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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ALEXANDER Q. PARAS,

Plaintiff and Appellant,

v.

DELTA DENTAL OF CALIFORNIA,

Defendant and Respondent.

A131055

(City & County of San Francisco  
Super. Ct. No. CGC-07-464071)

Plaintiff Alexander Paras appeals from a judgment entered following a grant of summary judgment and denial of leave to amend in this action against his former employer, defendant Delta Dental of California (Delta), for wrongful termination and retaliation in violation of public policy. Like the trial court, we conclude that plaintiff's claims fail for lack of evidence that plaintiff suffered any adverse employment actions in retaliation for his alleged participation in protected activity. Accordingly, we shall affirm the judgment.

**Procedural Background**

Plaintiff's complaint alleges three causes of action against Delta: discrimination in violation of the California Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq., retaliation in violation of FEHA, and wrongful termination in violation of public policy. After Delta moved for summary judgment, plaintiff sought leave to file an amended complaint adding a fourth cause of action for retaliation in violation of public policy. The proposed amendment was based on the factual allegations in the complaint regarding Delta's alleged retaliatory conduct prior to plaintiff's

termination and sought emotional distress damages, rather than damages for loss of earnings. The court ordered that the two motions be heard together and following a hearing on August 25, 2010, granted Delta's motion for summary judgment and denied plaintiff's motion for leave to file the amended complaint. Judgment was entered and plaintiff filed a timely notice of appeal.<sup>1</sup>

### **Statement of Facts**

The following undisputed facts were established with respect to the summary judgment motion:

Plaintiff began working for Delta in 1997. Since 1999 and until his termination in November 2005, he worked in Delta's accounting department.

In mid-to-late 2004, Carrie Greisen became plaintiff's supervisor. In November 2004, Delta implemented a new accounting system called the Oracle Financial System (Oracle). Greisen was responsible for training employees, including plaintiff, on the use of Oracle. Plaintiff encountered difficulties using Oracle soon after its implementation. These difficulties led to a series of professional disagreements between plaintiff and Greisen. For example, in December, plaintiff emailed coworkers a spreadsheet for use with Oracle that Greisen had not approved and which she believed was not compatible.

Between December 2004 and February 2005, the working relationship between plaintiff and Greisen became increasingly difficult. In January 2005, when Greisen asked plaintiff to email two reports to another coworker, plaintiff responded, "You and Michelle might need to continue working on this. My plate is just too full. I feel like vomiting already." In February, plaintiff and Greisen exchanged emails on two occasions regarding work-related disagreements.

In mid-February 2005, plaintiff was tasked with preparing a financial report regarding Delta's fixed assets that would be submitted to its accountant for preparation of Delta's property tax returns. In preparing the report, plaintiff discovered what he believed

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<sup>1</sup> Plaintiff conceded in the trial court that he could not establish a triable issue of fact as to his FEHA claims and consistent with that concession does not challenge on appeal the court's ruling with respect to those causes of action.

to be a \$200,000 discrepancy between the fixed asset report and the general ledger. Plaintiff was instructed by Greisen to use the fixed assets report for the property taxes and said that she would “plug the difference” into a computer account. She explained that the \$200,000 difference was “not material and it [was] not [plaintiff’s] fault” so he should not worry about it. The difference, Greisen explained, was caused by Delta’s acquisition of another company effective December 31, 2004. While the value of the total assets of the other company had been recorded in the general ledger, not all of the individual assets had been ascertained and recorded in the fixed assets report. Plaintiff refused to follow Greisen’s instructions and told her that he could not use the 2004 report because its numbers did not match the general ledger. He told Greisen that “the numbers concern me” and that he feared that he could get into serious trouble working with her. He believed that Greisen’s decision to balance the reports by “plug[ging] the difference of about \$200,000 into a computer account” would amount to falsifying Delta’s financial records. Because plaintiff refused to file the reports, Greisen filed them herself. She asserts in her declaration that she was following the directions given to her by Delta’s controller.

