UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PRISCILLA FOUNTAIN,

Plaintiff,

v.

DSW SHOE WAREHOUSE, INC., and DOES 1 through 10, inclusive,

Defendants.

Case No. 11cv02646 BTM (JMA)

ORDER

Pending before the Court is Defendant DSW Shoe Warehouse, Inc.'s motion to dismiss the complaint (Doc. 4). For the reasons set forth herein, the Court GRANTS IN PART and DENIES IN PART Defendant's motion.

I. BACKGROUND

This is the second action before this Court between the same parties arising out of the same operative facts. The first action was captioned Fountain v. DSW Shoe Warehouse, Inc., *et al.*, No. 10cv01318 (S.D. Cal.). In both actions, Plaintiff alleged the following:

Defendant DSW Shoe Warehouse Inc. ("Defendant" or "DSW") employed Plaintiff Priscilla A. Fountain, an African-American female, from June 2002 until June 23, 2009, in

a managerial capacity. In 2007, DSW's district manager promised Plaintiff, a high-performing employee, that she would become the manager of DSW's store in La Jolla (the "La Jolla Store") in 2008. (Compl. ¶ 13.) However, in May 2008, Plaintiff was passed over for the job, and DSW management instead gave the job to a Caucasian female with less industry experience. (Id. ¶ 15.) In September 2008, the Regional Manager assigned Plaintiff to work at the La Jolla Store as "Merchandise Manager," a position under the less qualified Caucasian store manager. (Id. ¶ 16.) Plaintiff confronted the Regional Manager and "complained that she was being discriminated against yet no action was taken on her complaint." (Id.)

Also in September 2008, a human resources manager at DSW informed Plaintiff that DSW "was probably violating the anti-discrimination laws by changing its company image to conform to a 'certain look' for [its] employees[,]" and Plaintiff observed "that DSW was promoting Caucasians over more qualified minority employees." (Id. ¶ 17.)

Beginning in September 2008, Plaintiff worked under the Caucasian store manager at the La Jolla Store. (Id. ¶ 18-19.) During this period, Plaintiff observed, personally experienced, and reported unspecified "discriminatory employment practices and policies against herself and other African-American employees and Hispanic employees . . . . by the Caucasian store manager[,]" and reported this discrimination to DSW management. (Id. ¶ 18.) The Caucasian store manager retaliated against Plaintiff for making these complaints "by falsely criticizing and disciplining plaintiff and interfering with her ability to perform her duties as Merchandise Manager." (Id.)

In February 2009, Plaintiff was demoted to assistant manager, with a decrease in pay, despite the availability of a merchandise manager position at a nearby store—all allegedly on account of her race. (Id. ¶ 19.)

In April 2009, Plaintiff heard from a third party that the Caucasian store manager had "openly referred to [her] as 'that fucking black bitch.'" (Id. ¶ 20.) At this point, Plaintiff "reported to the district manager that she felt she was being singled out and subject to illegal harassment, discrimination and retaliation. At no time did DSW conduct any meaningful

investigation into plaintiff's complaints or take action to prevent further unlawful actions against plaintiff." (Id.)

On June 23, 2009, the Caucasian store manager called Plaintiff into her office and "falsely accused plaintiff of repeated company policy violations." (Id. ¶ 22.) Specifically, the she accused plaintiff of permitting an employee to leave without emptying the trash, failing to inspect an employee's bag, and locking the store door too early. Plaintiff disproved all these accusations by showing security video recordings to the store manager. (Id.) On that same day, Plaintiff ended her employment relationship with DSW. (Id. ¶ 23)

On June 22, 2010, Plaintiff filed a complaint with the California Department of Fair Employment and Housing, alleging termination, harassment, failure to prevent discrimination or retaliation, retaliation, and failure to take action. (RJN Ex. 5.)

II. STANDARD

Under Fed. R. Civ. P. 8(a)(2), the plaintiff is required only to set forth a "short and plain statement" of the claim showing that the plaintiff is entitled to relief and giving the defendant fair notice of what the claim is and the grounds upon which it rests. Conley v. Gibson, 355 U.S. 41, 47 (1957). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be granted only where the plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

When reviewing a motion to dismiss, the allegations of material fact in the plaintiff's complaint are taken as true and construed in the light most favorable to the plaintiff. See Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although detailed factual allegations are not required, factual allegations "must be enough to raise a right to relief above the speculative level." Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007). "A plaintiff's obligation to prove the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will

not do." Id. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n] that the pleader is entitled to relief." Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1950 (2009) (internal quotation marks omitted).

