

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELVA RODRIGUEZ,
Plaintiff,
v.
JOHN MUIR MEDICAL CENTER,
Defendant.

No. 09-00731 CW
ORDER GRANTING
DEFENDANT'S
MOTION FOR
SUMMARY JUDGMENT

Plaintiff Elva Rodriguez brings claims of unlawful discrimination, harassment and retaliation against Defendant John Muir Medical Center. Defendant moves for summary judgment on all of Plaintiff's claims. Plaintiff opposes the motion. The motion was heard on August 5, 2010. Having considered oral argument and the papers submitted by the parties, the Court grants Defendant's motion for summary judgment.

BACKGROUND

Plaintiff is a Hispanic female. She has worked for Defendant since February, 1989. From 1989 to 2000, she worked as an environmental technician. While in this position, she took multiple leaves of absence for work-related injuries to her back and neck. In 2000, Rodriguez became a unit secretary in the postpartum division after returning from a leave of absence due to

1 a back injury. As a unit secretary, Plaintiff received an increase
2 in salary and was in a position in which she would not have to
3 perform work that would aggravate her back or neck injuries. Her
4 orthopaedic doctor, Francis Pecoraro, stated that her work
5 restrictions were "no lifting more than 20 lbs and no repetitive
6 flexion and extension of the lumbar spine." Rodriguez Decl., Ex.
7 8. As unit secretary, her clinical coordinator and daily
8 supervisor was Laurie Sibbitt, her manager was Marina Yardumian and
9 her director was Meredith Pence.

10 Plaintiff generally claims that she "was constantly and
11 continuously harassed by a clique of nurses led by Rachelle
12 Menconi-Shipp from early 2003 to March, 2008." Rodriguez Decl.
13 ¶ 3. The clique was made up of Menconi-Shipp, Jennifer Briggs,
14 Kristin Bower, Natalie Dicks, Janie Cockman and Shantelle McNabb.
15 Sibbitt Dep. at 9:16-19. She states that each time this clique of
16 nurses worked together, which was three times a week, the nurses
17 would "draw up chairs around [her] workstation and talk about
18 sexual experiences, length of penises, racial remarks, and the
19 like." Rodriguez Decl. ¶ 8. Sibbitt confirmed in general that she
20 observed the clique of nurses "make racial remarks about Hispanic
21 people." Sibbitt Dep. at 18:17-18. However, Sibbitt does not
22 state when or how often these comments were made. Sibbitt did not
23 notify her superiors about these comments.

24 Plaintiff's case is based on only two specific incidents of
25 national origin harassment. The first occurred at some point in
26 2003. She claims that, when she told Menconi-Shipp that she was
27 moving to Discovery Bay, Menconi-Shipp asked her how she could

1 afford to live there and if she received extra money from drug
2 dealing, "like the other Mexicans, drug dealers." Rodriguez Dep.
3 at 87:21-24.

4 On November 10, 2003, Sibbitt and Yardumian placed Plaintiff
5 on a forty-five day performance probation because of her behavior
6 and performance at work. The memo describing the reasons for the
7 probation noted, for example, her verbalized anger towards Sibbitt
8 and "another coworker," long periods away from her desk without
9 informing the charge nurse, many non-work-related telephone calls,
10 crying at her desk, refusal to go home when asked, telephone calls
11 to many staff members' houses, misuse of prescription drugs,
12 erratic behavior and an inability to concentrate and complete
13 tasks. Rodriguez Dep., Ex. 8.

14 On November 24, 2003, Plaintiff saw Dr. Pecoraro and
15 complained of "whole body pain and more specifically, increase in
16 lower back pain." Id. Dr. Pecoraro described his visit with
17 Plaintiff in a letter addressed to TriStar Insurance, stating, "As
18 you aware [sic], [Ms. Rodriguez] is having a great deal of stress
19 in her life because of work-related issues. To refresh your
20 memory, Ms. Rodriguez was accused of abusing her Vicodin. She was
21 accused of being oversedated at work and this came as quite a
22 surprise to Ms. Rodriguez, as well as myself." Id. Dr. Pecoraro
23 wrote that Plaintiff was not abusing her prescription medication,
24 and noted, "It is apparent at this time that although Ms. Rodriguez
25 should continue her employment with John Muir Medical Center, she
26 cannot continue to work in the department that she currently does
27 She should be transferred to another department which, in
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1 my estimation, should be easy enough to do." Id. Dr. Pecoraro
2 also noted that Plaintiff "has been seen by Dr. Rome, a well-
3 respected pain-trained psychologist. He feels strongly that Ms.
4 Rodriguez should be transferred to another department as this would
5 serve Ms. Rodriguez's best interest, as well as the interest of her
6 current department." Id. Dr. Pecoraro recommended that Plaintiff
7 stop working if not transferred because "her current situation is
8 intolerable." Id.

9 As noted above, this letter was addressed to TriStar
10 Insurance, not Defendant. Plaintiff has presented no evidence that
11 she or TriStar or anyone else provided the letter to Defendant.

