearney was hired as HR Manager in 2015, and she was Plaintiff's direct supervisor. (UMF, 4.) Kearney was responsible for reviewing Plaintiff's performance and approving her time off. (UMF, 14.) The GD defendants are national corporations based in Virginia and Florida. (UMF, 15.) GD Niceville employed Plaintiff, Kearney, and the other third-party witnesses herein referred to. (UMF, 16.)

In February of 2019, Plaintiff disclosed to Kearney that she had been diagnosed with cancer. (UMF, 17.) In March of 2019, Plaintiff requested, and Kearney approved, seven days of PTO to have surgery to treat her cancer. (UMF, 18.) Plaintiff did not explicitly request FMLA or CFRA leave for this; however, Plaintiff did notify Kearney that the leave was for her serious health condition and provided her the dates. (UMF, 18.) Also in March of 2019, Plaintiff was promoted to HR Administrator 3 and given a pay increase. (PAF, 37.)

Plaintiff again requested, and Kearney approved, another seven days of PTO for a second cancer-related surgery in June of 2019. (UMF, 19.) In July of 2019 Kearney expressed in an email to Jones that "Marshall" wanted to let Gina go. (PAF, 42.) However, GD did not terminate her. (PAF, 43.) There is nothing in the record suggesting that Plaintiff was aware of this email exchange.

Plaintiff took an approved FMLA/CFRA leave for six weeks from August 2019 to October 2019. Plaintiff returned to her same position. (UMF, 21.) Throughout her employment, GD never denied Plaintiff any leave she requested in connection with her cancer. (UMF, 24.) However, Plaintiff claims that she was required to work while on her six-week FMLA leave by having to calculate her own short-term disability pay and submit the form to payroll. (UMF, 25.)

In February 2020, Plaintiff received her annual performance review in which she was given a 2.8 out of 4 performance rating. (UMF, 27.) In the performance review, Kearney refers to Plaintiff's "personal situation" and states that she would like Plaintiff to not let her personal life impact or distract her from her work. (UMF, 28; PAF, 52.) In March 2020, her husband, Mike, was diagnosed with cancer. (Plaintiff's Additional Facts "PAF," 2.)

On or about November 30, 2020, Anthony Flores told Plaintiff that she was "no longer right for the role" of HR Administrator 3 and that she should look for another internal job within GD; Flores offered to help Plaintiff look for different roles at GD. (UMF, 30.) In December of 2020, Plaintiff texted with Flores about the Field Security Officer "FSO" position, asking if it would result in a change in her salary. Flores responded that he did not intend for there to be a salary change. (PAF, 65.) Plaintiff did not end up becoming an FSO. She remained in her HR Administrator 3 position. (PAF, 69.)

In February of 2021, Kearney gave Plaintiff another annual performance review that gave her a performance rating of 2.34 out of 4. (PAF, 72.) In the performance review, Kearney acknowledges Plaintiff's personal challenges, but says that she hasn't been able to count on Plaintiff to accomplish the tasks of her role. (PAF, 72.)

Near the end of 2021, Plaintiff was interviewed for a job at a different company, GMH Builders. (UMF, 31.) On December 10, 2021, Plaintiff received an offer letter from GMH Builders. (UMF, 32.) On May 24, 2021, Plaintiff's father passed away on the same day her husband was rushed to the hospital. (PAF, 4.)

On or about December 17, 2021, Plaintiff and Kearney spoke over the phone where Plaintiff complained about her displeasure with the work environment. They also spoke about Suzanne Jones wanting to know the "exit strategy" for Plaintiff and the possibility of Plaintiff receiving a severance package from Suzanne Jones, which Plaintiff posited could be very good if Plaintiff gave her an offer letter. (UMF, 33.) Following this phone conversation, on December 17, 2021, Plaintiff sent an email to Kearney in which she explained her complaints about her work environment and requested either job security or for GD to cut the cord, let her go, and give her a severance package as they indicated they would be willing to do. Plaintiff stated that she would expect a severance package of 40 weeks to be in hand on or before December 31, 2021. (UMF, 34.)

