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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ROSA LOPEZ,

Plaintiff and Appellant,

v.

LONGS DRUG STORES CALIFORNIA,
INC., et al.,

Defendants and Respondents.

A131638

(Contra Costa County
Super. Ct. No. C08-00700)

This case arises out of a reduction in force by Longs Drug Stores California, Inc. (Longs). Rosa Lopez (Lopez), a former Longs employee whose position was eliminated, appeals from a judgment following the grant of summary judgment on her complaint for wrongful termination, discrimination, and breach of implied contract and the covenant of good faith and fair dealing. She maintains the trial court erred in denying three motions for a continuance, issuing a protective order regarding a Longs document on the basis of privilege, and ultimately granting summary judgment. We disagree and affirm the judgment.

PROCEDURAL AND FACTUAL BACKGROUND

Longs hired Lopez in February 2000, when she was 41 years old, as a telecommunications facilities coordinator in its corporate offices in Walnut Creek. Her duties included administering telephone and fax services for Longs retail stores. Lopez was an at-will employee. She never received a negative job evaluation or was disciplined during her employment.

In 2003, Lopez's job duties were modified. She no longer managed land-based telephones and faxes, and instead managed cellular phone services and Blackberry accounts, a position in the Information Technology (IT) department.

In 2004, Lopez reported to a new supervisor, Kendall Fleck. Three other employees reported to Fleck: Wendy Hauser,¹ Candy Wullenweber and Sandy Hemsworth. The latter two are both Caucasian women over 40 years of age who performed accounting duties for the entire General Offices. Fleck reported to Ed Puskas, the head of the IT Department.

In late 2005, a decision was made to eliminate Lopez's and Hauser's positions in an attempt to meet the IT department's target budget. Puskas asked the IT department managers, including Fleck, to find ways to reduce costs by assessing their personnel and workload. Fleck determined Lopez and Hauser were not as busy as Wullenweber and Hemsworth, and believed the administrative duties performed by Lopez and Hauser could be absorbed more easily by other employees because the duties required minimal training and "knowledge base." Fleck recommended to Puskas those positions be eliminated if cuts had to be made.

Puskas analyzed the workloads and abilities of the groups within the IT department, as well as the recommendations of the manager of each group. He determined the duties of Lopez and Hauser could be more readily absorbed by other employees because they were not as busy as other employees and minimal training was required to perform their jobs. Puskas made the decision to eliminate Lopez's position in "[e]arly December, re-checked in early January. But it had to be finalized before February and was."

Sometime after February 1, 2006, Lopez fell and broke her shoulder at work. She was off work for two weeks, then returned to work on "modified duty" of four hours per

¹ Lopez testified at her deposition that Hauser was of Japanese descent and she believed Hauser was terminated for that reason. However, Hauser self-identified as, and Longs perceived her to be, Caucasian.

day. Puskas indicated Longs would have terminated Lopez in February, but “delayed” the termination until late March 2006 due to her fall and Worker’s Compensation claim.

On March 23, 2006, Lopez and Hauser were directed to attend a meeting with Puskas. At the meeting, Puskas told them their positions were being eliminated. They were both offered eight weeks of severance. Longs “typically” offered severance payments of “one week for every year of service and three months of C[OBRA],” with the one-week income calculated by taking an average of the last 12 weeks worked. Longs offered eight weeks of severance pay to Lopez, calculated at a rate of 27.19 hours per week, which was the average number of hours per week Lopez had worked during the 12 weeks preceding her termination. The total amount of severance offered was \$6,323.31. At the time of her termination, Lopez was making approximately \$54,000 per year and had worked for Longs for six years and one month. Lopez agreed that using the typical Longs formula of dividing her annual full-time salary of \$54,000 by 52 (number of weeks in a year), and multiplying that by six (her years of service) would have resulted in a severance payment² of approximately the same amount she was offered.

In March 2008, Lopez filed a complaint against Longs arising out of her termination. In her first amended complaint filed in July 2009, Lopez alleged causes of action for unlawful discrimination, wrongful termination, breach of an implied contract of continued employment and breach of the implied covenant of good faith and fair dealing.

In July 2009, Longs moved for summary judgment. Lopez filed an initial opposition and request for continuance under Code of Civil Procedure, section 437c, subdivision (h).³ After filing the opposition, she also filed additional requests for production and special interrogatories, seeking information about demographics of all non-store employees who worked anywhere in the company, including other states, from January 1, 2000 through December 31, 2008.

² In fact, that sum would have been \$6,230.77, less than Longs offered her in severance.

³ All further undesignated statutory references are to the Code of Civil Procedure.