12 After her evaluation by Dr. Pecoraro, Plaintiff went on
13 medical leave due to "mental stress." Rodriguez Dep. at 180:7-8.
14 While on leave, Plaintiff requested a transfer to another
15 department because of the stress deriving from interactions with
16 co-workers in her department. Kroll Decl. ¶ 5. Director of
17 Employee Health Barbara Kroll advised Plaintiff that she would need
18 a written verification from her treating physician to transfer her
19 to a different department. Kroll Decl. ¶ 5. On January 22, 2004,
20 Plaintiff's treating psychologist Dr. Rome wrote a letter to
21 Defendant which stated, "Ms. Rodriguez is released to return to her
22 usual and customary job with no restrictions from a psychological
23 standpoint." Upon her return from leave, Plaintiff handed this
24 letter to Yardumian. Plaintiff presents this short letter as the
25 sole evidence that she provided to Defendant concerning a doctor's
26 verification requesting a transfer to a different department.
27 However, nothing in this letter recommends such a transfer and
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1 Defendant claims that it did not receive any information from a
2 physician recommending a transfer. Thus, Defendant returned
3 Plaintiff to her former position as a unit secretary in the
4 postpartum department.

5 The other specific incident of national origin harassment of
6 which Plaintiff complains occurred at some point in 2004 or 2005,
7 when Menconi-Shipp made a derogatory remark about a Hispanic young
8 man who had died in the hospital. Menconi-Shipp said that "he was
9 Hispanic and worthless anyway." Rodriguez Dep. at 77:14-23; id.,
10 Ex. 6. Plaintiff complained to Sibbitt about this comment,
11 presumably in 2004 or 2005. There is no evidence that Sibbitt did,
12 or did not, do anything in response to this complaint.

13 Plaintiff claims that, at some point in 2005, she verbally
14 complained to Sibbitt about the inappropriately sexual nature of
15 the clique of nurses' conversations. Rodriguez Dep. at 74:20.
16 Sibbitt responded by telling the nurses to stop these discussions.
17 Sibbitt Dep. at 14:11-15. Sibbitt told Yardumian about Plaintiff's
18 complaint; Yardumian did not take any additional action. Id. at
19 14:4-19. Although not clear from the record, it appears that
20 Plaintiff complained directly to the nurses about these
21 conversations, but not until the end of 2007. Rodriguez Dep. at
22 73:10-12. At that time, Plaintiff told them, "You guys are getting
23 out of hand." Id.

24 In September, 2006, Menconi-Shipp replaced Laurie Sibbitt as
25 Plaintiff's immediate supervisor. Sibbitt transferred to a
26 different division because she disagreed with the way her
27 supervisors, Yardumian and Pence, dealt with the clique of nurses.

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1 Sibbitt claims that Yardumian and Pence did not help her
2 "supervise" the clique or "correct the problems" she was having
3 with the clique. Sibbitt Dep. 9:10-13. Before Menconi-Shipp was
4 promoted, Plaintiff wrote Yardumian a letter expressing her
5 concerns about Menconi-Shipp's qualifications. Plaintiff wrote
6 that Menconi-Shipp was the leader of a clique of nurses and that
7 she was "involved in every negative situation or problem amongst
8 the PM staff, even when it doesn't concern her." Rodriguez Dep.,
9 Ex. 13. She complained that Menconi-Shipp assigned her friends at
10 work the lightest assignments and overloaded other nurses with more
11 difficult patients. Id. The letter mentions no instances of
12 harassment or discrimination, based on national origin or anything
13 else.

14 Plaintiff presents no evidence of any harassment or complaints
15 about harassment between September, 2006 and March, 2008. On March
16 5, 2008, Menconi-Shipp and Yardumian met with Plaintiff to discuss
17 a complaint made by another nurse, Natalie Dicks. Dicks complained
18 that Plaintiff called her a "bitch." Rodriguez Dep. at 80:23-
19 82:11. Plaintiff denied making the comment and complained that
20 other nurses used profane language regularly. Plaintiff also
21 complained that the nurses routinely talked about sex in front of
22 her desk and used racial slurs to describe South Asians.
23 Specifically, she claimed that nurses at work called South Asians
24 "guptas" and "habibs" and joked about their body odor. It is not
25 clear who made these comments, and when or how often they were
26 made. Plaintiff does not deny that she also participated in making
27 such slurs. Dicks Dep. at 35:18-36:8; Menconi-Shipp Dep. at 19:1-

1 6.

2 On March 10, 2008, Plaintiff met with Yardumian and Menconi-
3 Shipp to discuss her performance evaluation. She received a
4 negative evaluation because she engaged in non-work related tasks
5 during work time, such as knitting, reading her personal mail,
6 doing Sudoku puzzles and making personal calls. The review also
7 noted that she failed to complete assigned tasks and convey a
8 professional image. Rodriguez Dep., Ex. 5. Yardumian and Menconi-
9 Shipp threatened to place Plaintiff on probation.

10 The next day, March 11, Plaintiff placed herself on a leave of
11 absence for "mental distress." Rodriguez Dep. at 133:14.
12 Defendant maintains a written policy of granting non-industrial
13 medical leave for up to six months and it requires a physician's
14 release prior to returning from the medical leave. In September,
15 at the expiration of the six months, Plaintiff was not able to
16 return to work and director of human resources Julie Anderson
17 informed her that Defendant would unilaterally extend her leave for
18 another ninety days. In December, after this ninety-day extension,
19 Plaintiff was still unable to return to work and she did not notify
20 Defendant whether she intended to return to work.

21 On January 7, 2009, Anderson notified Plaintiff that she had
22 been terminated as of December 10, 2008. Anderson was the sole
23 decision-maker concerning Plaintiff's termination and nobody
24 recommended to Anderson that Plaintiff should be terminated.