On December 20, 2021, Plaintiff signed GMH's employee confidentiality, nondisclosure, and nonrecruiting agreement. (UMF, 35.) Plaintiff did not tell anyone at GD that she had accepted an offer with GMH Builders in December. (UMF, 36.) Also on December 20, 2021, Plaintiff modified her complaint to allege that her harassment was related to her 2019 medical and disability leave in an email to Kearney. Plaintiff also reaffirmed her request of a severance package of 40 weeks to be in hand by December 31, 2021. (UMF, 37.)

On December 21, 2024, Suzanne Jones sent an email to Plaintiff in which she acknowledged Plaintiff's personal situation, but explained how her performance required micromanaging from Kearney because of problems with Plaintiff's attention to detail, follow-up, missed deadlines, accountability, ownership, and the general tone of her emails. Jones explained the resources available to Plaintiff to report or address her complaints about harassment. Jones also stated that she understood Plaintiff's desire to be with her family during that difficult time and appreciated Plaintiff's request to let her go with a severance package, but that she would have liked and still welcomed the opportunity to review her concerns and discuss a mutually agreeable solution that provides the support she is looking for either at work or away from work. (UMF, 38.) Jones stated, that she wanted to make clear that Plaintiff was not terminated and still had a job at GD, but her email the previous day made it clear that she wished to separate from GD. Jones stated that 40 weeks severance does not align with GD's separation schedule, but that employees with 16-20 years of service would receive 9 weeks severance. However, Jones offered Plaintiff 24 weeks of

severance stating it was because "we have much compassion for your situation." (UMF, 28.) Plaintiff responded that she is requesting 40 weeks' severance in order to address the alleged wage and hour violations over the years with a separation date of January 14, 2021. (UMF, 39.) Jones responded with an offer of 24 weeks' severance, but also stated that if Plaintiff wished to remain at GD, she supported her decision. (UMF, 40.)

Plaintiff did not receive a reduction in pay at any time after her disclosure of her cancer. (UMF, 41.) From December 17, 2021, until the end of her employment, GD never imposed any written discipline against Plaintiff, never cut her pay, and never demoted Plaintiff. (UMF, 42.) Kearney never told Plaintiff that if she refused to do work for her while she was out of the office for illness or wellness that it would result in discipline. (UMF, 44.)

After January 3, 2022, Plaintiff alleges that Kearney delayed her email responses, began using a terse tone with her, had minimal communication with Plaintiff, and describes these as instances in which Kearney was "ignoring" her. (UMF, 46.) On or about January 7, 2022, Plaintiff filed a complaint against GD with the Department of Fair Employment & Housing ("DFEH"). (UMF, 47.) On or about January 10, 2022, Plaintiff's counsel sent a letter to GD and GD's counsel detailing Plaintiff's claims, informing GD of Plaintiff's DFEH complaint, and accusing GD of wrongdoing. (UMF, 48.)

Plaintiff states that Kearney was normally a bubbly person who greeted her and would stop by her desk to talk, but on one occasion she stormed past her desk and closed her door, which she usually kept open. (UMF, 49.) Plaintiff did not ask her why she was upset. (UMF, 49.) Plaintiff states that there became a pattern of Kearney blaming Plaintiff for making mistakes and Plaintiff would have to prove her wrong by showing that she did not make the mistake. (UMF, 50.)

On January 25, 2021, Plaintiff emailed Jones and Kearny to complain of retaliation. (UMF, 52.) In mid-January of 2021, as a condition of her job offer with GMH, Plaintiff worked a trial day for GMH. (UMF, 53.) Plaintiff decided that her last day at GD would be February 1, 2021. (UMF, 54.) Plaintiff's offer letter from GMH had a start date of February 1, 2021. (PAF, 84.)

Plaintiff is Mexican American and identifies herself as Hispanic. (UMF, 67.) Plaintiff never discussed her race with anyone at GD. Plaintiff does not recall having any conversations with anyone at GD in which her race was the subject of the conversation. (UMF, 68.) Plaintiff does not recall ever overhearing Kearney, Jones, or Flores making any statements which she perceived as derogatory toward Hispanics including slurs or racialized comments. Nor does Plaintiff recall ever learning from someone else that they had made such comments. (UMF, 69-71.) Plaintiff does not recall any conduct of any kind by either Kearny, Jones, or Flores, that suggests they have some hostility toward Hispanics. (UMF, 72.) Plaintiff does not recall anyone at GD making any ageist derogatory comments against Plaintiff. (UMF, 73-76.)