After a number of continuances, and additional production of information by Longs, the motion was heard on December 21, 2010. At the summary judgment hearing, the court denied Lopez's further request for a continuance. Following the hearing, the court granted the motion and entered summary judgment in favor of Longs. Notice of entry of judgment was served on February 4, 2011.⁴

DISCUSSION

Denial of Lopez's Requests For Continuances

Lopez maintains the trial court erred in partially denying her request for a continuance of the hearing on the summary judgment motion in order to conduct further discovery on August 17, 2010, and in denying her further requests for continuances on November 22, 2010 and December 21, 2010.

History of Lopez's Discovery and Continuance Requests

We begin by reciting in detail the history of Lopez's discovery requests. In May 2008, Lopez propounded her first set of special interrogatories, seeking, inter alia, the identification of all employees "at the Longs Headquarters in Walnut Creek, California" who were terminated due to any reductions in force from January 1, 2000 through March 31, 2006. After the trial court denied her motion to compel, the parties agreed to a compromise production of a spreadsheet identifying the birth date, ethnicity, gender and termination date of "Longs'[s] corporate headquarters employees who were terminated during . . . Lopez's employment" with Longs, pursuant to a protective order. Longs also agreed to produce annual " 'snapshots' identifying the demographic composition of the employees in Longs'[s] corporate headquarters during that same period of time." Longs produced this information, including a spreadsheet with demographic information relating to 792 former employees laid off since 2000, on February 9, 2009.

On February 25, 2009, Lopez propounded her second set of 213 special interrogatories, seeking information about employees in "departments within the General

⁴ Lopez has not challenged on appeal summary adjudication as to her breach of contract or implied covenant claims.

Office of Longs' corporate headquarters." The same day, Lopez served her third set of 131 special interrogatories, seeking information about the "workers' compensation history" of 131 Longs employees. On February 26, 2009, Lopez served her fourth set of 13 special interrogatories regarding specific Longs employees.

In March 2009, Lopez made two requests for production of documents, seeking production of 109 categories of documents and 267 categories of documents, respectively. The document requests related to employees in Longs's General Office (GO), which Lopez defined as "Longs' corporate headquarters, including, but without limitation, the Longs' headquarters offices in Walnut Creek and Antioch, California." One document request sought 24 additional "snapshots" of "all GO employees" on specified dates between October 31, 2000 and January 31, 2006.

On April 20, 2009, Longs filed a motion for protective order regarding the discovery propounded. On April 23, 2009, Longs served its responses to Lopez's second request for production of documents and to set two and set three of Lopez's special interrogatories.

Following the hearing on Longs's motion for a protective order, the court approved a mailing to the former employees who had been terminated due to a reduction in force, seeking their approval to release their names and contact information to Lopez's counsel. Fourteen individuals responded, and 10 submitted declarations.

In July 2009, Longs moved for summary judgment. Lopez filed an initial opposition and request for continuance under section 437c, subdivision (h), asserting she needed further discovery. In support of the opposition, on September 25, 2009, Lopez's attorney filed a declaration admitting he "received demographic information from Longs[] regarding the Longs General Office (GO) employees who were terminated between February 2, 2000 and March 23, 2006 (GO Term List). . . . The demographic information also included 'snapshots' of what was represented to be the entire GO office staff for six specific days between 2001 and 2006." Additionally, in support of her opposition, Lopez filed the declarations of 10 former Longs employees who responded to the mailing.

On September 30, 2009,⁵ after filing the opposition, Lopez propounded additional requests for production and special interrogatories, seeking demographic information and reduction in force history about all “General Office or GO” employees from January 1, 2000 through December 31, 2008. Notably, Lopez expanded her prior definition of GO to include “Longs’ headquarters and facilities in Walnut Creek, Concord, Antioch, Benicia, and Oakland,” as well as the finance, human resources, marketing, MIS management, pharmacy, RX America, properties, region offices, or supply chain departments; all “Regional Districts,” for all districts in California and in other states, including Nevada and Hawaii. And, Lopez expanded the time frame for which she sought information by almost two years after her termination.

On October 9, 2009, the trial court granted Lopez’s request for continuance of the summary judgment motion until December 11, 2009. On December 11, the court granted another motion for continuance by Lopez until January 15, 2010.

In the meantime, on October 16, 2009, Longs filed a motion for protective order regarding some of Lopez’s new discovery requests. By this time, Lopez had taken the depositions of eight current or former Longs employees, and had propounded three sets of document requests, four sets of special interrogatories, and one set of form interrogatories. On December 11, 2009, the court ordered Longs to produce certain data relevant to Lopez’s disparate impact claim, but only if Lopez paid for the cost of production. The trial court granted Longs’s motion for a protective order regarding the “Project Orange” document and its contents on the basis of attorney/client privilege. The court also granted Longs’s request for a protective order as to Lopez’s fifth set of interrogatories, and ordered Longs was not required to provide further responses.