25 Meanwhile, in July, 2008, while on leave, Plaintiff had
26 written a letter to Defendant summarizing incidents she perceived
27 to be harassment over the years of her employment. The incidents

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1 included those discussed above. Defendant conducted an
2 investigation in response to Plaintiff's letter. Yardumian held a
3 staff meeting to inform employees that racial comments are
4 unacceptable in the work environment. She also sent staff an email
5 reiterating Defendant's policy against harassment and encouraging
6 staff to report any inappropriate comments.

7 On November 14, 2008, Plaintiff filed a charge of
8 discrimination with the Department of Fair Employment and Housing
9 (DFEH) and the Equal Employment Opportunity Commission (EEOC)
10 alleging retaliation and discrimination based on sex, national
11 origin and disability. On January 6, 2009, she filed another
12 charge with the DFEH and EEOC alleging retaliation and
13 discrimination based on national origin and disability. The 2009
14 charge mirrors the 2008 charge.

15 Plaintiff submitted evidence that, on April 14, 2010, she
16 began psychotherapy treatment with Dr. John Italia, who diagnosed
17 her with major depression and post-traumatic stress disorder.
18 Rodriguez Decl., Ex. 7.

19 Plaintiff's operative complaint alleges the following causes
20 of action: (1) national origin discrimination in violation of Title
21 VII; (2) national origin harassment in violation of Title VII;
22 (3) disability discrimination in violation of the Americans with
23 Disabilities Act (ADA); (4) disability harassment in violation of
24 the ADA; (5) failure to provide reasonable accommodation in
25 violation of the ADA; (6) another charge of disability
26 discrimination in violation of the ADA; (7) national origin and
27 disability discrimination in violation of the California Fair
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1 Employment and Housing Act (FEHA); (8) disability harassment in
2 violation of FEHA; (9) retaliation in violation of FEHA;
3 (10) failure to provide reasonable accommodation in violation of
4 FEHA; (11) failure to prevent disability discrimination in
5 violation of FEHA; and (12) wrongful discharge in violation of
6 public policy.

7 LEGAL STANDARD

8 Summary judgment is properly granted when no genuine and
9 disputed issues of material fact remain, and when, viewing the
10 evidence most favorably to the non-moving party, the movant is
11 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
12 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
13 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
14 1987).

15 The moving party bears the burden of showing that there is no
16 material factual dispute. Therefore, the court must regard as true
17 the opposing party's evidence, if supported by affidavits or other
18 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
19 F.2d at 1289. The court must draw all reasonable inferences in
20 favor of the party against whom summary judgment is sought.

21 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
22 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
23 1551, 1558 (9th Cir. 1991).

24 Material facts which would preclude entry of summary judgment
25 are those which, under applicable substantive law, may affect the
26 outcome of the case. The substantive law will identify which facts
27 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248

1 (1986).

2 Where the moving party does not bear the burden of proof on an
3 issue at trial, the moving party may discharge its burden of
4 production by either of two methods:

5 The moving party may produce evidence negating an
6 essential element of the nonmoving party's case, or,
7 after suitable discovery, the moving party may show that
8 the nonmoving party does not have enough evidence of an
9 essential element of its claim or defense to carry its
10 ultimate burden of persuasion at trial.

11 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
12 1099, 1106 (9th Cir. 2000).

13 If the moving party discharges its burden by showing an
14 absence of evidence to support an essential element of a claim or
15 defense, it is not required to produce evidence showing the absence
16 of a material fact on such issues, or to support its motion with
17 evidence negating the non-moving party's claim. Id.; see also
18 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
19 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the
20 moving party shows an absence of evidence to support the non-moving
21 party's case, the burden then shifts to the non-moving party to
22 produce "specific evidence, through affidavits or admissible
23 discovery material, to show that the dispute exists." Bhan, 929
24 F.2d at 1409.

25 If the moving party discharges its burden by negating an
26 essential element of the non-moving party's claim or defense, it
27 must produce affirmative evidence of such negation. Nissan, 210
28 F.3d at 1105. If the moving party produces such evidence, the
burden then shifts to the non-moving party to produce specific

1 evidence to show that a dispute of material fact exists. Id.

2 If the moving party does not meet its initial burden of
3 production by either method, the non-moving party is under no
4 obligation to offer any evidence in support of its opposition. Id.
5 This is true even though the non-moving party bears the ultimate
6 burden of persuasion at trial. Id. at 1107.

7 DISCUSSION

8 I. Discrimination Claims

9 A. Applicable Law

10 In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973),
11 and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248
12 (1981), the Supreme Court established a burden-shifting framework
13 for evaluating the sufficiency of plaintiffs' evidence in
14 employment discrimination suits. The same burden-shifting
15 framework is used when analyzing claims under FEHA. Bradley v.
16 Harcourt, Brace & Co., 104 F.3d 267, 270 (9th Cir. 1996) (FEHA).
17 Within this framework, plaintiffs may establish a prima facie case
18 of discrimination by reference to circumstantial evidence; to do
19 so, plaintiffs must show that they are members of a protected
20 class; that they were qualified for the position they held or
21 sought; that they were subjected to an adverse employment decision;
22 and that they were replaced by someone who was not a member of the
23 protected class or that the circumstances of the decision otherwise
24 raised an inference of discrimination. St. Mary's Honor Ctr. v.
25 Hicks, 509 U.S. 502, 506 (1993) (citing McDonnell Douglas and
26 Burdine). Once plaintiffs establish a prima facie case, a
27 presumption of discriminatory intent arises. Id. To overcome this

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1 presumption, defendants must come forward with a legitimate, non-
2 discriminatory reason for the employment decision. Id. at 506-07.
3 If defendants provide that explanation, the presumption disappears
4 and plaintiffs must satisfy their ultimate burden of persuasion
5 that defendants acted with discriminatory intent. Id. at 510-11.

