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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

WANDA ALBRITTEN, Plaintiff and Appellant, v. DEPARTMENT OF FORESTRY AND FIRE PROTECTION et al., Defendants and Respondents.	C086408 (Super. Ct. No. 34-2016-00190559-CU-OE-GDS)

Plaintiff Wanda Albritten appeals from summary judgment entered in favor of her employer, defendant Department of Forestry and Fire Protection (Cal Fire), and her coworker, defendant Dee Dee Garcia, in her suit alleging racial discrimination and retaliation under the California Fair Employment and Housing Act (FEHA). (Gov. Code, §§ 12940 et seq.) Plaintiff contends she supplied evidence disputing defendants' evidence showing a lack of racial basis for comments Garcia made and an insufficient

causal connection between plaintiff's internal complaint and her lack of job training. Disagreeing, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is an African-American woman; she and Garcia were employees of Cal Fire. Plaintiff and Garcia sat in cubicles sharing a wall and appeared to have a cordial working relationship from February 2014 to August 2014, although plaintiff alleges that, prior to August 2014, Garcia often said her first name "like a Southern drawl like dragging my name out." While plaintiff alleged that the way Garcia said her name bothered her, she never asked Garcia to say her name differently and did not tell Garcia that she did not like the way Garcia said her name.

"If You Don't Know, Now You Know"

In August 2014 plaintiff asked another employee a question. In response to the answer, plaintiff stated that she had not known the answer. Garcia, who was not part of the conversation up to that point, stated loudly and sarcastically from a separate cubicle, "un, if you don't know now, now you know." Plaintiff's supervisor warned Garcia to not say anything else, and another employee told plaintiff that the phrase was derogatory.[1]

Plaintiff researched the phrase online for less than 15 minutes and discovered that the phrase is a lyric from the rap song "Juicy" by The Notorious B.I.G., aka Biggie Smalls. In the explicit version of the lyrics plaintiff found online, the lyric ends with the word "nigga." While plaintiff acknowledged that she does not listen to rap music, never listened to the song, and does not know what the song is about, she found the phrase to be

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[1] This was later modified to "Un, if you don't know now you know" (omitting a "now" and a comma) and at times during the litigation a "then" was inserted before the remaining "now"; also at times a comma was added after "know." The corresponding segment of the lyric from the song alleged to be referenced is "And if you don't know, now you know." We do not consider these variances to be relevant, and assume the intention was to quote the song lyric, as we discuss in more detail *post*.

"very, very derogatory." She "saw enough" of the lyrics to know that the lyrics for the song are "disgusting" and the language and title of the song are "very derogatory."

Plaintiff did not confirm that Garcia was reciting a song lyric, did not know if Garcia was reciting the lyrics in the "clean" version of the song, which does not include any variation of the epithet at issue here, did not know what Garcia meant by the phrase, and never asked Garcia what she meant. Although Garcia never referred to her explicitly by any racial epithet, plaintiff presumed Garcia impliedly referred to her by the epithet when she recited the lyric.

"*Bye Felicia"*

The second set of allegedly discriminatory comments involved Garcia's use of the phrase "bye Felicia." Near the beginning of October 2014, Garcia was having a conversation with another employee when plaintiff overheard Garcia say, "Felicia" or "bye Felicia"; Garcia and the other employee laughed. Plaintiff was unfamiliar with the reference at the time, and she had no further recollection of the substance of that conversation. Plaintiff presumed Garcia was referring to her as "Felicia" because there was no one in the office with that name.

At the end of October 2014 when Garcia was leaving work, she walked by the cubicles of plaintiff and another employee. Garcia said, "bye Jeffrey, bye Wanda, bye Felicia." Neither plaintiff nor the other employee knew what "Felicia" referred to.

The next day, following a telephone conversation plaintiff had with a customer, Garcia told a supervisor that plaintiff was "unprofessional, rude, did not know how to talk to customers." Plaintiff first stated that Garcia called her "Felicia" when she entered the supervisor's office but later stated that Garcia said "bye Felicia" when plaintiff was leaving.

Around this time, plaintiff researched the meaning of "un, if you don't know, now you know" and "bye Felicia." At her deposition, plaintiff testified she watched a portion of the movie "Friday" in which a character dismisses another character named "Felisha"

by saying "bye Felisha." She testified the phrase "bye Felicia" is racial in nature because "Friday" is "an African-American movie" and the character being dismissed in the movie is African-American. Plaintiff also discovered an interview in which two celebrities discussed the meaning of "bye Felicia." A person on the video she found defined "Felicia" as "some random [person] that you don't even care about" and that it could refer to anybody. Plaintiff testified as to her understanding of what "bye Felicia" means: "apparently, I guess that's like your thoughts don't matter or something to that effect, and that's what I gathered what 'bye Felicia' means." She then testified, "It means that from the movie it's depicting an African-American woman that's either a crack head, on drugs, and she borrows everything." She felt "bye Felicia" was racial because the actress on the receiving end of "bye Felicia" was an African-American woman.