The parties disagreed about the cost of production of the data retrieval. In March 2010, Lopez filed a motion to determine allocation of costs. On June 17, 2010, the court ordered Lopez to pay \$8,325 for the data retrieval, half before Longs began work. Lopez

⁵ The discovery cut-off date was October 30, 2009.

then filed a writ petition challenging the court's order, which was denied on August 11, 2010.

During the time period in which the parties were disputing the cost of production of the data retrieval, the court granted Lopez's requests for continuance of the summary judgment hearing three more times, to March 9, 2010, April 6, 2010, and finally to August 17, 2010. By the time of the summary judgment hearing on August 17, 2010, Lopez had still not paid the 50 percent down payment to Longs. Her attorney indicated they were unable "to raise the money to pay the cost." The court's tentative decision was to grant the motion for summary judgment, and deny a further continuance based on Lopez's failure to pay, noting "[p]laintiff's counsel declares that plaintiff is unable to pay those costs; there is no showing that additional time will change that." At the hearing, Lopez's counsel represented that an unnamed "investor" had agreed to fund the case, and that he now had the money to pay for the discovery pursuant to the court's order. He gave a check for \$4,200 as a down payment to Longs's counsel at the hearing, and the court ordered the data retrieval by September 17, 2010. Lopez's counsel indicated he would need "at least 30 days to look through that stuff and put it together and come back and address the disparate impact." The trial court granted summary adjudication of all Lopez's causes of action except the discrimination cause of action based on alleged disparate impact, to which the data retrieval related, and continued the hearing as to that cause of action until October 19, 2010.

Longs made the data available, with a declaration from Clint Lu, the employee who retrieved it, on September 20, 2010. On October 4, 2010, Lopez's counsel informed counsel for Longs he needed an additional 45 days to assess the data. On October 15, 2010, Longs informed Lopez's counsel there were errors in the data because the "snapshots" did not include certain employees who were terminated in 2009, and it would produce a corrected set. Longs also proposed a new briefing schedule.

At the October 19, 2010 hearing, the court continued the summary adjudication hearing until December 21, 2010, and ordered Longs to produce the corrected data by October 22, 2010, which it did. Longs also submitted another declaration of Clint Lu,

who explained the errors in the snapshot data previously provided. He explained “records for employees who were employed at some period of time between January 31, 2000 and January 31, 2008, but who had termination dates that occurred in the year 2009” were inadvertently excluded from the “snapshots.” Other employees were “inadvertently included in snapshots for years after they were terminated.” The errors were only in the “snapshot” data, not in the termination data already provided.

Lopez then filed another motion for continuance, seeking 90 additional days to “go[] through and crunch[] all the numbers.” At the hearing on November 22, 2010, Lopez’s attorney admitted to the court he had not yet “retained [an] expert at this point” to perform the required analysis. The court denied his request for continuance.

Finally, at the hearing on December 21, 2010, Lopez’s counsel maintained another continuance was needed because the new data produced by Longs had an “extra 50, 60 people that weren’t identified in February [2009] that are now identified.”⁶ The court denied the request for continuance, noting the absence of a “requisite declaration of counsel” in support, and granted the motion for summary judgment.

“Partial Denial” of Request for Continuance

Lopez asserts the August 17, 2010, partial denial of her request for a continuance violated section 437c, subdivision (f)(1) because the order did not “completely dispose[]” of the first cause of action. Lopez maintains the trial court “did not have the discretion to deny” her request for continuance of the entire summary judgment motion, claiming she made a proper showing under section 437c, subdivision (h). She also claims the court could not deny her request because a different judge had granted her earlier requests for continuances “based on the same set of facts.”

⁶ At oral argument, plaintiff’s counsel maintained there were 268 additional people disclosed in fall of 2010 who were terminated by Longs due to reductions in force and who were not disclosed in February 2009. The record does not reflect how many additional individuals were identified. The February 2009 production was only regarding years 2000 through 2006, while the 2010 production was regarding years 2000 through 2008.

Section 437c, subdivision (h) provides: “If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.” We review the denial of a request for continuance under this section for abuse of discretion. (*Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1438.) “Under this standard, we will not reverse the trial court unless . . . the court’s decision was beyond the bounds of reason.” (*Ibid.*)

Lopez contends the partial denial of the request for continuance was error because it “sever[ed] [Lopez’s] FEHA claims into two parts based on disparate impact and disparate treatment theories of recovery, and to summarily adjudicate one but not the other, [in] . . . direct violation of [section] 437c[, subdivision] (f)(1).”