6 To survive summary judgment, plaintiffs must then introduce
7 evidence sufficient to raise a genuine issue of material fact as to
8 whether the reason the employer articulated is a pretext for
9 discrimination. Plaintiffs may rely on the same evidence used to
10 establish a prima facie case or put forth additional evidence. See
11 Coleman v. Quaker Oats Co., 232 F.3d 1271, 1282 (9th Cir. 2000);
12 Wallis v. J.R. Simplot Co., 26 F.3d 885, 892 (9th Cir. 1994).
13 However, "in those cases where the prima facie case consists of no
14 more than the minimum necessary to create a presumption of
15 discrimination under McDonnell Douglas, plaintiff has failed to
16 raise a triable issue of fact." Wallis, 26 F.3d at 890.

17 Plaintiffs can provide evidence of "pretext (1) indirectly, by
18 showing that the employer's proffered explanation is unworthy of
19 credence because it is internally inconsistent or otherwise not
20 believable, or (2) directly, by showing that unlawful
21 discrimination more likely motivated the employer." Raad v.
22 Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir.
23 2003) (citation and internal quotation marks omitted). When
24 plaintiffs present indirect evidence that the proffered explanation
25 is a pretext for discrimination, "that evidence must be specific
26 and substantial to defeat the employer's motion for summary
27 judgment.'" EEOC v. Boeing Co., 577 F.3d 1044, 1049 (9th Cir.

1 2009) (quoting Coghlan v. Am. Seafoods Co. LLC, 413 F.3d 1090, 1095
2 (9th Cir. 2005)). When plaintiffs proffer direct evidence that
3 defendants' explanation is a pretext for discrimination, "very
4 little evidence" is required to avoid summary judgment. Boeing,
5 577 F.3d at 1049.

6 The Ninth Circuit has instructed that district courts must be
7 cautious in granting summary judgment for employers on
8 discrimination claims. See Lam v. Univ. of Hawai'i, 40 F.3d 1551,
9 1564 (9th Cir. 1994).

10 B. Analysis

11 1. National Origin Discrimination Claims

12 Defendant is entitled to summary judgment on Plaintiff's
13 national origin discrimination claims under Title VII and FEHA
14 because Plaintiff cannot make out a prima facie case that she
15 suffered an adverse employment action as a result of
16 discrimination.

17 Defendant argues that Plaintiff has not suffered an adverse
18 employment action as a result of any discrimination. The Ninth
19 Circuit defines "'adverse employment action' broadly." Fonseca v.
20 Sysco Food Services of Arizona, Inc., 374 F.3d 840, 847 (9th Cir.
21 2004) (citing Ray v. Henderson, 217 F.3d 1234, 1241 (9th Cir.
22 2000); see also Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th
23 Cir. 2000) (collecting cases). An adverse employment action is one
24 that "materially affect[s] the compensation, terms, conditions, or
25 privileges of . . . employment." Davis v. Team Elec. Co., 520 F.3d
26 1080, 1089 (9th Cir. 2008). However, "[n]ot every employment
27 decision amounts to an adverse employment action." Brooks, 229
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1 F.3d at 928.

2 Plaintiff argues that she suffered the adverse employment
3 action of a constructive discharge on the theory that the constant
4 harassment that she suffered forced her to discontinue working. A
5 constructive discharge occurs when the "working conditions
6 deteriorate, as a result of discrimination, to the point that they
7 become 'sufficiently extraordinary and egregious to overcome the
8 normal motivation of a competent, diligent, and reasonable employee
9 to remain on the job to earn a livelihood and to serve his or her
10 employer.'" Brooks, 229 F.3d at 930 (quoting Turner v. Anheuser-
11 Busch, Inc., 7 Cal. 4th 1238, 1246 (1994). A "single isolated
12 instance of employment discrimination is insufficient as a matter
13 of law to support a finding of constructive discharge." Watson v.
14 Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987). "A
15 plaintiff alleging a constructive discharge must show some
16 aggravating factors, such as a continuous pattern of discriminatory
17 treatment." Id. (emphasis in original) (internal quotation marks
18 and citations omitted). "The determination whether conditions were
19 so intolerable and discriminatory as to justify a reasonable
20 employee's decision to resign is normally a factual question left
21 to the trier of fact." Watson v. Nationwide Ins. Co., 823 F.2d
22 360, 361 (9th Cir. 1987).

23 Plaintiff complains that, three times a week for several
24 years, a group of nurses would sit by her desk and gossip about
25 sexual and racial matters. However, Plaintiff has not presented
26 any specific examples of the comments made during these
27 discussions, or any evidence that comments made during these

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1 discussions were directed at herself. Plaintiff has not shown that
2 Defendant discriminated against her because of her national
3 original or that she suffered any adverse employment action because
4 of her national origin.