III. DISCUSSION

Plaintiff presently asserts five causes of action: (1) wrongful termination in violation of public policy; (2) racial discrimination; (3) retaliation; (4) racial harassment; and (5) failure to prevent discrimination, retaliation, and harassment.[1] It is not entirely clear from the face of Plaintiff's complaint which of Plaintiff's specific factual allegations form the basis of her different claims.

Before determining whether the factual content pleaded in the Complaint supports these causes of action, the Court addresses Defendant's argument that claims based on conduct occurring prior to June 22, 2009, are barred by the FEHA's one year statute of limitations. The Court then addresses Plaintiff's individual causes of action.

a. Claims based on events occurring before June 22, 2009

In Plaintiff's first action based on these same facts (the "10cv01318 matter"), the Court found that all Plaintiff's claims based on "purported discriminatory conduct occurring before June 22, 2009 [are] time-barred[,]" and dismissed those claims without prejudice. Fountain v. DSW Shoe Warehouse, Inc., *et al.*, No. 10cv01318, slip op. at 2 (S.D. Cal. Apr. 25. 2011) (order re motion to dismiss). The Court explained:

> An employee seeking relief under the FEHA must exhaust her administrative remedies by filing a verified complaint with the California Department of Fair Employment and Housing ("DFEH") within one year of the alleged adverse action. Cal.

[1]Plaintiff has abandoned the sixth cause of action asserted in the Complaint (failure to take action). See Opp. Br. at 1.

> Gov't Code § 12960(d) . . . . Here, Plaintiff filed her DFEH complaint on June 22, 2010.

(Id.) For the same reasons set forth in the Court's April 25, 2011 order in the 10cv01318 matter, the Court finds that Plaintiff's claims based only on purported discriminatory conduct occurring before June 22, 2009 are time-barred. Plaintiff's Complaint in the present matter adds no new factual allegations occurring within the limitations period.

In the 10cv01318 matter, the Court *dismissed* Plaintiff's time-barred claims because Plaintiff did not "assert that these claims are timely under the continuing violation theory or provide any alternative ground as to why the limitations period should be extended." (Id.) In her opposition to the present motion to dismiss, Plaintiff states—with no explanation—that the incidents occurring outside the limitations period are "pleaded only as a factual part of a continuing course of illegal misconduct by [DSW]." (Opp. Br. at 1.) Plaintiff's conclusory invocation of the "continuing violation doctrine" does not suffice to rescue claims based exclusively on pre-June 22, 2009 conduct.

Under the continuing violation doctrine, an employer may be liable under the FEHA for actions that occur before the one-year period if the acts are "(1) sufficiently similar in kind . . . ; (2) have occurred with reasonable frequency; [and] (3) have not acquired a degree of permanence." Richards v. CH2M Hill, Inc., 29 P.3d 175, 190 (Cal. 2001). "The first two prongs of the Richards test incorporate the broad issue of relatedness," or, put differently, they address "whether the employer's conduct occurring outside the limitations period is sufficiently linked to unlawful conduct within the limitations period that the employer ought to be held liable for it." Cucuzza v. City of Santa Clara, 104 Cal. App. 4th 1031, 1041-42 (6th Dist. 2002). The third prong, however, "sets an outside limit on the length of time a course of conduct may continue before it is barred." Id. at 1041. The third prong is an objective test: The necessary degree of permanence is achieved "when an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation . . . will be futile." Richards, 29 P.3d at 191. In the present case, regardless of whether the alleged pre-June 22, 2009 conduct was sufficiently similar and frequent enough to constitute

a continuing course of conduct, the continuing violation doctrine does not apply because "the situation had reached permanence" long before Plaintiff's alleged constructive termination on June 23, 2009. See id.