The court’s tentative ruling had been to grant summary judgment, disposing of all causes of action. After Lopez’s counsel stated an “investor” had provided funds for him to pay Longs \$4,200 as the down payment on the discovery, the court allowed him to do so and held Lopez “may proceed on the [first] cause of action as to the disparate impact theory[] on the condition that the records to be turned over are the ones previously requested pursuant to Comm. Saunders[’s] order.” The court granted summary adjudication of the second, third and fourth causes of action.⁷

Section 437c, subdivision (f)(1) provides in part “A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an

⁷ Lopez asserts this ruling included an “implicit finding” that the discovery sought did not relate to the dismissed claims. It did not. Lopez’s counsel asked: “Is the Court saying that the only cause of action that the statistical data is relevant to would be the disparate impact cause of action.” The court responded “No, I’m not saying that, but I’m saying that that is the only one that’s going to be remaining, because there was insufficient showing on the other causes of action”

affirmative defense, a claim for damages, or an issue of duty.” (§ 437c, subd. (f).) “[T]he clearly articulated legislative intent of section 437c, subdivision (f), is effectuated by applying the section in a manner which would provide for the determination on the merits of summary adjudication motions involving separate and distinct wrongful acts which are combined in the same cause of action. To rule otherwise would defeat the time and cost saving purposes of the amendment and allow a cause of action in its entirety to proceed to trial even where, as here, a separate and distinct alleged obligation or claim may be summarily defeated by summary adjudication.” (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854–1855.) “[R]egardless of how pled in the complaint,” the allegation may consist of two separate and distinct causes of action. (*Id.* at p. 1854.) “[U]nder subdivision (f) of section 437c, a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action.” (*Id.* at pp. 1854–1855.)

Lopez’s first cause of action alleges both disparate treatment and disparate impact. “The FEHA proscribes two types of disability discrimination: (1) discrimination arising from an employer’s intentionally discriminatory act against an employee because of his or her [protected class] . . . (disparate treatment discrimination), and (2) discrimination resulting from an employer’s facially neutral practice or policy that has a disproportionate effect on employees [who are members of a protected class] . . . (disparate impact discrimination). [Citation.]” (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1002.) “Disparate treatment and disparate impact are different theories of discrimination, requiring different proof.” (*Turman v. Turning Point of Cent. California, Inc.* (2010) 191 Cal.App.4th 53, 61.) “ ‘Disparate treatment’ is intentional discrimination against one or more persons on prohibited grounds. [Citations.] Prohibited discrimination may also be found on a theory of ‘disparate impact,’ i.e., that regardless of motive, a facially neutral employer practice or policy, bearing no manifest relationship to job requirements, in fact had a disproportionate adverse effect on members

of the protected class.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20, italics omitted (*Guz*).

Lopez’s attorney conceded at the hearing “the first [cause of action] has language in there about disparate impact and/or disparate treatment. [¶] . . . [¶] . . . I alleged them alternatively, and that is something that has never been challenged in the pleadings by demurrer. I know that counsel has made the argument that I need to separate them out and that they are separate things. And I agree. They are separate things, and we are alleging both of them.” The trial court stated “if the motion had ever been brought before me to separate those out, it would have been granted. [¶] . . . [¶] [I]t is clear enough that these are two separate theories, two separate issues” Because the claims of employment discrimination based on disparate treatment and employment discrimination based on disparate impact are two separate and distinct causes of action, the trial court did not err in granting summary adjudication of the disparate treatment claim and continuing the hearing on the disparate impact claim.⁸

Moreover, Lopez’s attorney sought the very result he now decries. “ ‘Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error.’ [Citation.] . . . [¶] . . . ‘ ‘At bottom, the doctrine rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court. [Citations.]’ ’ [Citation.]” (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1000.)

Lopez’s attorney stated at the hearing: “I would ask the Court to deny the motion with regard to disparate treatment today, and to continue the motion with regard to disparate impact for a period of time to allow us to get this data, analyze it, and be able to present it to the Court in—you know, to establish the statistical basis for the disparate

⁸ Although Lopez also claims section 437c, subdivision (h) does not allow denial of a continuance as to all but one claim, it does not proscribe it.

impact claim.” The court ordered exactly what Lopez sought at the outset of the hearing.⁹

Lopez also asserts the trial court had no discretion to deny her request for continuance of the entire matter because she made a “proper showing” under section 437c, subdivision (h) and the “facts remained the same” as those in her previous requests for continuance, which were granted. She avers “the court’s decision on [her] continuance request should have been the same as every other ruling since October 9, 2010,” and claims because one judge granted her previous requests for continuances, any other judge was required to grant her next request.