Approximately one month later, plaintiff was in her cubicle when she overheard Garcia use the term "Felicia" or "bye Felicia" while walking down the hall past her cubicle with two coworkers. Plaintiff was not part of the conversation, did not see Garcia make any gestures toward her, and did not know what the women were talking about at the time.

That same day, plaintiff overheard Garcia and a coworker having a conversation in another cubicle. Plaintiff overheard Garcia say "Felicia" or "bye Felicia" and then laugh. Plaintiff did not recall the substance of the conversation.

Internal Complaint, "Speak of the Devil," and Alleged Retaliation

In December 2014 plaintiff filed an internal equal employment opportunity (EEO) harassment complaint alleging discriminatory acts and a non-EEO complaint alleging non-discriminatory acts, including an allegation that Garcia blew bubbles in the workplace. Cal Fire investigated, and it wrote a letter to plaintiff stating its finding that Garcia "displayed unprofessional, disrespectful, and discourteous treatment toward [plaintiff] in violation of the CAL FIRE EEO policy 1403, 1403.2, and 1403.8." The letter also informed plaintiff that the findings, along with recommendations for

appropriate corrective action, were reported to the Office of the State Fire Marshal management.

In approximately late March or early April of 2015, plaintiff saw Garcia standing in a supervisor's doorway, and she said "speak of the devil" as plaintiff approached. The supervisor then requested that plaintiff come into his office. Plaintiff did not know why Garcia made the statement, and she acknowledged that the phrase could have referred to anyone in the office. Although plaintiff did not "have a clear understanding" of what the phrase means, because "the word devil itself is evil," she found the comment offensive because she is religious.

Plaintiff did not recall any other instances of discriminatory conduct or statements, and Garcia never physically threatened plaintiff.

After plaintiff filed her EEO complaint, she alleges she was denied training on "Excel, Notetaking and Minutes." But plaintiff conceded in her deposition that access to training had been "an issue" since she started working at Cal Fire. She also acknowledged that she did not believe Cal Fire denied her training because she filed an EEO complaint against Garcia. And she agreed that her supervisor was encouraging training but that training did not occur due to workload demands. By January 2017 plaintiff's new supervisor "made sure that everyone would get the training that they needed," and plaintiff had taken multiple trainings.

Procedural History

Plaintiff filed a civil complaint alleging two causes of action: (1) she was subjected to unwanted harassing conduct based on her race and the conduct was so severe, widespread, and persistent that a reasonable African-American would have considered the environment to be hostile or abusive; and (2) plaintiff's complaints of racial harassment were a motivating reason for Cal Fire to deny her job training and for continuing racial harassment.

Cal Fire and Garcia moved for summary judgment. They argued plaintiff's race harassment claim failed because she could not establish Garcia's comments were based on her race, she could not establish that the comments were severe or pervasive, and she could not show a causal connection between the internal complaint and any lack of training or further unwarranted comments.

In opposition, plaintiff filed a declaration that included new factual allegations. Plaintiff asserted that Garcia said "Bye Felicia" and "Felicia" three or four times to her after she filed the internal complaint. She also alleged that Cal Fire management was retaliating against her by Garcia reporting on her job performance and being "back in [her] business." She also alleged that she was being denied job training due to her internal complaint.

The trial court granted defendants' motion for summary judgment and entered judgment in their favor. The court found that (1) there was no evidence that Garcia's comments were racial in content or motivated by race, (2) Garcia's conduct was neither severe nor pervasive, (3) there was no causal connection between plaintiff's internal complaint and her being denied training, and (4) plaintiff's declaration was contrary to her sworn deposition testimony and could not defeat the summary judgment motion.

Plaintiff timely appeals from the judgment entered against her.

DISCUSSION

Plaintiff contends there is a triable issue of fact with respect to both her claim of a hostile work environment and her claim of retaliation for a protected activity. We disagree.

I

Standard of Review

A motion for summary judgment must be granted if the submitted papers show there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The moving party

initially bears the burden of making a "prima facie showing of the nonexistence of any genuine issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) As applicable here, a defendant moving for summary judgment can meet its burden of showing that a cause of action has no merit by showing that one or more elements of the cause of action cannot be established. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to the cause of action. (*Ibid.*)

"We independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. [Citations.] In performing our independent review of the evidence, 'we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue.' " (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196.)