5 The only specifically identified racially discriminatory
6 comments are insufficient to make out Plaintiff's prima facie case
7 because they were so isolated and infrequent as to amount to "stray
8 remarks." Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1438 (9th
9 Cir. 1990). "[S]tray' remarks are insufficient to establish
10 discrimination." Id. Plaintiff points to two specific remarks
11 allegedly made by Menconi-Shipp: in 2003, she referred to
12 "Mexicans" as "drug dealers" and in 2005 she called a deceased
13 Hispanic young man "worthless." Although these racist comments are
14 offensive, they were made two years apart and several years before
15 Plaintiff's termination. They were not made within the context of
16 Defendant's decision to terminate Plaintiff. These comments are
17 insufficient to establish a constructive termination.

18 This is especially true in light of the fact that Plaintiff
19 does not dispute that she made inappropriate racial remarks
20 herself. For example, she referred to a housekeeper named Harry as
21 "Habib Harry Balls" when he came through her department to collect
22 the trash. Dicks Dep. at 35:18-36:8. And, just like the clique of
23 nurses, she referred to South Asians as "guptas." Menconi-Shipp
24 Dep. at 19:1-6.

25 At most, the evidence shows that the nurses in this clique
26 simply did not get along with Plaintiff. "Because an employer
27 cannot force employees to socialize with one another, ostracism
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1 suffered at the hands of coworkers cannot constitute an adverse
2 employment action." Brooks, 229 F.3d at 929. Plaintiff has not
3 presented evidence that Defendant discriminated against her because
4 of her national origin such that no reasonable person in her shoes
5 would continue to work there. Accordingly, Plaintiff has not
6 established a prima facie case of national origin discrimination.

7 2. Disability Discrimination Claims

8 To recover for discrimination under the ADA, "an employee
9 bears the ultimate burden of proving that he is (1) disabled under
10 the Act, (2) a 'qualified individual with a disability,' and
11 (3) discriminated against 'because of' the disability." Bates v.
12 United Parcel Serv., 511 F.3d 974, 988 (9th Cir. 2007) (quoting
13 Nunes v. Wal-Mart Stores, 164 F.3d 1243, 1246 (9th Cir. 1999)). "A
14 'disabled' employee under the ADA is one who: (1) has a 'physical
15 or mental impairment that substantially limits one or more of the
16 major life activities of such individual'; (2) has a 'record of
17 such an impairment'; or (3) is 'regarded as having such an
18 impairment.'" Thornton v. McClatchy Newspapers, 261 F.3d 789, 794
19 (9th Cir. 2001) (quoting 42 U.S.C. § 12102(2)). To determine
20 whether an impairment substantially limits an individual, a court
21 considers "the nature, severity, duration, and impact of the
22 impairment." Fraser v. Goodale, 342 F.3d 1032, 1038 (9th Cir.
23 2003) (citing 29 C.F.R. § 1630.2(j)(2)(i)-(iii)). "Whether a
24 person is disabled under the ADA is an 'individualized inquiry.'" Thornton,
25 261 F.3d at 794 (quoting Sutton v. United Air Lines,
26 Inc., 527 U.S. 471, 483 (1999)).

27 A prima facie claim for disability discrimination under the
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1 FEHA requires a plaintiff to show "(1) he suffers from a
2 disability, (2) he is otherwise qualified to do his job, (3) he
3 suffered an adverse employment action, and (4) the employer
4 harbored discriminatory intent." Avila v. Continental Airlines,
5 Inc., 165 Cal. App. 4th 1237, 1246 (2008). "'An adverse employment
6 decision cannot be made 'because of' a disability, when the
7 disability is not known to the employer.'" Id. (quoting Brundage
8 v. Hahn, 57 Cal. App. 4th 228, 236 (1997)).

9 Unlike the ADA, the FEHA does not require that a disability
10 substantially limit a plaintiff's major life activity. See Cal.
11 Gov. Code § 12926.1(c).

12 [T]he Legislature has determined that the definitions of
13 "physical disability" and "mental disability" under the
14 law of this state require a "limitation" upon a major
15 life activity, but do not require, as does the Americans
16 with Disabilities Act of 1990, a "substantial
17 limitation." This distinction is intended to result in
18 broader coverage under the law of this state than under
19 that federal act.

20 Id.

21 Plaintiff claims that Defendant discriminated against her
22 because of her physical and mental disabilities. Plaintiff argues
23 that she was suffering from "significant emotional distress" caused
24 by the "hostile clique" and Defendant discriminated against her
25 when it did not transfer her to another division. However,
26 Defendant offered to transfer Plaintiff to another division if she
27 presented Defendant with a letter from her physician so
28 recommending. The letter Plaintiff gave to Defendant upon her
return from leave and in support of her transfer stated that she
"is released to return to her usual and customary job with no

1 restrictions from a psychological standpoint." Rodriguez Dep., Ex.
2 47 (emphasis added). Plaintiff submitted to the Court a different
3 letter from her psychiatrist recommending a transfer out of the
4 postpartum department, but that letter was not addressed to
5 Defendant and there is no evidence that it was ever delivered to
6 Defendant. Therefore, Plaintiff has submitted no evidence that
7 Defendant discriminated against her based on her disability when it
8 did not transfer her to a different department.