“[S]ince it is impossible to foresee or predict all of the vicissitudes that may occur in the course of a contested proceeding [citation], the determination of a request for a continuance must be based upon the facts and circumstances of the case as they exist *at the time of the determination.*” (*Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App.4th 332, 343, italics added.) Section 437c, subdivision (h) “does not provide for an unlimited number of continuances.” (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 547.)

Lopez cites no authority for her assertion that once a court grants a request for continuance, it must continue to grant continuances. Contrary to her claim, the facts could not be the same at the time of each subsequent request—at minimum, time had passed. Indeed, in the time period between the fifth and sixth requests for continuance, the court had determined the cost of production of the demographic data and ordered Lopez to make a down payment of half that amount. According to her attorney, Lopez

⁹ After the court ruled, however, it took a recess to allow counsel to confer regarding the details of the document production. When the court returned, it asked Lopez’s counsel for clarification regarding the allegations of the first cause of action, and expressed concern that section 437, subdivision (f)(1) allows summary adjudication only if “it completely disposes of a cause of action or an issue of duty. [¶] So this is the problem I’m having with the ruling that I have already made.” Lopez’s attorney then changed his position, and contended the court could not rule in the way he had earlier sought. The court, nevertheless, did not change its earlier ruling.

had been “tr[ying] to raise the \$8,375.00¹⁰ to obtain the statistical data from Longs in time to use it in her opposition to Long’ summary judgment motion [but] . . . could not.” Lopez’s attorney also declared he had filed a petition for writ of mandate in this court, seeking to reverse the “cost-shifting” order and requesting a stay of trial court proceedings.¹¹ These circumstances were, by counsel’s own admission, not the same existing at the time of Lopez’s prior requests for continuances.

Given the circumstances, we cannot say the trial court abused its discretion in its August 17, 2010 ruling. Likewise, we find no error in the trial court’s partial grant of a continuance of the disparate impact claim, even though Lopez alleged both disparate impact and disparate treatment in the first cause of action. And, assuming arguendo there was any error, it was invited, at least in part, by counsel for Lopez.

Subsequent Denials of a Continuance

Lopez also contends the trial court’s November 22, 2010 denial of her subsequent request for continuance was error. After Lopez paid the cost of the “data pull” in the amount ordered by the court, Longs produced the data on September 20, 2010. Longs discovered certain data regarding the “snapshots” was missing, and produced the supplemental data on October 22, 2010. Based on the belated provision of complete data, the hearing on the motion was continued until December 21, 2010.

Lopez then sought another continuance, asserting she needed more time to analyze the data, and claiming she needed to propound additional discovery, including “the deposition of the individual who did the data pull,” and wanted to conduct another mailing to former Longs employees who had been terminated due to other reductions in force.

At the hearing, the court noted discovery had been closed for more than a year, with the exception of the outstanding demographic information which was produced by Longs once payment was made. Lopez’s attorney told the court he had still not retained

¹⁰ Lopez’s attorney declares the court determined the cost of the data production to be borne by Lopez was \$8,375, but the court actually determined the cost to be \$8,325.

¹¹ We denied that petition on August 11, 2010.

an expert for the purpose of rendering an opinion on the data, and conceded Lopez's ability to use an expert at trial would depend on the court granting leave to disclose the expert if one were ever hired. A continuance of the summary adjudication motion had already been granted based on Long's corrected production on October 22, 2010. Lu's declaration indicated the only changed information was regarding the employee "snapshots," not the termination data already provided, and Lopez had approximately five weeks to analyze that new data before her opposition to the motion for summary judgment was due on November 29, 2010. And, Long's motion for summary judgment had been on file since July 2009. We find no abuse of discretion in the court's November 22, 2010 denial of a continuance.

Lopez's final request for a continuance was made a week later, on November 29, 2010, with her opposition to the motion for summary judgment. The court denied her request at the hearing on the continued motion on December 21, 2010, because Lopez had not submitted a declaration of counsel, as required by section 437c, subdivision (h), and had failed to establish grounds for any further continuances.

Lopez's failure to comply with the declaration requirement was sufficient reason to deny the request. (§ 437c, subd. (h); *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1353.) Moreover, Lopez made no showing the circumstances had changed in the week since the court denied her prior request for continuance (on November 22, 2010) and Lopez's subsequent request for a continuance on November 29, 2010. The court did not abuse its discretion in denying this last-minute request for yet another continuance.