"In determining whether there is a triable issue of material fact, we consider all the evidence set forth by the parties except that to which objections have been made and properly sustained. [Citations.] We accept as true the facts supported by plaintiff's evidence and the reasonable inferences therefrom [citation], resolving evidentiary doubts or ambiguities in plaintiff's favor." (*Lackner v. North, supra,* 135 Cal.App.4th at p. 1196.)

II

Hostile Work Environment Claim

Plaintiff's complaint claims that Cal Fire and Garcia subjected her to unwanted harassing conduct due to her race that was "so severe, widespread and/or persistent that a

reasonable African-American in [her] circumstances would have considered the environment to be hostile or abusive." On appeal, plaintiff argues there is a triable issue of fact as to that claim.

The FEHA makes it unlawful "[f]or an employer . . . or any other person, because of race . . . to harass an employee." (Gov. Code, § 12940, subd. (j)(1).) "Harassment includes but is not limited to: [¶] (A) Verbal harassment, e.g., epithets, derogatory comments or slurs on a basis [of race]." (Cal. Code of Regs., tit. 2, § 11019, subd. (b)(2)(A).) "To establish a prima facie case of a racially hostile work environment, [plaintiff] was required to show that (1) [she] was a member of a protected class; (2) [she] was subjected to unwelcome racial harassment; (3) the harassment was based on race; (4) the harassment unreasonably interfered with [her] work performance by creating an intimidating, hostile, or offensive work environment, and (5) [Cal Fire] is liable for the harassment. [Citations.]" (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876.)

" '[H]arassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being.' [Citations.] 'A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment.' [Citation.] 'The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination.' [Citation.] 'The harassment must

satisfy an objective and a subjective standard. " '[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." . . .' " [Citation.] And, subjectively, an employee must perceive the work environment to be hostile. [Citation.] Put another way, "[t]he plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that [she] was actually offended." [Citation.]' [Citation.]" (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 582-583.)

We conclude defendants' motion established that plaintiff could not satisfy the elements of her racial harassment claim and that plaintiff failed to establish the existence of a triable, material issue of fact. While plaintiff, as an African-American, is a member of a protected class, she cannot show that Garcia harassed her based on her race.

Plaintiff argues that Garcia harassed her by (1) speaking her name with a Southern drawl; (2) saying "un, if you don't know, now you know" in response to her statement that she did not know the answer to a question; (3) calling her "Felicia" or "bye Felicia" on five occasions; and (4) saying "speak of the devil" as she approached. None of these actions were shown to be harassing on the basis of her race.

First, plaintiff does not even try to explain how Garcia's drawing out the pronunciation of her name is based on her race. While that conduct could be construed as annoying or unprofessional, plaintiff presents no basis to believe that the conduct was racially motivated.

Second, plaintiff cannot show that Garcia's statement, "un, if you don't know, now you know" was an epithet, derogatory, or a slur based on her race. She argues that Garcia was reciting a lyric from a rap song and that Garcia intended to refer to her by a slur appearing at the conclusion of that lyric in the explicit version of the song. Construing the evidence in the light most favorable to the plaintiff, we make the reasonable inference that Garcia was reciting a lyric from the song "Juicy" by the

Notorious B.I.G. But the inference that Garcia intended the lyric to impliedly refer to plaintiff by a racial slur is speculative and insufficient to establish harassment. (See *Guthrey v. State of Cal.* (1998) 63 Cal.App.4th 1108, 1118 [speculation insufficient to establish discrimination led to hostile conduct].) Garcia's statement did not explicitly state a racial slur, and Garcia never referred to plaintiff by the slur she infers, or any slur, for that matter. Plaintiff never heard Garcia tell a racially insensitive joke or make any gestures she felt were derogatory toward African-Americans. While one version of the song "Juicy" contains a slur at the end of the lyric, another "clean" version of the song does not include the slur. Plaintiff conceded she did not know what Garcia meant by the statement, and she did not ask. And the lyric, considered outside of the context of the song, is a logical response to plaintiff's comment that she had not previously known the answer to a question she asked another employee.

Further, plaintiff cannot show that the instances in which Garcia stated the phrase "bye Felicia" were harassment based on her race. Construing the evidence in the light most favorable to the plaintiff, we presume that the genesis of Garcia's reference to "bye Felicia" was the movie "Friday." But plaintiff's inference that the phrase "bye Felicia" was racially derogatory is speculative. Plaintiff testified that "bye Felicia" is racial in nature because "Friday" is casted by predominately African-American actors, and the character who was summarily dismissed with the phrase "bye Felicia" is African-American. But she also testified that she understood the phrase to mean "your thoughts don't matter or something to that effect." That interpretation is bolstered by the interview plaintiff discovered on the Internet, in which "bye Felicia" was defined as "some random [person] that you don't even care about" and that it could refer to anybody. In other words, plaintiff cannot show that the phrase "bye Felicia" is a racially derogatory comment or, rather, whether it is used to summarily dismiss a person whose "thoughts don't matter." Therefore, plaintiff cannot show that Garcia's comments were harassing based on her race.