9 Plaintiff also claims that Defendant discriminated against her
10 because of her physical disability. She asserts that she was
11 repeatedly written up for not performing physical tasks, such as
12 carrying patients' items or reaching for elevated files, which she
13 was medically restricted from performing. However, Plaintiff
14 presents no evidence that she received any such disciplinary
15 action. Although she received a negative evaluation for not
16 performing certain tasks requested by other nurses, none of these
17 tasks required her to lift anything over twenty pounds or
18 repeatedly bend over or stretch for items. See Rodriguez Dep., Ex.
19 5. In sum, although Plaintiff has presented evidence that she
20 suffers from depression and anxiety, she has not presented any
21 evidence that she was discriminated against because of a physical
22 or mental disability. Accordingly, the Court grants Defendant's
23 motion for summary judgment of her disability discrimination
24 claims.

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1 II. Harassment Claims

2 A. Applicable Law

3 1. National Origin Harassment

4 A plaintiff may prove national origin harassment by
5 demonstrating that an employer has created a hostile or abusive
6 work environment. Meritor Savings Bank v. Vinson, 477 U.S. 57,
7 65-67 (1986). To prevail on a hostile workplace claim, a plaintiff
8 must show: (1) that she was subjected to verbal or physical conduct
9 because of her national origin; (2) that the conduct was unwelcome;
10 and (3) that the conduct was sufficiently severe or pervasive to
11 alter the conditions of her employment and create an abusive work
12 environment. Vasquez v. County of L.A., 349 F.3d 634, 642 (9th
13 Cir. 2003). A plaintiff must show that the work environment was
14 abusive from both a subjective and an objective point of view.
15 Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995).
16 Whether the workplace is objectively hostile must be determined
17 from the perspective of a reasonable person with the same
18 fundamental characteristics as the plaintiff. Id. Although the
19 "mere utterance of an . . . epithet which engenders offensive
20 feelings in an employee" does not alter the employee's terms and
21 conditions of employment sufficiently to create a hostile work
22 environment, "when the workplace is permeated with 'discriminatory
23 intimidation, ridicule, and insult,'" such an environment exists.
24 Meritor, 477 U.S. at 65, 67. Neither "simple teasing," "offhand
25 comments," nor "isolated incidents" alone constitute a hostile work
26 environment. Faragher v. City of Boca Raton, 524 U.S. 775, 788
27 (1998). Further, "even if a hostile working environment exists, an

1 employer is only liable for failing to remedy harassment of which
2 it knows or should know." Fuller, 47 F.3d at 1527.

3 California courts also apply federal decisions interpreting
4 Title VII to analyze FEHA national origin harassment claims. Etter
5 v. Veriflo, 67 Cal. App. 4th 457, 464 (1999).

6 2. Disability Harassment

7 The elements of a claim of hostile environment harassment
8 based on disability under FEHA are the same as if analyzed as a
9 harassment claim under Title VII: (1) the plaintiff belongs to a
10 protected group; (2) the plaintiff was subject to unwelcome
11 harassment because of being a member of that group; and (3) the
12 harassment was sufficiently severe or pervasive to alter the
13 conditions of employment and create an abusive working environment.
14 Aguilar v. Avis Rent A Car System, Inc., 21 Cal. 4th 121, 130
15 (1999); Etter, 67 Cal. App. 4th at 463. The plaintiff must show a
16 "concerted pattern of harassment of a repeated, routine, or
17 generalized nature." Aguilar, 21 Cal. 4th at 131.

18 The Ninth Circuit has not determined whether a plaintiff can
19 maintain a hostile work environment claim under the ADA. See Brown
20 v. City of Tuscon, 336 F.3d 1181, 1190 (9th Cir. 2003) (declining
21 to decide the issue); see also Keller-McIntyre v. S.F. State Univ.,
22 2007 WL 776126, at *13 (N.D. Cal.). However, other circuits have
23 addressed this issue. "To succeed on a claim of disability-based
24 harassment, the plaintiff must prove: (1) that she belongs to a
25 protected group; (2) that she was subjected to unwelcome
26 harassment; (3) that the harassment complained of was based on her
27 disability or disabilities; (4) that the harassment complained of

1 affected a term, condition, or privilege of employment; and
2 (5) that the employer knew or should have known of the harassment
3 and failed to take prompt, remedial action." Flowers v. S. Reg'l
4 Physician Servs., Inc., 247 F.3d 229, 232 (5th Cir. 2001); see also
5 Keller-McIntyre, 2007 WL 776126, at *13 (citing Flowers).

6 Even if harassment claims under the ADA are cognizable,
7 Plaintiff's claim fails.

8 B. Analysis

9 1. National Origin and Disability Harassment Claims

10 Plaintiff claims that the repeated gossiping and comments by
11 the clique of nurses near her desk created a hostile work
12 environment. However, Plaintiff has not presented evidence that
13 she was subjected to abusive verbal conduct because of her national
14 origin or disability. As discussed above, Plaintiff does not give
15 specific examples of discriminatory comments made during these
16 gossiping sessions. Further, that the nurses gossiped near her
17 desk is not evidence that they subjected her to inappropriate
18 verbal conduct because of her national origin or disability.
19 Menconi-Shipp's two comments referring to Hispanics are offensive,
20 but they were not sufficient to create a hostile work environment.
21 They were made two years apart and several years before Plaintiff
22 stopped coming to work in 2008.¹ Similarly, the derogatory names