The Court notes that Plaintiff makes several factual assertions in Plaintiff's Additional Facts that are not supported by the evidence cited. The Court has disregarded any factual assertions that do not reflect the evidence in the record.

<u>First, Second, Third, Fourth and Ninth Causes of Action for Medical Condition Discrimination, Disability Discrimination, Disability-Based Associational Discrimination, Age, Race, Ethnicity and National Origin Discrimination, and Retaliation</u>

A. Discrimination

The Supreme Court has mandated that a three-part analysis take place in cases of workplace discrimination, as follows: (1) the complainant must establish a prima facie case of discrimination; (2) the employer must offer a legitimate reason for its actions; and (3) the complainant must prove that this reason was a pretext to mask an illegal motive. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.) In order to make a prima facie case for discriminatory discharge, the complainant must show: "(1) complainant belongs to a protected class; (2) his job performance was satisfactory; (3) he was discharged; and (4) others not in the protected class were retained in similar jobs, and/or his job was filled by an individual of comparable qualifications not in the protected class." (*Mixon v. Fair Emp. & Hous. Com.* (1987) 192 Cal.App.3d 1306, 1318.)

Initially, the Court finds that no triable issue of fact exists as to whether Plaintiff was discriminated against for her age, race, ethnicity or national origin. As supporting her argument that she was discriminated against because she is Hispanic, Plaintiff states that GD refused to promote her to the HR manager position when it was available in 2012 and 2015. Plaintiff states that the people who were chosen for the higher position were white females.

In order for Plaintiff to be able to make a prima facie case for discriminatory discharge on the basis of race, Plaintiff would need to also show that (1) she applied for the positions; and (2) she was qualified for the positions for which she was rejected. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802.) There is no evidence in the record that Plaintiff ever applied for the open manager positions (the record simply says that she was never considered for them) nor that she was qualified for them and, despite being qualified, the job was given to a non-Hispanic persons instead. (*Ibid*.) Plaintiff also vaguely suggests in her response to Defendants' UMF 58 that the FSO position was given to a white male after Plaintiff tried it briefly. Plaintiff points to page 100 of Kearney's declaration, supposedly attached in Exhibit 2 of the Bourne Declaration as supporting this assertion. Page 100 of the Kearney declaration is not attached the Bourne declaration. Therefore, this factual assertion is unsupported by the evidence. Even if it were, there is no evidence that she applied for FSO role, nor that she was qualified for it. It was suggested to her that she try it, but her supervisors ultimately decided she would not be a good fit for the role. (Bourne Decl., Ex. 3, p. 88.) The Court also notes that there is no evidence in the record of Plaintiff's age, nor any evidence of the ages of the people who were chosen for the positions that she was not considered for. Accordingly, the Court finds no merit to Plaintiff's Fourth Cause of Action.

Regarding Plaintiff's other discrimination claims, Plaintiff was not formally discharged from GD. She argues that the was constructively discharged by the way she was being treated by her supervisors and other employees during the period of time when she needed to take time off of work to care for herself, her husband, and her father who all battled cancer during that time.

To establish a constructive discharge, a plaintiff must show (1) the employer created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the plaintiff's position would have had no reasonable alternative except to resign; and (2) the plaintiff resigned because of these working conditions. (CACI 2510.) "In order to be sufficiently intolerable, adverse working conditions must be unusually aggravated or amount to a continuous pattern. In general, single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim. But in some circumstances, a single intolerable incident may constitute a constructive discharge." (*Ibid*.)

Defendants argue that Plaintiff cannot establish a constructive discharge because the conduct complained of, as a matter of law, did not create working conditions that were so intolerable that a reasonable person in Plaintiff's position would have had no reasonable alternative except to resign. Defendants cite several cases where the issue of constructive discharge was decided by summary judgment.