The Order Granting Summary Adjudication

Lopez maintains the court erred in granting summary adjudication of her first and second causes of action, in which she alleged FEHA claims for employment discrimination based on disparate treatment and disparate impact, and wrongful termination in violation of public policy. "We review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute

warrant judgment for the moving party as a matter of law.” (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

“Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.” (*Guz, supra*, 24 Cal.4th at p. 354.) “In California, courts employ at trial the three-stage test that was established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802 . . . , to resolve discrimination claims [Citation.] At trial, the employee must first establish a prima facie case of discrimination, showing ‘ ‘ ‘actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were “based on a [prohibited] discriminatory criterion” ’ ’ ’ [Citation.] Once the employee satisfies this burden, there is a presumption of discrimination, and the burden then shifts to the employer to show that its action was motivated by legitimate, nondiscriminatory reasons. [Citation.] A reason is ‘ “legitimate” ’ if it is ‘facially unrelated to prohibited bias, and which if true, would thus preclude a finding of discrimination.’ [Citation.] If the employer meets this burden, the employee then must show that the employer’s reasons are pretexts for discrimination, or produce other evidence of intentional discrimination. [Citation.]” (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 520, fn. 2, italics omitted.)

In the context of a motion for summary judgment brought by the employer, “[a]ssuming the complaint alleges facts establishing a prima facie case that unlawful disparate treatment occurred, the initial burden rests on the employer (moving party) to produce substantial evidence (1) negating an essential element of plaintiff’s case or (2) (more commonly) showing one or more legitimate, nondiscriminatory reasons for its action against the plaintiff employee [¶] The burden then shifts to the plaintiff employee (opposing party) to rebut defendant’s showing by producing substantial evidence that raises a rational inference that discrimination occurred; i.e., that the employer’s stated neutral legitimate reasons for its actions are each a ‘pretext’ or cover-up for unlawful discrimination, or other action contrary to law or contractual obligation.” (Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2012)

¶¶ 19:728-19:729, p. 19-84, italics omitted.) By applying *McDonnell Douglas*'s shifting burdens of production in the context of a motion for summary judgment, “ ‘the judge [will] determine whether the litigants have created an issue of fact to be decided by the jury.’ ” (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805–807 (*Horn*).)

“[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer’s stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.” (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004–1005.) “The employee [cannot] simply show the employer’s decision was wrong, mistaken, or unwise. Rather, the employee ‘ ‘must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could rationally find them ‘unworthy of credence,’ [citation], and hence infer ‘that the employer did not act for the [. . . asserted] non-discriminatory reasons.’ [Citations.]’ [Citations.]’ [Citation.]” (*Horn, supra*, 72 Cal.App.4th at pp. 805–807, italics omitted.)

Lopez claims “Longs cannot satisfy [its] initial burden because there are disputed issues of material fact regarding [its] business reasons for selecting [Lopez] for termination by way of a [reduction in force (RIF)].” Assuming arguendo Lopez pleaded sufficient facts in her complaint to set forth a prima facie case, Longs demonstrated it terminated Lopez for a legitimate, nondiscriminatory business reason—a reduction in force in order to reduce the IT budget.

Lopez correctly notes that “ ‘[d]ownsizing alone is not necessarily a sufficient explanation under the FEHA for the consequent dismissal of [a protected] worker.’ ” (*Guz, supra*, 24 Cal.4th at p. 358.) Longs, however, did not rely solely on downsizing in its explanation for why Lopez was chosen for termination. Longs submitted evidence of the decisionmaking process used in choosing to terminate Lopez and Hauser. Fleck,

Lopez's manager, considered all four individuals in her group when making her recommendation about who should be terminated if a reduction in force was necessary to meet the IT department's target budget. Fleck determined Lopez and Hauser were not as busy as Wullenweber and Hemsworth, and believed the administrative duties performed by Lopez and Hauser could be absorbed more easily by other employees because the duties required minimal training and "knowledge base." Fleck thus recommended to Puskas that Lopez and Hauser's positions be eliminated if cuts had to be made.

Puskas analyzed the workloads and abilities of the groups within the IT department, as well as the recommendations of the manager of each group. He agreed with Fleck's assessment that the duties of Lopez and Hauser could be more readily absorbed by other employees because they were not as busy as other employees and minimal training was required to perform their jobs, which were administrative rather than technical.