23 _____
24 ¹Further, the statutes of limitations bar Plaintiff's
25 (1) Title VII claims based on acts that occurred more than 300 days
26 before she filed her complaint with the EEOC and (2) FEHA claims
27 based on acts that occurred more than one year before she filed her
28 complaint with the DFEH. 42 U.S.C. § 2000e-5(e)(1); Cal. Gov't
Code § 12960(d). These claims were filed in November, 2008. The
continuing violation doctrine does not apply because Plaintiff has
not established that actions taken outside the statutes of

1 other nurses used for South Asians are not evidence of verbal
2 harassment because of Plaintiff's national origin or disability.
3 In sum, just as Plaintiff has not presented evidence that her co-
4 workers' comments caused her constructive termination, she fails to
5 show that they were sufficiently severe or pervasive to alter the
6 conditions of her employment and create an abusive work
7 environment.

8 III. Reasonable Accommodation Claims

9 A. Applicable Law

10 Under the ADA, a defendant's "failure to provide reasonable
11 accommodation to 'an otherwise qualified individual with a
12 disability' constitutes discrimination." Kaplan v. City of Las
13 Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (quoting 42 U.S.C.
14 § 12112(b)(5)(A)). A "reasonable accommodation" includes:

15 (A) making existing facilities used by employees readily
16 accessible to and usable by individuals with
disabilities; and

17 (B) job restructuring, part-time or modified work
18 schedules, reassignment to a vacant position, acquisition
19 or modification of equipment or devices, appropriate
20 adjustment or modifications of examinations, training
materials or policies, the provision of qualified readers
or interpreters, and other similar accommodations for
individuals with disabilities.

21 42 U.S.C. § 12111(9).

22 Under California law, "reasonable accommodation" is defined
23 almost identically as under federal law. Cal. Gov. Code

24

25

26 _____
27 limitations are sufficiently linked to unlawful conduct that
28 occurred within the limitations period. See Yanowitz v. L'Oreal,
36 Cal. 4th 1028, 1056 (2005).

1 § 12926(n).² The "elements of a failure to accommodate claim are
2 (1) the plaintiff has a disability under the FEHA, (2) the
3 plaintiff is qualified to perform the essential functions of the
4 position, and (3) the employer failed to reasonably accommodate the
5 plaintiff's disability." Scotch v. Art Inst. of Cal.-Orange
6 County, Inc., 173 Cal. App. 4th 986, 1009-10 (2009).

7 B. Analysis

8 Plaintiff appears to argue that Defendant failed to
9 accommodate her disability by failing (1) to transfer her to a
10 different department and (2) to stop the work-place harassment. It
11 also appears that the disability Defendant failed to accommodate is
12 her mental stress and anxiety.

13 While Plaintiff's diagnosed depression and post-traumatic
14 stress disorder may constitute a disability covered by FEHA and the
15 ADA, she has not presented evidence that she is a qualified
16 individual.

17 California's proscription against disability discrimination
18 applies only to "those employees with a disability who can perform
19 the essential duties of the employment position with reasonable
20 accommodation." Green v. State, 42 Cal. 4th 254, 264 (2007); Cal.
21 Gov. Code § 12940(a)(1). "Therefore, in order to establish that a
22 defendant employer has discriminated on the basis of disability in
23 violation of the FEHA, the plaintiff employee bears the burden of
24 proving he or she was able to do the job, with or without
25 reasonable accommodation." Green, 42 Cal. 4th at 262.

26
27 ²California law does not include the word "appropriate" before
"adjustment."

1 The ADA defines a "qualified individual," in pertinent part,
2 as "an individual with a disability who, with or without reasonable
3 accommodation, can perform the essential functions of the
4 employment position" 42 U.S.C. § 12111(8). The individual
5 must also "satisf[y] the requisite skill, experience, education and
6 other job-related requirements of the position." Bates v. United
7 Parcel Service, Inc., 511 F.3d 974, 990 (9th Cir. 2007) (en banc).

8 Here, Defendant had a policy allowing medical leave for a
9 maximum period of six months. When Plaintiff was not able to
10 return to work at the end of six months, Defendant extended her
11 leave for another ninety days. When Plaintiff was still unable to
12 return to work after this ninety-day extension, Defendant
13 terminated her employment. Plaintiff's most recent doctor's note
14 did not set any certain date for her return to work. Therefore,
15 Plaintiff has not shown that she was a qualified individual and her
16 reasonable accommodation claims fail.

17 Even if Plaintiff were a qualified individual, Defendant was
18 not required to transfer her to a different department as an
19 accommodation. As noted above, Plaintiff was given the opportunity
20 to transfer departments, but failed to present Defendant with a
21 physician's note recommending such a transfer.

22 Finally, Plaintiff cites no authority for the proposition that
23 cessation of harassment is a required reasonable accommodation.
24 While harassment based on a protected classification is a separate
25 cause of action, Plaintiff has not presented sufficient evidence
26 that it occurred, or demonstrated that it is actionable under a
27 reasonable accommodation theory. Hayman v. Food Lion, Inc., 893 F.

1 Supp. 1092, 1106 (S.D. Ga. 1995); Cannice v. Norwest Bank Iowa, 189
2 F.3d 723, 728 (8th Cir. 1999). Accordingly, Plaintiff's reasonable
3 accommodation claims fail.