Shortly thereafter, plaintiff was told that he was to submit all emails to Greisen for review prior to sending them. Delta asserts that this requirement was imposed because it had received increasing complaints regarding plaintiff’s email communications. Plaintiff claims that he asked to see the complaints, but none were provided. In her deposition, Greisen’s supervisor testified that she received two complaints about plaintiff’s emails in 2004. She identified one of the complainants by name and explained that he told her he “believed the emails he was receiving [from plaintiff] were inappropriate and that they were telling him to process his work not in accordance with our procedures.” She could not remember who made the second complaint and did not explain the details of that complaint. In her declaration, Greisen specified two emails that plaintiff sent that contained incorrect or conflicting information about the use of Oracle. Plaintiff acknowledges sending these emails but disputes that the information was incorrect. He also acknowledges that Greisen explained to him why one of the emails should not have

been sent but asserts that, at the time, he considered her explanation “to be criticism not counseling.” Plaintiff acknowledges that he refused to submit future emails for approval, claiming that “he would not take punishment for something he had not done.” Greisen confirms that in response to the new requirement, plaintiff indicated that he would not comply and said “So . . . fire me!”

On March 23, 2005, plaintiff sent a written complaint to Delta’s management stating that Greisen had asked him to file “doctored property tax returns for Delta.” Plaintiff then believed the discrepancy in the fixed assets report had grown to \$10 million. He explained that Greisen erroneously processed depreciation in November and December and that her attempt to fix her mistakes resulted in “Fixed Assets being out of balance by over \$10,000,000.00 as of December 2004.” He also claimed that she “manipulated the Fixed Assets record of Delta with a lot of ‘true up’ entries to balance accounts.” Finally, he asserts that “Because of [Greisen’s] manipulation of its Fixed Assets records, it is very possible that Delta, for the first time, will not have accurate Fixed Assets ledgers to prepare tax returns from. Instead of cleaning up the mess she did in the Fixed Assets, [Greisen] told me to submit doctored ledgers. I had voiced my objection to this and this is one reason [she] wants me out of Delta.”

In response to plaintiff’s complaint, Delta launched an investigation, conducted by an outside auditor, which revealed that “the balances in the general ledger are reasonable and do not appear to have any fraudulent assets recorded.” Although the investigator acknowledged that “the subsidiary ledger does not agree to the general ledger,” he concluded that “[t]his is due to the fact that Deltanet’s fixed assets that were subsumed as part of the liquidation are not completely recorded in the subsidiary ledger.”

In late March and early April, plaintiff complained to Delta’s Human Resources department that Greisen was harassing him. He complained that Greisen had sent emails in which she “bad-mouthed him” and tried to make him “look bad” and that she had improperly required him to submit all email communication to her for approval prior to sending. Plaintiff also reasserted his claim that Greisen was trying to “make [his] stay at Delta uncomfortable” because he had refused to engage in illegal activity. The human

resources department conducted an investigation and on May 9 issued a memorandum detailing its finding that “[t]here is simply no evidence to support your allegations that Ms. Greisen has waged a campaign against you in order to discredit your work and terminate your employment with Delta.”

On March 28, Greisen assigned plaintiff the “job task of compiling the financial information and preparing reports relating to paid claims statistics.” According to plaintiff, this new task required plaintiff to use a program he was not trained to use and made his work very stressful. After he “wasted many hours of research work” on the assignment, Greisen informed him that “the information needed to complete the work was not ready yet.”

On April 6, Greisen “moved up the deadlines for certain tasks that [plaintiff] had been performing.” Plaintiff was informed that beginning in May, a task that previously was required to be completed on the 7th working day of the month, would be required to be completed on the 6th working day of the month. Delta submitted evidence that the advancement of this deadline was a company-wide decision that affected all employees. Also on April 6, plaintiff was assigned “the booking and reconciling of intercompany settlements between Delta . . . and its subsidiaries,” which previously had been performed by a different department.

Communication between Greisen and plaintiff remained tense in April 2005. On April 3, plaintiff responded to a question from Greisen, stating that the issue “was brought to your attention on Feb 25 . . . [a]nd up to this date you still have not resolved it. . . . Why is it taking you so long to resolve this issue? This problem has gone thru [*sic*] 2 accounting periods already!” A week later, plaintiff responded to an email about missing invoices stating that Greisen should “be more upfront in dealing with situations like this.” He reiterated that he has “always been committed to doing productive hardwork. But you [have] been wasting a lot of my time with your way of doing work. And I wish you’d stop blaming me for this mess that you are creating.”