As in *Guz*, to survive summary judgment, Lopez was "thus obliged to point to evidence raising a triable issue—i.e. permitting an inference—that notwithstanding [Long's] showing, its ostensible reasons were a mask for prohibited . . . bias." (*Guz, supra*, 24 Cal.4th at p. 353.) The evidence, however, did not raise an inference of discrimination. Lopez herself testified at her deposition she did not believe Long's selection of her position for elimination was discriminatory. She never heard or observed anything at Long's that led her to believe Long's valued or respected male employees more than female employees, Caucasian employees more than Hispanic employees, or younger employees more than older employees, or that employees who never had "any kind of physical problem were favored over employees who had had physical problems or work-related injuries." The employees in Lopez's group were all women, and three of the four were over the age of 40. The two employees who were retained were ages 56 and 60, both older than Lopez, and one had a prior workplace injury. They performed the accounting work for the entire general office. Lopez and Hauser both performed administrative support duties. Hauser was under 40, a woman, and Caucasian. Their positions were eliminated, and Lopez's duties were redistributed to other employees.

Lopez's supervisor Fleck took over management of some cell phone and Blackberry billing. Lopez understood most of her job duties were divided between Charles Parra, a Hispanic man over 40 years of age, and Dan Hummer, a Caucasian man under age 40. Parra and Hummer took over Lopez's duties of "ordering cell phones [and] . . . equipment and troubleshooting." Some of the billing work was shifted to Jackie Ponzini, a Caucasian woman over 40, who worked in the MIS department. Some of Lopez's administrative duties were shifted back to Sprint, a cellular telephone company with which Longs contracted.

Lopez maintains Longs's reasons for selecting her for inclusion in the reduction in force were pretextual because they are "devoid of any factual support, or directly disputed." She claims there were no documents produced showing she was not as busy as other employees, and disputed Fleck's testimony that she asked Lopez for a summary of her duties. Thus, she essentially claims Longs's witnesses were not being truthful about their true motivations. "[A]n inference of intentional discrimination cannot be drawn solely from evidence, if any, that the company lied about its reasons." (*Guz, supra*, 24 Cal.4th at p. 360.) Lopez was required to "do more than . . . deny the credibility of [Long's] witnesses." [Citation.] [She] must produce "specific, substantial evidence of pretext." [Citation.]' [Citation.]" (*Horn, supra*, 72 Cal.App.4th at p. 807.)

Lopez also maintains because Longs conducted reductions in force between 2003 and 2006 for the same "purported" reasons-" 'job elimination' and to 'save money,' . . . , it is simply not credible that [Lopez's termination] . . . would share the same process and justification." Lopez has not produced any substantial evidence showing Longs's making repeated reductions in force in order to save money demonstrates pretext.

Instead, Lopez now claims the *lack* of evidence of discrimination in the reduction in force that eliminated Lopez's position is evidence of pretext. She asserts the fact that Hauser, who was Caucasian, under forty and not disabled, was the other employee chosen for termination in the same reduction in force was "compelling evidence that [Longs] intentionally used age, race and disability status in fashioning the RIF to create an artificial appearance of absolute balance." Contrary to Lopez's claim, the termination of

employees who do *not* fall within protected groups does not raise the inference of discrimination.

Lastly, Lopez asserts Puskas's testimony he did not believe Lopez could be trained to take over another job without "extensive and costly training" establishes that the "only" reasonable inference to be drawn is age and race bias. She explains it thusly: "[T]here is no evidence that Mr. Puskas did anything to familiarize himself with the intelligence, capabilities and work history of [Lopez]. . . . [T]he only [inference] that fits the facts of this case—is that he assumed that she was either too old to quickly learn and adapt to new tasks, and/or that, as a Hispanic, she lacked the native intelligence and drive to transition to a new job, especially in the MIS Department."

Puskas, in fact, received information from Fleck about Lopez's duties, capabilities and how busy she was in comparison to others in her department. Lopez performed administrative support duties, and her highest level of education was a high school diploma. Fleck testified "the requirements are very minimal to do the duties" of Lopez and Hauser. "There is not a lot of training involved or knowledge base there, that another department in IT could easily have picked up their duties." In contrast, Puskas knew the "positions within other IT groups required a high-level of technical knowledge and experience." Puskas did not believe either Lopez or Hauser "had the training or experience necessary to absorb duties of other, more technical positions within the IT group without undergoing extensive and costly training." Age, race or disability discrimination is not a rational inference that can be drawn from this evidence.