In *Turner v. Anhauser-Busch, Inc.* (1994) 7 Cal.4th 1238, the plaintiff made complaints in 1984 to management regarding observed violations of federal and state law. In 1985 he was reassigned and in 1988 he received a low performance rating. Then, in 1989, he resigned. The Court found that he had not been constructively discharged because the existence of violations of the law do not in themselves create an intolerable workplace and his 1985 reassignment was attenuated in time to his resignation. Furthermore, the Court found that "a single negative performance rating does not amount to a constructive discharge." (*Id*. at 1255.) The Court found that, even if considered together, these instances of conduct do not create continuous pattern of harassment or aggravating conditions. The Court noted, "'An employee is protected from...unreasonably harsh conditions, in excess of those faced by his [or her] co-workers. He [or she] is not, however, guaranteed a working environment free of stress.'" (*Id*. at 1247.)

In *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, the Court found "A poor performance rating, accompanied by a demotion and reduction in pay, does not constitute a constructive discharge." (*Id*. at 1022.) The *Scotch* Court noted that the employer did not change Scotch's working conditions or make it difficult for him to perform his job, and he was not shunned, treated harshly or subjected to epithets and scorn. (*Id*. at 1023.)

In *King v. AC & R Advertising* (1995) 65 F.3d 764, 769, the Court found no constructive discharge as a matter of law when the plaintiff's employment status had been changed to at-will, his managerial responsibilities reduced, and his compensation reduced.

Plaintiff cites *Vasquez v. Franklin Management Real Estate Fund Inc.* (2013) 222 Cal.App.4th 819, 827, for the notion that "[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." This is true. However, it can be decided on summary judgment when the facts demonstrate, as a matter of law, that there was no constructive discharge. That is the case here. As a matter of law, as demonstrated by the several cases cited above, the conduct complained of by Plaintiff does not rise to the level of severity required to show constructive discharge. "The facts must support a finding that the resignation was 'coerced,' rather than 'simply one rational option for the employee.'" (*Ibid*.) The facts do not support the Plaintiff's position that she was coerced.

B. Retaliation

In retaliation claims brought under the California Fair Employment and Housing Act ("FEHA"), the elements of a prima facia showing for the cause of action are: 1) plaintiff engaged in protected activity; 2) the employer subjected plaintiff to an adverse employment action; and 3) a causal link exists between the protected activity and the employers action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) "If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation drops out of the picture, and the burden shifts back to the employee to prove intentional retaliation." (*Id.*1042 (quotations omitted).)

"An 'adverse employment action,' which is a critical component of a retaliation claim…requires a 'substantial adverse change in the terms and conditions of the plaintiff's employment.'" (*Holmes v. Petrovich Dev. Co., LLC* (2011) 191 Cal.App.4th 1047, 1063.) "'[A] mere offensive utterance or...a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of [the FEHA]...'" (*Ibid.*) "'However, a series of alleged discriminatory acts must be considered collectively rather than individually in determining whether the overall employment action is adverse [citations] and, in the end, the determination of whether there was an adverse employment action is made on a case-by-case basis, in light of the objective evidence.'" (*Ibid*.)

Plaintiff argues that she suffered an adverse employment action as a result of her medical conditions, medical leave, and her race. Plaintiff was not terminated from her position nor transferred to another position. The adverse employment action complained of is her "unflattering" performance reviews that occurred in 2020 and 2021, after she reported her and her husband's medical conditions, being denied "the sort of bonus she would have received in the past", being strongly encouraged to apply for a non-HR position within the company, and Kearney's shift in treatment toward her.

Plaintiff cites *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1389-1390 for the argument that lateral transfers can constitute adverse employment action. Plaintiff was not laterally transferred. She remained in her HR Administrator 3 position since she was promoted to it in 2019 until she left GD.

Plaintiff cites *Winarto v. Toshiba America Electronics Components, Inc.* (2001) 274 F.3d 1276 for the notion that "Even non-sub-average ratings can constitute an 'adverse employment decision' if they are clearly undeserved or a large departure from past reviews." This quotation is included in a footnote. Importantly, however, in the footnote, the *Winarto* Court cites *Yartzoff v. Thomas* (1987) 809 F.2d 1371, which provides "Transfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions' cognizable under this section." (*Id*. at 1376.) The *Yartzoff* Court explained that a prima facie case can be made through circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected activity and the allegedly retaliatory employment decision. In *Yartzoff*, the plaintiff did not merely suffer adverse employment ratings. He also suffered a transfer of job duties which occurred only 3 months after he engaged in protected activities. (*Id*. at 1376.) He received his sub-average performance rating about 3 weeks after he met with his supervisors to discuss administrative complaint he had filed. (*Ibid*.)