On May 18, plaintiff met with Greisen to clarify his job responsibilities. Greisen provided plaintiff with a memorandum detailing Delta’s expectation of plaintiff’s

performance. According to plaintiff's declaration, the list included "a number of new job responsibilities . . . for which [he] had not been trained." Plaintiff's declaration states "(b) Greisen assigned me the task of adjusting inter-company invoices for depreciation. I was aware that she had been performing this task beforehand. I was not trained for the task, and from my general familiarity with the nature of the task, I was aware that it was time-consuming. [¶] (c) Greisen also assigned me the task of running depreciation on the 6th business day. I was not trained for the task, and from my general familiarity with the nature of the task, I was aware that it was time-consuming. [¶] (d) Greisen also assigned me the task of reviewing depreciation entries. I was aware that Greisen, with the help of two other Delta . . . employees, had performed this task beforehand. I was not trained for the task, and from my general familiarity with the nature of the task, I was aware that it was time-consuming. [¶] (e) Greisen also assigned me the task of performing the final depreciation runs. I was aware that Greisen, with the help of two other Delta . . . employees, had performed this task beforehand. I was not trained for the task either, and from my general familiarity with the nature of the task, I was aware that it was time-consuming. [¶] (f) Greisen also assigned me the task of assigning all furniture and office equipment invoices to a depreciation expense account. I was aware that Greisen, with the help of two other Delta . . . employees, had performed this task beforehand. I was not trained for the task either, and from my general familiarity with the nature of the task, I was aware that it was time-consuming. [¶] (g) Greisen also assigned me the task of preparing a journal entry on the morning of the 7th business day to allocate certain depreciation to other cost centers. I was aware that Greisen, with the help of two other Delta . . . employees, had performed this task beforehand. I was not trained for this task either, and from my general familiarity with the nature of the task, I was aware that it was time-consuming." Plaintiff admits that at this May 18 meeting he responded by calling Greisen a "glib and contagious liar" and "untrustworthy." He also admits that he said that he did not respect her, that Greisen scared him and that he was unsure if he would be able to continue working for her.

On May 20, Greisen's supervisors met with plaintiff to inform him that Delta "would no longer tolerate his disrespect and insubordination." Plaintiff was advised in writing that his behavior at the May 18 meeting was rude, unwarranted and diametrically opposed to the purpose of the meeting. Plaintiff was given three options for moving forward. He could perform all his duties and continue to report to Greisen, or apply for a different position with Delta, or resign his employment. Plaintiff opted to remain in his position.

On May 23, plaintiff responded in a written memorandum. He acknowledged his comments about Greisen but asserted, "I was not calling [Greisen] names. I was stating facts." He explained, "In February 2005, in relation to the preparation of the property tax returns for Delta, [Greisen] verbally instructed me to lie to California State Assessors by instructing me to use falsified documents that will be basis for the preparation of Delta's property tax returns. . . . She is a glib and contagious liar because she almost convinced me to do it and she might have convinced other Delta managers to agree with her approach of resolving the imbalance situation in Delta's fixed assets books. [Greisen's] approach would save her a lot of work that is needed to appropriately balance Delta's fix assets books. However, when I realized the ramification of what she was trying to do I became scared of working for her. [She] could get me and others into serious trouble with the State of California. [¶] Had I listened to [her], Delta would have had submitted to the State Assessors an Asset by Category Report as of December 31, 2004 that is in balance with a falsified General Ledger. Had I listened to [her], Delta would have had its fixed assets subsidiary records in balance with a falsified general ledger as early as February 2005. She would have illegally adjusted Delta's general ledger by booking the difference into one of DNET asset accounts even before that determination is made. Her journal entries were entered into the general ledger in such a labyrinthine way and even seasoned auditors will find it difficult to untangle if there would ever be a questions and if these were detected at all. I did not listen to [Greisen]. Instead, I found a way to communicate with you the problems we are having with the imbalance fixed assets records in relation to the preparation for Delta's property tax returns. I now hear that you have a different,

professional and legal approach to recognizing and resolving the imbalance situation of Delta's fixed assets records. And your approach is what is being done now, instead of [Greisen's] illegal directive to me in February . . . . Your approach may take more effort and longer time, but I am confident that it is the correct and legal one."

