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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BARBARA BORREGO,
Plaintiff and Appellant,

v.

ST. ROSE HOSPITAL,
Defendant and Respondent.

A141866

(Alameda County
Super. Ct. No. HG13662702)

Barbara Borrego appeals from a judgment entered after the trial court granted respondent's summary judgment motion on Borrego's claims arising out of the termination of her employment. She contends the court erred because there was a triable issue of material fact with respect to respondent's motive in laying her off. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

Borrego's appellate briefs do not set forth the trial court proceedings in an orderly manner with appropriate references to the appellate record. We summarize the proceedings as follows.

A. Borrego's Complaint

Borrego filed a complaint against respondent St. Rose Hospital (Hospital), asserting causes of action for violation of the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12940 et seq.) and wrongful termination in violation of public policy. She alleged that she was employed as a registered nurse for Hospital

from 1983 through October 2012, when she was laid off as part of Hospital's purported systematic replacement of all Caucasian nurses who were full-time employees with nurses who were of Filipino ancestry. The wrongful termination cause of action also alleged that she had been discharged in retaliation for filing a discrimination complaint with the California Department of Fair Employment and Housing (DFEH).

B. Hospital's Answer and Affirmative Defense

Hospital answered the complaint and asserted, as one of its affirmative defenses, that any action it took with respect to Borrego's employment was "based on legitimate, non-discriminatory reasons unrelated to her age, race[,] national origin or other protected status."

C. Hospital's Summary Judgment Motion

In November 2013, Hospital filed a motion for summary judgment or, in the alternative, summary adjudication of issues.

Hospital contended that Borrego could not recover under FEHA as a matter of law because there was no evidence it selected Borrego for layoff with a discriminatory intent, and in any event Hospital had a legitimate, nondiscriminatory reason for laying her off, in that her layoff was part of a hospital-wide reduction in force based on economic necessity. Hospital further contended that Borrego had no wrongful termination claim for the same reasons and, to the extent Borrego claimed that Hospital retaliated against her for filing a complaint with DFEH, Borrego did not file her DFEH complaint until *after* she was laid off.

Hospital's separate statement of material facts set forth the relevant events as follows. Borrego, a Caucasian, was employed by Hospital as a part-time registered nurse in the Medical-Surgical Department. In 2011 and 2012, Hospital experienced financial stress so severe that its existence was threatened. By the summer of 2012, Hospital administrators determined that layoffs were necessary due to Hospital's financial condition. Hospital therefore reduced nurse staffing levels in the Medical-Surgical and Telemetry Departments from a patient census of 90 patients to a patient

census of 75 patients. Hospital's written layoff policy provided that part-time employees were to be laid off before full-time employees. Nine or 10 nurses in the Medical-Surgical and Telemetry Departments were laid off on October 18, 2012, including all of the part-time nurses (such as Borrego) and some of the full-time nurses. Of the nurses laid off in those departments, only one besides Borrego self-identified as Caucasian. In implementing this layoff, the Hospital followed its layoff policy and Borrego's race, national origin, and age were not taken into account. Borrego and the other laid-off employees were given the option of accepting "indefinite layoff" status or separating from Hospital employment; Borrego chose the latter on or about October 22, 2012. On the same date, she filed a charge with the DFEH.

Hospital produced evidence to support its statement of undisputed material facts. Among other things, Hospital submitted a declaration from its chief financial officer averring that in the fiscal year immediately preceding Borrego's selection for layoff, Hospital had sustained operating losses of \$10.1 million; in the year before that, it suffered losses of \$30.3 million. According to a declaration by John Davini, vice president and, later, director of human resources, the operating losses had caused multiple reductions in force even before the round of layoffs affecting Borrego. In 2011 and 2012, 88 employees had been laid off, and the layoffs affected 28 Hospital departments. (Even Davini was laid off in the same month as Borrego.)

Hospital also submitted its written policy concerning reductions in force, which provided that introductory (newly hired) employees would be laid off first, followed by probationary employees, part-time employees, and full-time employees, in that order, unless a stated exception applied. Davini averred in his declaration that Hospital followed this policy in implementing the October 2012 layoff. Besides Borrego, the eight nurses laid off from Borrego's department were all younger than age 40; three self-identified as Asian-Pacific Islander, one as Caucasian, one as Hispanic, one as "Asian and White," and two declined to self-identify.

D. Borrego's Opposition to the Summary Judgment Motion

In her written opposition to the summary judgment motion, Borrego asserted there was a triable issue of material fact as to Hospital's intent in laying off Borrego: more specifically, Borrego claimed, Hospital was engaged in a systematic practice of discharging older, more experienced Caucasian workers in favor of younger Filipino nurses as part of a practice put in place by its director of patient services, Ramon Magtibay, a Filipino.