Lopez failed to meet her burden of producing substantial evidence raising a rational inference that discrimination occurred. The court did not err in granting summary adjudication on her first and second causes of action for alleged discrimination.¹²

¹² Lopez's cause of action for wrongful termination in violation of public policy (FEHA's proscription "against employment discrimination") is grounded on the same claims of discrimination alleged in her first cause of action, and she relies on the same legal analysis in claiming summary adjudication of that cause of action was error. Based

The “Project Orange” List

Lopez avers the trial court erred in granting a protective order regarding the “Project Orange” list on the basis it was protected by attorney/client privilege. We also review this ruling for abuse of discretion. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186.) “ ‘In addition, if the trial court reached its decision after resolving conflicts in the evidence, or inferences that could be drawn from the evidence, we review those factual findings to determine whether they are supported by substantial evidence. [Citation.]’ [Citation.]” (*Pomona Valley Hospital Medical Center v. Superior Court* (2012) 209 Cal.App.4th 687, 692–693.)

“Project Orange” was a code name for a 2003 reduction in force at Longs. The “Project Orange” document was a six-page document with the notation “Longs Drugs Confidential,” listing the names, job titles and employment locations of 139 employees Lopez’s attorney obtained the document from Douglas Hale, a former Vice President of Administration at Longs who was laid off in 2003. In his declaration, Hale stated he “received an internal and confidential document from Longs Legal Department entitled ‘Project Orange Address Listing,’ ” a few days after he was laid off in February 2003.

Linda Watt, former Senior Vice President of Human Resources at Longs, declared “I recognize [the Project Orange Document] to be a version of a document my staff exchanged with Longs’ lawyers for the purposes of seeking and obtaining legal advice about the employees Longs was considering for layoff as part of the ‘Project Orange’ RIF. This document was not a final list of those who had been selected for layoff; rather it appears to be an interim list. This document was created solely for the purpose of the ‘Project Orange’ RIF and we treated it as confidential and privileged—i.e., as part of a privileged communication with the Company’s attorneys. Other than to Longs’ outside lawyers, I am not aware of anyone disclosing or sending this document to anyone outside

on our conclusions regarding summary adjudication of her first cause of action, we likewise conclude the court did not err in granting summary adjudication of her second cause of action. And, because we conclude summary adjudication as to the first and second causes of action was properly granted, we do not reach Lopez’s claim that she was entitled to seek punitive damages based on those causes of action.

of the Company's Human Resources or Legal Departments. I never provided Mr. Hale with a copy of this document, nor was he authorized to possess it.”

“ [C]onfidential communication between client and lawyer’ means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.” (Evid. Code, § 952.) “ ‘Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence’ [Citation.] ‘It is no mere peripheral evidentiary rule, but is held vital to the effective administration of justice. [Citation.]’ [Citation.]” (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 715.)

The court in *O’Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563 (*Mitsubishi*) addressed a similar situation. In that case, Mitsubishi’s manager of human resources prepared a list of employees identified for termination “at the direction of the company’s in-house attorney so he could give legal advice about the upcoming layoffs.” (*Id.* at p. 577.) The court held “It is hard to imagine a document which would more readily fall within the attorney-client privilege.” (*Ibid.*)

Lopez contends Watts’s declaration has “two fatal evidentiary defects.” She asserts the declaration does not “affirmatively state” the version of the Project Orange list Hale received “was the same ‘version’ of the list that was purportedly sent to the Longs legal department.” She also claims Watts’s declaration does not establish her personal knowledge that the human resources staff exchanged a version of the Project Orange list with Longs’s attorneys.

Watts’s declaration stated and established she had personal knowledge. “I was involved at a high level in overseeing aspects of the ‘Project Orange’ RIF. At my

direction, my Human Resources staff who were involved in working on this RIF worked closely with Longs attorneys (I do not recall today exactly which Longs' attorneys were involved). Our purpose in involving Longs' counsel on this RIF was to obtain legal advice on executing the layoff. . . . During this process, my staff provided Longs' lawyers information about employees' work locations and demographics for the purpose of obtaining legal advice about the RIF.”

Though Watts's declaration indicates there was more than one version of the “Project Orange” list, nothing suggests the version Hale received was not privileged. Hale declared he “received” the document, which he admitted was “confidential,” from the Longs legal department after he was terminated, but does not reveal who gave him the document or under what circumstances. Watts declared the Human Resources department, of which she was the vice-president, exchanged “Project Orange” employee lists with the Longs legal department.

Just as in *Mitsubishi*, the “Project Orange” document was a list of employees identified for possible termination, prepared by the human resources department for the company attorneys. The fact that the “Project Orange” list was modified in the course of being “exchanged” between Human Resources and the legal department does not indicate the document Hale produced was not privileged. Substantial evidence supports the trial court's factual findings in this regard.

DISPOSITION

The summary judgment is affirmed. Longs is entitled to its costs on appeal.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.