On May 31, plaintiff was given a final written warning with respect to his insubordination. The notice stated that he was advised on May 20 that if he returned to work with Greisen he "would be expected to work with [her], as [his] supervisor, and not against her" and that his "on-going claims of prior 'wrong-doing' by [Greisen] would need to stop and that Delta . . . would no longer tolerate [his] name calling, personal attacks or rude behavior." The letter continues to explain that plaintiff's May 23 written response directly violates his prior agreement. The letter rejects plaintiff's suggestion that Delta has found a new way to resolve the fixed assets issue and observes that plaintiff's response "clearly indicates that [he does] not understand our processes and [his] inability to accept [Delta's] repeated, reasonable explanations." The memorandum summarizes, "your response was not only inappropriate, but continues to exhibit your negative and attacking attitude towards your supervisor. You must be willing to perform the duties as required, or face termination for insubordination."

On June 6, plaintiff complained to management again that Greisen was "making it impossible for [him] to do [his] work as required in option 1." He alleged that she "continue[s] to find ways to make my work conditions difficult, unhealthy and unsafe. She is continuously doing this to make me resign or get fired. [She] is doing this to harass and retaliate against me for questioning her illegal and inappropriate ways." In detailing Greisen's alleged recent retaliatory actions, plaintiff claims again that she moved up deadlines, which "gave him less time to do a very time consuming task." She then "dumped on me new, time consuming and tedious tasks." As a result, he has been forced to complete his work at home on the weekends. He writes in closing, "It has been very stressful for me to suffer the harassment and retaliation that [Greisen] had done against me. It has been very stressful for me just to think of what new ways [she] will come up to

continue her harassment and retaliation on me.” Again, Delta investigated plaintiff’s complaints and determined they were unsubstantiated.

Plaintiff reported to work at Delta for the last time on June 15. He was away from work due to illness for a period of weeks and immediately thereafter took an extended medical leave of absence. Plaintiff was “aware his authorized leave of absence would expire, and if he did not return to work at Delta . . . , he would be terminated.” Plaintiff’s treating doctor issued him a full release to return to work without restrictions starting on October 6, 2005. On October 14, Delta notified plaintiff via letter that if he did not return a medical certification extending his leave of absence, he would be subject to disciplinary action up to and including termination. In September, however, plaintiff, who was unsatisfied with the treatment he was receiving from his treating doctor, had seen a second doctor, who advised him that he should not return to work. On November 2, the new doctor submitted a form to Delta stating that plaintiff “could not perform his duties at that time and that it would be harmful to him to return to work.” He also stated that “it was unclear when he would be able to return to his job.” On November 28, 2005, plaintiff informed Delta’s Human Resources Department that he would not be returning to his position in the Accounting Department or to any other position in the immediate future. Delta terminated plaintiff’s employment the same day.

The letter confirming the termination of plaintiff’s employment explains, “The letter follows up our prior correspondence concerning your inability to return to work and request for additional time off under the Americans with Disabilities Act. Unfortunately, the requested time off placed too great a burden on your department and the company sought to find an alternative accommodation to continued leave of absence. Human resources informed you of the referenced hardship and sent you a list of all open positions. Your response was due on November 18, 2005. As of November 21, 2005, you had not responded to our correspondence. [¶] Consequently, on November 21, 2005, Human resources sent another letter to you to remind you of your obligation to participate in the interactive process. In that letter, Human resources informed you that you must declare (1) whether you can return to work immediately in either your current position or

any other open position within the company no later than close of business on Wednesday November 23, 2005, and (2) to the extent you chose a position, submit a certification from your physician which confirmed your ability to perform the essential functions of that position by November 28, 2005. [¶] This morning, November 28, 2005, you sent me an email message stating you are unable to return to your current position or any position in the immediate future because of your continuing medical condition. Therefore, please be advised effective today, Delta . . . will terminate your employment because your condition apparently has become indefinite and we cannot afford your continued absence from the workplace.”

### **Discussion**

Plaintiff contends that Delta retaliated against him and ultimately terminated his employment because he refused to submit what he believed to be an inaccurate financial report to Delta’s tax preparer and because he reported to Delta’s management that an inaccurate financial statement was being submitted for tax preparation.