Finally, plaintiff cannot show that Garcia's statement "speak of the devil" was harassment based on her race. While plaintiff may have found the phrase offensive to her religious beliefs, the phrase as commonly used merely implies that a person arrives at a place while being spoken about by others. We see no reason to infer that Garcia's statement was meant as a *racial* slur in any way, and plaintiff has provided us with no reason to do so.

Plaintiff contends that Cal Fire's letter informing her that Garcia had violated its policies is evidence that her comments were racially motivated. But while the letter stated that Garcia "displayed unprofessional, disrespectful, and discourteous treatment toward [plaintiff] in violation of the CAL FIRE EEO policy 1403, 1403.2, and 1403.8," nothing in that letter constitutes an admission by Cal Fire that Garcia's conduct was racially motivated. Even assuming Garcia's comments were unprofessional, disrespectful, and discourteous, the letter does not state that Garcia's comments were racially motivated, and any inference to the contrary is unsupported.

Plaintiff cannot show that the totality of Garcia's conduct created an intimidating, hostile, or offensive work environment. Plaintiff presented evidence that Garcia made fewer than 10 allegedly offensive comments over the course of nine months. Given the complete lack of any racial reference in the comments themselves and the infrequency of the comments, the comments were not at all severe or pervasive as defined by statute and recent caselaw as explained *ante*, and do not support a claim for a hostile work environment.

The trial court did not err in granting defendants' motion for summary judgment as to plaintiff's claim of racial harassment.

III

Retaliation Claim

Plaintiff next claims that there is a triable issue of fact on her claim that her EEO complaint motivated Cal Fire to deny her job training and to continue subjecting her to unwanted racial comments. We disagree.

"[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) "[A] plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision." (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492.)

Plaintiff's claim that Cal Fire denied her training due to her EEO complaint lacks merit. Plaintiff conceded in her deposition that lack of training had been "an issue" since she started working at Cal Fire and that she did not believe there was a causal connection between her EEO complaint and her being denied training. While plaintiff filed a declaration in support of her opposition to defendants' motion for summary judgment alleging that Cal Fire's denial of her training was retaliatory, such a self-serving declaration contradicting sworn testimony cannot defeat summary judgment. (See *Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319, 325 (*Trovato*).) Therefore, there is insufficient evidence of a causal link between plaintiff's EEO complaint and a lack or denial of training.

Similarly, there is no evidence that Garcia made unwanted racial comments after plaintiff filed her EEO complaint. In her deposition, plaintiff testified that the only allegedly derogatory comment Garcia made after her EEO complaint was to say, "speak of the devil." As we discussed *ante*, plaintiffs offer no evidence to show that Garcia used

that phrase outside of its normal usage or that the phrase was racially motivated. And although plaintiff filed a declaration contradicting her deposition testimony and asserting that Garcia said "bye Felicia" three or four more times after plaintiff's EEO complaint, her declaration contradicting sworn testimony cannot defeat summary judgment. (See *Trovato, supra,* 192 Cal.App.4th at p. 325.)[2]

Finally, plaintiff emphasizes that Garcia "continued to issue [her] directives and *engage in efforts to sabotage her job*." But we consider only whether defendants' motion for summary judgment is successful as to those claims plaintiff raised in her complaint (see *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381 [function of pleadings in a motion for summary judgment is to "delimit the scope of the issues"]). Plaintiff's retaliation claim only alleged denial of job training and unwanted racial comments. Therefore, we do not consider this argument.

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[2] Plaintiff appears to attempt to raise two other arguments. She first asserts that defendants failed to unequivocally state whether 40 of her 43 additional facts were disputed. While she contends the defendants' failure to appropriately respond "makes for unnecessary ambiguity, and more work for the courts and opposing party," she does not argue that defendants' failure to respond is reversible error. Therefore, the argument is forfeited. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1029 [points not supported by legal argument and citation to authority may be treated as waived].) She next asserts that the court "inexplicably reversed" its tentative ruling, in which the court stated that "Garcia's comments were not explicitly racial in content, and it is no more reasonable to conclude that the comments were racially motivated than not." But plaintiff does not argue that the court's "inexplicabl[e] revers[al]" of its tentative ruling was erroneous or requires reversal. Therefore, that argument is also forfeited. (See *ibid.*)

DISPOSITION

The judgment is affirmed. Defendants shall recover costs on appeal. (Cal. Rules of Court, rule 8.278.)

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Renner, J.