4 IV. Retaliation Claims

5 A. Applicable Law

6 Claims for retaliation under Title VII and FEHA are analyzed
7 under the McDonnell-Douglas framework outlined above. Lam, 40 F.3d
8 at 1559 n.11; Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1042
9 (2005). To establish a prima facie case of retaliation, a
10 plaintiff must "show (1) he or she engaged in a 'protected
11 activity,' (2) the employer subjected the employee to an adverse
12 employment action, and (3) a causal link existed between the
13 protected activity and the employer's action." Yanowitz, 36 Cal.
14 4th at 1042; accord Miller v. Fairchild Indus., Inc., 797 F.2d 727,
15 731 (9th Cir. 1986).

16 B. Analysis

17 Plaintiff generally states that her "harassment intensified
18 after [she] complained to management." Rodriguez Decl. ¶ 8.
19 However, she does not support this general statement by pointing to
20 any specific instances of a complaint followed by harassment. The
21 only cited incident concerns her complaint to Menconi-Shipp and
22 Yardumian during the March 5, 2008 meeting. Although this meeting
23 was convened to discuss Plaintiff's alleged inappropriate comment
24 about a co-worker, Plaintiff used the meeting as an opportunity to
25 complain that the clique of nurses (1) used profane language
26 regularly, (2) routinely talked about sex in front of her desk and
27 (3) used racial slurs to describe South Asians. On March 10, 2008,
28

1 Menconi-Shipp and Yardumian met with Plaintiff to discuss her work
2 performance. They gave Plaintiff a negative work evaluation and
3 threatened to place her on probation.

4 Plaintiff's complaint constituted protected activity because
5 it addressed an "unlawful employment practice." See EEOC v. Crown
6 v. Zellerbach Corp., 720 F.2d 1008, 1013 (9th Cir. 1983); Blom v.
7 N.G.K. Spark Plugs (USA), Inc., 3 Cal. App. 4th 382, 388 (1992).

8 Defendant, however, argues that neither the evaluation nor the
9 threat of probation constituted adverse employment actions. The
10 Ninth Circuit has held that "only non-trivial employment actions
11 that would deter reasonable employees from complaining about Title
12 VII violations will constitute actionable retaliation." Brooks,
13 229 F.3d at 928. Plaintiff has not cited any case to support the
14 proposition that the threat of probation is such an action.

15 Although an "undeserved negative performance review can
16 constitute an adverse employment decision," id. at 929, it does not
17 in the present case. Plaintiff received a negative performance
18 evaluation on March 10, 2008, but she left work the following day
19 and never returned. Plaintiff provided no evidence that she
20 suffered negative consequences as a result of this evaluation.
21 Thus, she has not shown that the performance evaluation "materially
22 affect[ed] the compensation, terms, conditions, or privileges of
23 [her] employment." See Davis, 520 F.3d at 1089. Further, because
24 Plaintiff left so abruptly after her evaluation, it is not clear
25 whether she could have appealed the evaluation or whether it was
26 "sufficiently final to constitute an adverse employment action."
27 Brooks, 229 F.3d at 930 ("Because the evaluation could well have
28

1 been changed on appeal, it was not sufficient final to constitute
2 an adverse employment action.").

3 However, assuming *arguendo* that the negative evaluation was an
4 adverse action, because it was issued within five days of the
5 complaint, it would have satisfied the causation element of the
6 prima facie case.

7 The burden of production would then shift to Defendant to
8 present legitimate reasons for the negative evaluation. Defendant
9 has satisfied this burden. Menconi-Shipp and Yardumian based their
10 negative review of Plaintiff on her performance of non-work related
11 activities during work time. Defendant claims that Plaintiff also
12 received a negative review because she failed to complete assigned
13 tasks and convey a professional image. Id.

14 The burden of production would then shift back to Plaintiff to
15 demonstrate a genuine issue of material fact that the reasons
16 advanced by Defendant were pretextual. Plaintiff has not met this
17 burden. In fact, Plaintiff admitted to doing all of the above-
18 mentioned non-work related activities during work hours and she was
19 verbally warned several times prior to her performance evaluation.
20 Rodriguez Dep. at 93:6-21; 98:23-99:17; 100:2-4. Further, she does
21 not dispute that she failed to complete assigned tasks and convey a
22 professional image at work. Moreover, Plaintiff has not presented
23 evidence that similarly situated individuals made the same mistakes
24 at work and did not receive negative performance evaluations.
25 Although a short period of time between Plaintiff's protected
26 activity and the adverse employment action enables her prima facie
27 case, she has not presented any evidence that Defendant's reasons

1 for the negative evaluation are pretextual. Plaintiff's only
2 evidence of pretext is to reiterate her prima facie case, which,
3 when based on such weak evidence, is not enough to overcome summary
4 judgment. See Wallis, 26 F.3d at 890. Accordingly, Plaintiff's
5 retaliation claims fail.³

6 CONCLUSION

7 For the foregoing reasons, the Court grants Defendant's motion
8 for summary judgment. The clerk shall enter judgment for Defendant
9 and Plaintiff shall bear Defendant's costs.

10 IT IS SO ORDERED.

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12 Dated: 08/31/10



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CLAUDIA WILKEN
United States District Judge

25 ³Because Plaintiff's discrimination and harassment claims
26 fail, her claims for failure to prevent discrimination and
27 harassment also fail. Similarly, Plaintiff's claim against
28 Defendant for violating California's public policy against
discrimination also fails.