A claim for wrongful termination in violation of public policy permits a plaintiff to recover damages “when a termination is undertaken in violation of a fundamental, substantial and well-established public policy of state law grounded in a statute or constitutional provision.” (*Kelly v. Methodist Hospital of So. California* (2000) 22 Cal.4th 1108, 1112.) The tort of wrongful termination in violation of public policy is an exception to the rule that an at-will employee may be terminated for no reason or for a reason that is arbitrary or irrational. (*Silo v. CHW Medical Foundation* (2002) 27 Cal.4th 1097, 1104 [“ ‘[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy.’ ”].) A similar claim for retaliation in violation of public policy may be alleged where the alleged employer misconduct involves an action that is less severe than discharge. (*Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1562, disapproved on another point in *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1093-1095 [“employee can maintain a tort claim against his or her employer where disciplinary action has been taken against the

employee in retaliation for the employee's 'whistle-blowing' activities, even though the ultimate sanction of discharge has not been imposed"]; see also *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 467 ["The Court of Appeal, following our ruling in *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, held that an employee, who was not discharged but was wrongfully disciplined by the employer in retaliation for revealing the latter's illegal activity, may sue in tort"], disapproved on other grounds in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352, fn. 17].)

In evaluating an employee's claim for retaliation or wrongful termination in violation of public policy, California courts utilize the three-stage, burden-shifting framework adopted by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1108–1109.) "In the first stage, the '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.' [Citation.] If the employee successfully establishes these elements and thereby shows a prima facie case exists, the burden shifts to the employer to provide evidence that there was a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces evidence showing a legitimate reason for the adverse employment action, 'the presumption of retaliation " " "drops out of the picture," ' ' ' [citation], and the burden shifts back to the employee to provide 'substantial responsive evidence' that the employer's proffered reasons were untrue or pretextual." (*Id.* at p. 1109.) " 'A defendant employer's motion for summary judgment slightly modifies the order of [the *McDonnell Douglas*] showings. . . ." (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1005.) The employer bears the initial burden to either (1) negate an essential element of the employee's prima facie case or (2) establish a legitimate, nonretaliatory reason for terminating the employee. (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 160.) Our review of an order granting summary judgment is de novo, and we must consider all the evidence set forth in the

moving and opposing papers except evidence to which objections were made and sustained. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 (*Yanowitz*.)

The trial court summarily adjudicated plaintiff's wrongful termination claim in part on the ground that plaintiff could not establish a causal link between his protected activity and his termination because the undisputed evidence "shows that plaintiff was terminated because he failed to return to work from an extended leave of absence." Similarly, the trial court denied plaintiff's motion for leave to amend in part on the ground that amendment would be futile because the alleged retaliatory acts identified by plaintiff do not constitute "adverse employment actions" taken by Delta. We agree.<sup>2</sup>

With respect to plaintiff's wrongful termination claim, we agree with the trial court that plaintiff cannot establish that there is a "causal link" between his alleged protected activity and his termination. As detailed above, plaintiff was given notice that his leave had expired and that his employment would be terminated if he did not return to work or extend his leave. Plaintiff refused to return to work and did not attempt to extend his leave of absence. Delta was under no obligation to continue his leave indefinitely. Accordingly, the undisputed evidence establishes that plaintiff was terminated for failing to return to work following the expiration of his leave of absence.

Plaintiff's argument to the contrary is not persuasive. Plaintiff does not dispute that his employment was terminated because he did not return to work. He argues, however, Delta's "wrongful conduct made [him] too ill to work. Because [his] illness and inability to return to work timely led directly to his termination, under traditional tort analysis, the wrongful conduct that made [him] ill was a substantial factor in his ultimate termination." Even assuming that improper conduct by his supervisors caused plaintiff to take a medical leave and that his condition prevented him from returning to work, his termination was not retaliatory. The wrongful conduct alleged in this cause of action is

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<sup>2</sup> For purposes of this analysis we assume without deciding that plaintiff engaged in protected activity. In light of our conclusion that plaintiff failed to establish a prima facie showing of retaliation or wrongful termination in violation of public policy, we need not consider the parties' remaining arguments.

not the earlier conduct by his supervisors, as to which the statute of limitations may have run,<sup>3</sup> but plaintiff's termination. Based on the undisputed facts, and as plaintiff acknowledges, he was not terminated in retaliation for having challenged his supervisors' decisions but because he would not return to work and had failed to request an extension of his leave of absence. Therefore the termination was not wrongful. Accordingly, the trial court properly granted Delta's motion for summary judgment.