Plaintiff also cites *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal.App.4th 413 because it provides that refusal to promote is an adverse employment action. The *Wysinger* Court did not find that a refusal to promote alone consisted an adverse employment action. The Court stated, "There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts that caused him substantial psychological harm." (Id. at 424.) The Court notes here that Plaintiff was promoted to HR Administrator 3 in March of 2019, after she initially reported her medical condition to Kearney.

"[I]n determining whether an employee has been subjected to treatment that materially affects the terms and conditions of employment, it is appropriate to consider the totality of the

circumstances…" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036.) Here, Plaintiff refers to the performance reviews she received in 2020 and 2021 that included reference to Plaintiff's "personal situation" during that time period and how it affected her performance. She argues that this, coupled with the evidence of supervisors suggesting she transfer to another position, helping her find job listings outside of the company, and allegedly treating her differently after reporting her and her husband's medical conditions, creates a triable issue of fact as to whether she suffered an adverse employment action. However, the Court does not agree. There is no evidence showing that these performance ratings were undeserved. The fact that the performance reviews reference how her personal situation has affected her job performance does not alone create a triable issue of fact regarding whether the low performance ratings *because* she took medical leave. Furthermore, though there is evidence in the record that there were talks of transferring Plaintiff to another position, Plaintiff was not ever transferred. There is no evidence that the responsibilities of the position that she held were reduced. Plaintiff states that she was helped to find job listings outside of the company, but the evidence suggests that such help was given upon Plaintiff's request. While Plaintiff states she did not receive the kind of bonus she was accustomed to, there is no evidence that this was undeserved. Regarding Kearney treating Plaintiff differently after taking leave for her and her husband's medical conditions, this does not show that the terms and conditions of Plaintiff's employment were altered. Considering the totality of the circumstances, the Court finds no triable issue of fact as to whether Plaintiff suffered an adverse employment action.

The Court notes that Defendants argue that the *Wysinger* and *Winarto* cases are distinguished from this one because they do not involve a constructive discharge analysis. Plaintiff did not cite these cases in support of her constructive discharge argument. She cited them in support of her adverse employment action argument. They are directly relevant to that analysis.

Defendants argue that, even if an adverse employment action existed, Plaintiff cannot show that a causal link exists between the adverse employment action and the protected activity. Defendants argue that there existed significant intervening acts between "any discriminatory conduct and any adverse employment action" that severed the causal nexus.

"Both direct and circumstantial evidence can be used to show an employer's intent to retaliate. 'Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive. [Citation.]'…Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers." (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153.)

"'To avoid summary judgment, [the plaintiff] 'must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses.' [Citation.] [He] must produce 'specific, substantial evidence of pretext.'" (*Horn v. Cushman & Wakefield W., Inc.* (1999) 72 Cal.App.4th 798, 807.) "[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Dep't of Soc. Servs.* (1997) 57 Cal.App.4th 997, 1004–05.)

Here, even if the Court assumes that Plaintiff suffered an adverse employment action, Plaintiff has not provided substantial evidence of pretext. Plaintiff points to the references in her performance

reviews of her personal situation affecting her performance. However, this does not constitute substantial evidence. Even considered with the other evidence Plaintiff points to regarding being encouraged to look for a different position within the company and Kearney's difference in treatment of her, this does not constitute specific, substantial evidence of pretext that would support a conclusion that the employer engaged in intentional discrimination. Accordingly, Plaintiff's retaliation cause of action lacks merit.

Fifth and Sixth Causes of Action for CFRA Interference and Retaliation

To establish a violation of CFRA rights, a plaintiff must prove, (1) Plaintiff was eligible for CFRA leave; (2) Plaintiff requested or took leave; (3) Plaintiff provided reasonable notice to her employer of her need for leave, including the expected time and length; (4) the employer refused to grant the request for leave or refused to return the plaintiff to the same or a comparable job when the leave ended." (CACI 2600.) "[C]ourts have distinguished between two theories of recovery under the CFRA and the FMLA. 'Interference' claims prevent employers from wrongly interfering with employees' approved leaves of absence, and 'retaliation' or 'discrimination' claims prevent employers from terminating or otherwise taking action against employees because they exercise those rights." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 920.)