Borrego disputed Hospital's undisputed material facts, and listed her own additional material facts, with the following primary assertions: (1) around the time of her layoff, Hospital was engaged in aggressively hiring younger, less experienced, cheaper Asian and Filipino nursing personnel through a Filipino-owned registry named First Call; (2) around the time of her layoff, a Caucasian manager (Linda Aug) offered Borrego the opportunity to convert to full-time employment, which Borrego accepted, but Magtibay then disallowed; and (3) in January 2013, Aug offered Borrego a reinstatement to employment full time and Borrego accepted, but she was never reinstated.

In purported support of these assertions, Borrego presented her own and her husband's declarations, some deposition excerpts, and certain exhibits. Exhibit 1 was a photograph purportedly taken at a 2009 Christmas party, years after Magtibay took over the hiring of the nursing staff. Borrego argued that the photograph showed an absence of Caucasian faces. The photograph was not authenticated.

As Exhibit 2, Borrego presented Hospital's response to a special interrogatory, which listed the nursing personnel hired in Borrego's department during Magtibay's tenure as director of patient services. Borrego argued that the surnames of the people on the list showed that the overwhelming majority of hires were of Filipino descent. She offered no other evidence of the age, race, or national origin of any of the individuals.

As Exhibit 3, Borrego submitted printouts of emails between Hospital and First Call nursing registry. The emails referred to various individuals and job classifications. None of the emails identified the age, race, or national origin of any of the individuals.

E. Hospital's Objection to Borrego's Evidence

Hospital objected to Exhibit 1 and Exhibit 2 on the grounds of lack of authentication, relevance, and “foundation.” (Evid. Code, §§ 350, 403-405, 1401.) It objected to the emails in Exhibit 3 on the same grounds, as well as hearsay (Evid. Code, § 1200). And it asserted numerous objections to Borrego's declaration and other evidence she submitted.

F. Trial Court's Ruling

After issuing a tentative ruling and holding a hearing, the trial court granted Hospital's summary judgment motion. As to Borrego's claim of discrimination in violation of FEHA and wrongful termination in violation of public policy, the court concluded that Hospital had established that Borrego could not prove her age, race, or national origin was a motivating factor in the decision to lay her off; Hospital further established it had a legitimate nondiscriminatory reason for the layoff; and Borrego did not raise any triable issue of material fact.

As to the retaliation claim Borrego had alleged in her complaint—that she was laid off for filing a DFEH complaint—the court concluded the claim was meritless because Borrego was informed she was a candidate for layoff before she filed her DFEH complaint.

In addition, the court noted Borrego's suggestion in her opposition to the summary judgment motion that she suffered retaliation in that, in January 2013, after filing her DFEH complaint, she was offered reinstatement but was ultimately not reinstated. The court rejected the claim because it was not alleged in Borrego's complaint and she had not exhausted her administrative remedies.

The court sustained Hospital's objections to Borrego's Exhibit 1 (the photograph) and Exhibit 2 (the list of names) and ordered entry of judgment.

Although a copy of the judgment does not appear in the record, the register of action indicates the entry of a dismissal with prejudice.

This appeal followed.

II. DISCUSSION

We conduct an independent review to determine whether there is a triable issue of material fact and the moving party is entitled to summary judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We construe the moving party's evidence strictly, and the nonmoving party's evidence liberally, in determining whether there is a triable issue. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20; *Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72 (*Thomas*).)

A defendant seeking summary adjudication must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc. § 437c, subd. (p)(2).) The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue. (See Code Civ. Proc., § 437c, subd. (p)(2); *Thomas, supra*, 98 Cal.App.4th at p. 72.)

We address Borrego's causes of action in turn.

A. FEHA Claim

To establish a prima facie case under FEHA, a plaintiff must prove that (1) she is a member of a protected class, (2) she performed her job satisfactorily, (3) she suffered an adverse employment action, and (4) the action occurred under circumstances suggesting a discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356.)

As mentioned, Hospital sought summary judgment based on the fourth element, asserting that Borrego could not prove Hospital had a discriminatory motive in laying her off. To this end, Hospital presented evidence that it had determined the layoffs were necessary in light of the millions of dollars of losses it suffered over the preceding two years; the layoffs occurred in multiple departments; the layoffs were implemented

pursuant to the Hospital's written policy and without regard for age, national origin, or race; and of the nine or so laid-off employees in Borrego's department besides Borrego, only one self-identified as Caucasian and none were over the age of 40.

From Hospital's evidence, a reasonable inference is that Borrego was selected for layoff without any discriminatory intent. Indeed, Borrego does not dispute that Hospital met its initial burden as the moving party.

The burden therefore shifted to Borrego to establish, with admissible evidence, a triable issue of material fact. (See Code Civ. Proc., § 437c, subd. (p)(2).) In this regard, Borrego contends Hospital's true intent was to replace Caucasian workers with younger Filipino workers, and her layoff was not due to Hospital's dire financial condition because, at the time of her layoff and a few months later, she was offered a full-time position. As discussed next, she failed to establish a triable issue under either theory.