With respect to plaintiff's proposed amendment to the complaint to allege a claim for retaliation in violation of public policy, the trial court found that amendment would be futile because his amended claims would similarly be subject to summary adjudication. The court explained that plaintiff could not establish a prima facie case "because the conduct he complains of (insufficient training, changing the due date on one of his job tasks, requiring that he run his emails past his supervisor for review and being asked to perform additional duties) does not constitute an 'adverse employment action' taken by Delta."

A trial court's decision to deny a plaintiff leave to amend his complaint is reviewed for an abuse of discretion. (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 770.) There is no abuse of discretion in denying leave to amend when the amendment is sought in response to a defendant's summary judgment motion and the proposed amendments are insufficient to overcome the defects shown in the motion. (*Id.* at pp. 771-772.)

In *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455, a discrimination case, the court observed that "an adverse employment action is not limited to 'ultimate' employment acts, such as a specific hiring, firing, demotion, or failure to promote decision. The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints, and the use of intermediate retaliatory actions may certainly

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<sup>3</sup> Although in this court Delta has referred in passing to the statute of limitations, the issue was not raised in the trial court and was not the basis for the trial court's rulings. We similarly place no reliance on this ground.

have this effect.” The court held that “to be actionable, the retaliation must result in a substantial adverse change in the terms and conditions of the plaintiff’s employment. A change that is merely contrary to the employee’s interests or not to the employee’s liking is insufficient. Requiring an employee to prove a substantial adverse job effect ‘guards against both “judicial micromanagement of business practices,” [citation] and frivolous suits over insignificant slights.’ ” (*Id.* at p. 1455)

In *Yanowitz*, the court confirmed that the test for retaliation encompasses not only ultimate employment decisions, “but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in his or her career.” (*Yanowitz, supra*, 36 Cal.4th at p. 1054.) Minor or relatively trivial adverse actions by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee do not materially affect the terms or conditions of employment. (*Ibid.*) But the terms or conditions of employment “must be interpreted liberally and with a reasonable appreciation of the realities of the workplace [to further ‘the fundamental antidiscrimination purposes of the FEHA].’ ” (*Ibid.*) The court observed further that when an employee alleges that the employer’s actions “formed a pattern of systematic retaliation” courts “need not and do not decide whether each alleged retaliatory act constitutes an adverse employment action in and of itself.” (*Id.* at p. 1055.) The court explained that “there is no requirement that an employer’s retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries.” (*Ibid.*)

Plaintiff asserts that after engaging in allegedly protected activity, he was subjected to increased scrutiny when he was asked to submit all outgoing email to Greisen for review. Requiring one’s email be reviewed for accuracy and tone does not materially change the terms and conditions of employment. While perhaps upsetting, the additional supervision is not “reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in his or her career.” (*Yanowitz, supra*, 36 Cal.4th at p. 1054.) To the extent that some cases reference increased scrutiny as a factor bearing on whether employment conditions have changed,

the scrutiny has involved increased oversight leading to negative reviews and ultimately termination or other adverse employment action. (See *Hairston v. The Gainesville Sun Publishing Co.* (11th Cir. 1993) 9 F.3d 913, 921 [incidents of increased scrutiny and resulting unfavorable performance reviews bear on the question of pretext], citing B. Schlei & P. Grossman, *Employment Discrimination Law* 554 (2d ed. 1983) [“noting that surveillance ‘strongly suggests the possibility of a search for a pretextual basis for discipline, which in turn suggests that subsequent discipline was for purposes of retaliation’ ”].) Plaintiff acknowledges that he refused to comply with the review requirement and did not suffer any direct consequence as a result of his refusal.