In analyzing Plaintiff's FEHA discrimination and retaliation claims, the Court found that Plaintiff was not subject to an adverse employment action or discharge. Accordingly, there exists no triable issue of material fact as to Plaintiff CFRA retaliation claim, since maintaining such a claim would require a showing of termination or other adverse employment action. Accordingly, the Defendants' motion for summary adjudication is GRANTED as to the Sixth Cause of Action.

Turning to Plaintiff's Fifth Cause of Action for interference, the parties dispute whether the time off taken by Plaintiff other than the 2019 CFRA leave constituted CFRA leave since Plaintiff did not specifically classify it as such. Plaintiff argues that it was Defendants' burden to designate her leave as CFRA or CFRA/FMLA leave according to Cal. Code Regs. tit. 2, § 11091. According to the Code, after the employee provides notice of the leave and the reason for the leave, 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…" This is because an employee "need not expressly assert rights under CFRA or FMLA or even mention CFRA or FMLA to meet the notice requirement…"

Defendants have failed to show the lack of triable issue of fact as to this cause of action. Plaintiff alleges and Defendants agree that she took designated CFRA leave in August of 2019 due to her cancer diagnosis. She alleges that GD interfered with this leave by contacting her and requiring her to answer work-related questions and to perform HR-related tasks. Defendants have not provided evidence showing that this did not occur. Therefore, regardless of whether the other leave taken by Plaintiff during the span of 2019-2021 was CFRA leave, Defendants have not shown that they did not interfere with the undisputed CFRA leave taken in August of 2019. They have also failed to show a lack of triable issue of material fact as to whether the other leave taken by Plaintiff constituted CFRA leave. Defendants have failed to meet their initial burden on this cause of action. As such, the burden did not shift to Plaintiff. Accordingly, the Defendants' motion for summary adjudication is DENIED as to the Fifth Cause of Action.

Seventh Cause of Action for Hostile Work Environment Harassment

"Harassment includes '[v]erbal harassment' such as 'epithets, derogatory comments or slurs on a basis enumerated in the Act' (Cal. Code Regs., tit. 2, § 11019, subd. (b)(2)(A)); it also includes '[p]hysical' and '[v]isual forms of harassment'…" (*Bailey v. San Francisco Dist. Attorney's Off.* (2024) 16 Cal.5th 611, 627.)

Plaintiff's argument suggests that a plaintiff no longer needs to show severe or pervasive conduct in order to prove harassment. However, even the cases cited by Plaintiff, which were decided after the enactment of Government Code § 12923, confirm that "severe and pervasive" conduct must still be shown. In *Bailey v. San Francisco Dist. Attorney's Off., supra*, the Court stated that in order to prevail on a claim of workplace hostility an employee must show that she was subjected to harassing conduct that was "sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment." (*Bailey, supra,* at 627.) "[H]arassment claims focus 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.'" (*Ibid.* Italics in original.) "'The working environment must be evaluated in light of the totality of the circumstances.'" (*Id*. at 628.)

> " 'These may include 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.' " (*Miller*, at p. 462, 30 Cal.Rptr.3d 797, 115 P.3d 77, quoting *Harris*, at p. 23, 114 S.Ct. 367.) " 'The required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct.' " (*Reynaga v. Roseburg Forest Products* (9th Cir. 2017) 847 F.3d 678, 687 (*Reynaga*).) " '[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious)' " are not sufficient to create an actionable claim of harassment.

(*Id*. at 628.) "The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position." (*Id*. at 629.) In *Bailey*, the Court found that one-time use of a racial slur can be so offensive it gives rise to a triable issue of actionable harassment. (*Id*. at 629.)

Plaintiff also cites *Beltran v. Hard Rock Hotel Licensing, Inc.* (2023) 97 Cal.App.5th 865, 878. The *Beltran* Court stated, "Sexual harassment law in California requires an employee to prove 'severe or pervasive' harassment." The *Beltran* Court also stated that Government Code § 12923 simply provided clarification regarding the type of conduct sufficient to establish a hostile working environment. However, the objective standard and the severe and pervasive standard still apply.