In her complaint, Plaintiff states that by April 2009 she had been demoted from "merchandise manager" to "assistant manager" with a decrease in pay (Compl. ¶ 19); she had "observed and personally experienced discriminatory employment practices and policies against herself and other African-American employees" (id. ¶ 18); she was aware of a "pattern of discriminatory harassment due to her race" (id. ¶ 22); DSW had "refused to intervene following plaintiff's complaints" (id. ¶ 23); and she had been "warned of a DSW campaign of harassment, retaliation and discrimination" (id.). Under these circumstances, the discrimination against Plaintiff "had become permanent as to her" by April 2009 at the latest. Cucuzza, 104 Cal. App. 4th at 1043 (holding that plaintiff's loss of job duties for allegedly discriminatory reasons had become permanent when her job title changed); see also Morgan v. Regents of the University of California, 88 Cal. App. 4th 52, 65 (1st Dist. 2000) ("[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [she] was being discriminated against at the time the earlier events occurred." (citation and quotation marks omitted)).

Plaintiff's opposition brief does not substantively respond to Defendant's argument that the continuing violation doctrine does not apply. In the Complaint, however, Plaintiff claims that it was not until June 23, 2009—when the store manager falsely accused her of company policy violations—that Plaintiff realized her "employer would not cease the continuing course of illegal conduct." (Compl. ¶ 23.) Plaintiff nowhere explains why she failed to realize that her "employer would not cease" the alleged discriminatory conduct until June 23, 2009—even though she admits that by April 2009, she had already been demoted and she was already aware of an ongoing pattern of discrimination, a company-wide discriminatory policy, and the refusal of DSW upper level management to take action on at least two separate complaints. Moreover, as a matter of law, Plaintiff's statement regarding her subjective realization is not sufficient to establish that June 23, 2009 is the date on which

the discrimination became permanent as to Plaintiff, since the third prong of the Richards test is an objective inquiry. Accordingly, the Court dismisses with prejudice all Plaintiff's FEHA claims to the extent they are based exclusively on conduct occurring before June 22, 2009.

b. Wrongful termination in violation of public policy / Retaliation

The FEHA prohibits an employer from either discharging an employee or otherwise discriminating against the employee "in compensation or in terms, conditions, or privileges of employment[,]" on account of race. Cal. Gov't Code § 12940(a). The FEHA also makes it unlawful to "discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden" by the FEHA. Cal. Gov't Code § 12940(h). Plaintiff's first cause of action alleges that the end of her employment relationship with DSW constituted a wrongful "constructive terminat[ion]" (Compl. ¶ 23), and her third cause of action alleges that she was terminated on account of her race and/or in retaliation for opposing other discriminatory conduct (id. ¶ 32).

Constructive discharge is a termination of employment that is caused by the employer and is against the employee's will, and occurs where "the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1029 (Cal. 1994). "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job . . . ." Id. The statute of limitations for a constructive discharge claim begins to run on the date of the actual termination, and not on the date of the first adverse actions by the employer leading to the discharge, because "the employee may elect to overlook earlier adverse actions . . .

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in the hope of conciliation[.]" Mullins v. Rockwell Int'l Corp., 936 P.2d 1246, 1253 (Cal. 1997) (addressing common law breach of contract claim based on constructive termination).

"The determination [of] whether conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question left to the trier of fact." Watson v. Nationwide Ins. Co., 823 F.3d 360, 361 (9th Cir. 1987) (addressing Title VII constructive termination claim); see also Zody v. Microsoft Corp., No. 12cv00942, 2012 WL 1747844, at *5 (N.D. Cal. May 16, 2012) ("The determination whether conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question left to the trier of fact."). Plaintiff's Complaint includes allegations that she was passed over for a promotion on account of her race; that she was subsequently demoted on account of her race; that a human resources manager informed Plaintiff that DSW made employment decisions based on a company-wide discriminatory policy; that Plaintiff's superior referred to her as "that fucking black bitch" outside of Plaintiff's presence; and that on June 23, 2009, her superior falsely accused her of multiple company policy violations. The Court does not find, as a matter of law, that these allegations are insufficiently "extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job." Turner, 876 P.2d at 1029.

In opposition to Plaintiff's claims based on constructive discharge, Defendant argues that the unfair criticism lodged at Plaintiff on June 23, 2009, and the racial remark made outside Plaintiff's presence, are both insufficient as a matter of law to support Plaintiff's constructive discharge claim. The Court disagrees. With respect to the unfair criticism, the cases cited by Defendant all address either motions for summary judgment or post-trial motions, and none stand for the proposition that the Court cannot consider unfair criticism as one of several allegations supporting a constructive discharge claim.