Plaintiff also asserts that his workload was increased by Greisen in retaliation for his complaints. In his declaration he details a list of new tasks assigned in May, asserting for each new task that “from my general familiarity with the nature of the task, I was aware that it was time-consuming.” Nothing in the record, however, quantifies the burden that would have been imposed by the new tasks had he in fact performed them, which he did not. Nor is there any suggestion that the tasks were not within the general scope of the responsibilities of his position, that there was any particular difficulty in his learning to perform the tasks, that he was incapable of performing the tasks, or that the defendant refused to provide any training that might have been required. Moreover, plaintiff’s evidence did not compare his workload to others similarly situated, nor did he even attempt to show that assignment of the tasks was “reasonably likely to impair [his or] a reasonable employee’s job performance or prospects for advancement or promotion.” (*Yanowitz, supra*, 36 Cal.4th at pp. 1054-1055.). Simply asserting that he was assigned additional job tasks is insufficient to meet plaintiff’s burden of establishing a *material* change in the terms and conditions of employment. “Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable.” (*Id.* at p. 1054; see also *Pinero v. Specialty Restaurants Corp.* (2005) 130 Cal.App.4th 635.)

Plaintiff acknowledges that there is no California authority holding that a mere change in workload is an adverse employment action for purposes of a claim for retaliation in violation of public policy. Nor does he, or could he, suggest that the facts here are comparable to those in *Yanowitz*, which alleged “a pattern of systematic retaliation” (*Yanowitz, supra*, 36 Cal.4th at p. 1060) sufficient to overcome a summary judgment motion. There, plaintiff alleged with specificity unwarranted negative performance evaluations, the employer’s refusal to allow the employee to respond to the unwarranted criticism, unwarranted criticism in the presence of other associates and employees, humiliating public reprobation, refusing requests for necessary resources and assistance causing the resentment of other employees, and the solicitation of negative feedback from the employee’s staff. (*Id.* at p. 1055; see also *Akers v. County of San Diego, supra*, 95 Cal.App.4th 1441 [performance review and counseling memorandum accusing deputy district attorney of incompetence, dishonesty, and insubordination rendering her no longer promotable].)

The federal cases plaintiff relies on are also distinguishable in significant ways. None of these cases involves an increased workload without other adverse actions. To the extent they discuss the impact of an increased workload on the conditions of employment, the analysis includes at least some comparative evidence. (See *Strother v. Southern Cal. Permanente Medical Group* (9th Cir. 1996) 79 F.3d 859, 869 [plaintiff’s allegations that “she was excluded from educational seminars, meetings, and positions involving quality assurance . . . [that] may have put her in a position for merit pay increases . . . [and] that she was excluded from meetings with nurses and regarding telephone access, that she suffered some verbal and physical abuse at the hands of other doctors, that she has been excluded from Urgent Care meetings, that she has been denied secretarial support, and that she had been given a more burdensome work schedule . . . if proven, would be sufficient to demonstrate an adverse employment decisions”]; *Davis v. Team Elec. Co.* (9th Cir. 2008) 520 F.3d 1080, 1089 [plaintiff’s evidence that she was given a disproportionate amount of dangerous and strenuous work, that she was given less varied work, that she was excluded from areas of work site, and that supervisors

failed to respond to her radio communications was sufficient to establish an adverse employment action]; *Ford v. General Motors Corp.* (6th Cir. 2002) 305 F.3d 545, 553-554 [evidence that plaintiff was “forced to work harder . . . *after* he filed his . . . complaint than he was before he engaged in that protected activity” combined with evidence of a “racially hostile workplace in which his actions . . . were scrutinized more closely than those of his coworkers” and eventual constructive discharge constituted materially adverse employment action]; *Feingold v. New York* (2d Cir. 2004) 366 F.3d 138, 153 [Evidence of plaintiff’s termination as well as evidence that he was assigned an excessive and disproportionately heavy workload show that he experienced an adverse employment action for purposes of establishing a prima facie case of discrimination.].) Plaintiff’s evidence here shows nothing comparable to the situation in any of these cases. Accordingly, the trial court properly concluded that the alleged retaliatory conduct was insufficient to establish a prima facie case as a matter of law.

**Disposition**

The judgment is affirmed. Delta shall recover its costs on appeal.

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Pollak, J.

We concur:

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McGuinness, P. J.

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Siggins, J.