Here, Defendants have met their burden of showing the lack of triable issue of fact as to this cause of action because there was no severe or pervasive conduct related to Plaintiff's medical condition, disability, her family's medical conditions or disabilities, or Plaintiffs age, race, ethnicity or national origin. The burden of proof on this cause of action shifted to Plaintiff to raise a triable issue of material fact. Plaintiff argues that she was told, in writing, multiple times via her performance reviews, and verbally she was no longer a good fit for the role after taking leave. She posits that this was severe and pervasive enough "to alter the conditions of employment and create a work environment that qualifies as hostile or abusive..." The Court does not agree that this is sufficient evidence of "severe or pervasive" conduct to create a triable issue of fact regarding harassment. Even considered together with Plaintiff's allegations regarding the different treatment she received from Kearney, it does not constitute severe or pervasive conduct that created an abusive environment. Plaintiff does not cite any authority that supports her contention that this conduct

would be sufficient to support a cause of action for hostile work environment harassment.

Eighth Cause of Action for Failure to Prevent Discrimination and Harassment

This cause of action is derivative of Plaintiff's other discrimination and harassment causes of action. Since the Court has found that summary adjudication should be granted in favor of Defendants on those causes of action, the same is true for this one.

Tenth Cause of Action for Whistleblower Protection

To establish a claim for whistleblower protection, as relevant here, the plaintiff must prove that 1) she disclosed to an employee with authority to investigate that her employer was in violation of the law; 2) the employer subjected plaintiff to an adverse employment action; and 3) the disclosure was a contributing factor in the employer's decision to take an adverse employment action against her. (CACI 4603.) The FEHA definition an adverse employment action is applicable to a retaliation lawsuit under Labor Code § 1102.5. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387, disapproved on other grounds by *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 718.)

This Court has found that no triable issue of material fact exists regarding whether Plaintiff was subjected to an adverse employment action or constructively discharged. Rather, Plaintiff was neither subjected to an adverse employment action nor constructively discharged. Accordingly, she cannot maintain this cause of action.

Eleventh and Twelfth Causes of Action for Negligent and Fraudulent Misrepresentations

Defendants argue that Plaintiff's fraud causes of action lack merit. Plaintiff fails to respond to these arguments in her opposition. The Court deems Plaintiff's failure to oppose the motion in regard to these two causes of action as consent to the granting of the motion. (Cal. Rules of Court, Rule 8.54.) The Court also grants the motion based on the fact that Defendants have met their burden of showing that no triable issues of fact exist regarding these fraud causes of action and Plaintiff has failed to meet the shifted burden of proof.

Thirteenth Cause of Action for Constructive Wrongful Termination

This cause of action is derivative of Plaintiff's discrimination, retaliation, and harassment causes of action. Since summary adjudication is granted as to those causes of action it is also granted as to this cause of action in favor of Defendants.

Fourteenth and Fifteenth Causes for Nonpayment of Wages

Defendants' motion for summary adjudication of these causes of action is MOOT because these two causes of action were dismissed with prejudice by Plaintiff on January 24, 2025.

Punitive Damages

Defendants argue in their memorandum in support of the motion that Plaintiff's prayer for punitive damages should "stricken" because Plaintiff cannot establish malice, fraud or oppression. However,

a motion to strike was not noticed in the notice of motion. Furthermore, it was not identified either in the notice of motion or in the separate statement in support of the motion that this was an issue for which Defendants sought summary adjudication. "[T]he specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." (Cal. Rules of Court, Rule 3.1350.) The request is accordingly denied.

Plaintiff's Request to Deny Motion Because of Defendants' Purported Delay in Producing Discovery

Plaintiff requests the Court deny Defendants' motion because Defendants have allegedly been uncooperative during discovery. None of Plaintiff's allegations are supported with evidence. None of the declarations submitted in support of Plaintiff's opposition provide evidentiary support for the factual allegations made in the memorandum regarding Defendants' alleged uncooperativeness during discovery. Plaintiff has failed to show that a denial or continuance is necessary pursuant to CCP § 437c(h) because she has failed to submit an affidavit showing that essential facts supporting her opposition may exist but cannot be presented at this time.

*****This is the end of the Tentative Rulings*****