Similarly, Defendant argues that "incidents of offensive behavior happening outside the presence of the plaintiff are disregarded in evaluating the conditions of employment." (Rep. Br. at 7 (citing Kovatch v. Cal. Casualty Mgmt. Co., Inc., 65 Cal. App. 4th 1256, 1244-

47 (4th Dist. 1998) (alterations and quotation marks omitted)).) However, the Kovatch court declined to disregard "incidents of offensive behavior" if "those incident occurred in [plaintiff's] presence *or . . . he learned of them before the termination of his employment*[.]" 65 Cal. App. 4th at 1268 (emphasis added). Here, Plaintiff learned that her immediate supervisor had made an offensive racial remark prior to the end of the employment relationship, and thus the incident is properly considered in the constructive discharge analysis.

Taking the allegations in the Complaint as true and viewing the facts in the light most favorable to Plaintiff, the Court finds that Plaintiff has sufficiently pleaded her claims for wrongful discharge in violation of public policy and retaliation based on wrongful discharge. Accordingly, the Court DENIES Defendant's motion to dismiss as to Plaintiff's first and third causes of action.

c. Racial discrimination / Racial harassment

A claim for discrimination under the FEHA must allege a change "in compensation or in terms, conditions, or privileges of employment." Cal. Gov't Code § 12940(a). Given that Plaintiff's claim of constructive termination is predicated on her allegations of racial discrimination, the Court finds that the same allegations found sufficient to establish a claim for constructive termination are also sufficient to state a claim for discrimination.

A claim for harassment under the FEHA requires a showing that "the harassment was so severe and pervasive as to alter the conditions of employment and create an abusive working environment." Etter v. Veriflo Corp., 67 Cal. App. 4th 457, 463-65 (1st Dist. 1998). While conduct occurring *exclusively* before June 22, 2009 cannot form the basis of any of Plaintiff's FEHA claims (see section III.a, supra), "acts beyond the statute of limitations might be relevant to showing a pattern of continuous harassment[.]" Fisher v. San Pedro Peninsula Hospital, 214 Cal. App. 3d 590, 513 (2d Dist. 1989). The false accusation lodged against Plaintiff on June 23, 2009, when viewed in conjunction with the earlier events that

Plaintiff has alleged, is sufficient to establish a claim of racial harassment.

Accordingly, the Court DENIES Defendant's motion to dismiss with respect to Plaintiff's second and fourth causes of action.

d. Failure to prevent

Section 12940(k) prohibits an employer from "fail[ing] to take all reasonable steps necessary to prevent discrimination and harassment from occurring." Cal. Gov't Code § 12940(k). A "failure to prevent" claim raised under this section requires a predicate finding of discrimination, harassment, or retaliation. Trujillo v. North County Transit Dist., 63 Cal. App. 4th 280, 286-89 (4th Dist. 1998). Defendant contends that Plaintiff's failure to state a claim for discrimination or harassment makes it impossible to state a "failure to prevent" claim. However, as stated above, the Court finds that Plaintiff has stated a claim for wrongful termination in violation of public policy and retaliation. The Court also notes that Plaintiff has specifically alleged that she reported, on two separate instances, her grievances regarding racial discrimination at DSW to senior level management. (Compl. ¶¶ 16, 18.) Accordingly, the Court finds that Plaintiff has stated a claim for failure to prevent.

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IV. CONCLUSION

For the reasons set forth above, the Court GRANTS IN PART and DENIES IN PART Defendant's motion to dismiss. The Court DENIES the motion to dismiss as to Plaintiff's claims for wrongful termination, retaliation, and failure to prevent (first, third, and fifth causes of action), and DISMISSES with prejudice Plaintiff's claims for discrimination based on pre-

June 22, 2009 conduct as alleged in the second and fourth causes of action.

The Court also DISMISSES Plaintiff's sixth cause of action (failure to take action), as Plaintiff has abandoned that claim.

IT IS SO ORDERED.

DATED: October 18, 2012

BARRY TED MOSKOWITZ, Chief Judge
United States District Court