1. Hospital's Alleged Scheme to Hire Younger Filipino Nurses

Borrego argues that she was selected for layoff not in accordance with Hospital's written reduction in force policy, but as part of Magtibay's plan to replace older Caucasian nursing staff with younger Filipino nurses.

Borrego fails to demonstrate a triable issue on this basis, for two reasons. First, her opening brief in this appeal does not direct us to any *evidence* creating a triable issue. Instead, she merely cites to her statement of additional material facts. This is insufficient to demonstrate error, since a summary judgment motion is defeated by evidence showing a triable issue, not by the material fact statement itself. (Code Civ. Proc., § 437c, subd. (c); see *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178 fn. 4 [in appeal from summary judgment, citation should be to the evidence in the record, not to the party's separate statement in the trial court].)

Second, our examination of the evidence that Borrego cited in the trial court to dispute Hospital's statement of undisputed facts, and to support her statement of

additional material facts, reveals no admissible evidence from which a trier of fact could reasonably conclude that Borrego's layoff was due to any discriminatory intent.

a. Photograph of 2009 Christmas Party (Exhibit 1)

Borrego's Exhibit 1 contains three copies of the same photograph: one that shows a number of people facing the camera; one with numbers in place of their faces; and a third that is indecipherable. There is no declaration properly authenticating any of these photographs.¹

The trial court ruled that Exhibit 1 was inadmissible, sustaining Hospital's objections on the grounds of lack of authentication, relevance, and foundation. Borrego does not challenge the court's evidentiary ruling in her opening brief in this appeal. In her reply brief, she contends the foundation was laid by deposition testimony submitted to the trial court, but she provides no citation to the record. She therefore fails to establish that the court erred in ruling Exhibit 1 inadmissible. Only admissible evidence can create a triable issue of material fact. (Code Civ. Proc., § 437c, subs. (c), (d).)

At any rate, even if Exhibit 1 *were* admissible, it would not create a triable issue of material fact as to Hospital's motive in laying off Borrego in October 2012. First, it does not show the composition of *Borrego's department at any relevant time*. The photograph was purportedly taken in 2009—roughly three years before Borrego's layoff—at an off-site party not sponsored by the Hospital; it includes individuals who were not Hospital employees and not nurses; and it includes only half of the employees of one shift of Borrego's department. Second, the photograph does not establish the *age, race, or national origin* of any of the individuals portrayed in the photograph, and Borrego did not submit competent evidence from Hospital's personnel records or the

¹ In her deposition, Borrego testified about a photograph taken at a Christmas party in 2009, which she downloaded from someone else's Facebook page. Borrego suggests that this testimony was referring to the photograph submitted in the summary judgment proceedings as Exhibit 1. According to Borrego's reply brief in this appeal, Exhibit 1 consists of the photograph as used in the depositions of Borrego, Aug, and Magtibay.

individuals' self-identification indicating which of them were Filipino, foreign born, or younger than Borrego. Although Magtibay testified about some of the individuals in the photograph, he essentially related that some were Filipino, some were not, some he hired, some he did not, and some he did not know. Furthermore, we cannot discern the age, race, or national origin of any of the individuals from the copies of the photograph in the record. Accordingly, Exhibit 1 does not show that Magtibay had a scheme to hire Filipinos, much less that Hospital laid off Borrego during its financial difficulties three years later because she is Caucasian. (See *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1319 [plaintiff in discrimination case must prove causal connection between protected classification and adverse employment action].)

b. List of Hires (Exhibit 2)

Borrego's Exhibit 2 contained Hospital's response to a special interrogatory, listing dozens of persons hired as a nurse or "anyone else" in Borrego's departments during the time Magtibay was director of nursing.

The trial court ruled that Exhibit 2 was inadmissible, and Borrego does not establish otherwise. Exhibit 2 does not identify the age, race, or national origin of any of the people on the list; it is therefore irrelevant to whether Hospital discriminated on the basis of age, race, or national origin. (Evid. Code, §§ 210, 350.)

In any event, for much the same reason, Exhibit 2 does not create a triable issue of material fact. Borrego does not identify which of the dozens of people on the list are Filipino, or provide any legitimate basis for doing so. There is no way to tell from the list if any of the individuals were younger than Borrego when she was laid off. And Borrego offered no independent evidence of the age, race, or national origin of any of the listed individuals. Exhibit 2 therefore tells us nothing about whether there was discriminatory hiring at Hospital, much less the reason for Borrego's layoff.

In her reply brief in this appeal, Borrego contends it is simply common sense that certain names are Filipino. But she does not tell us *what* names she thinks are Filipino, any basis for drawing that conclusion, why surnames would indicate race or

national origin in light of the possibility that they might be last names by marriage, or even how many of those names appear on the list. She fails to establish that Exhibit 2 creates a triable issue of material fact.

c. First Call Emails (Exhibit 3)

As Exhibit 3, Borrego submitted printouts of a number of emails from or regarding First Call, a nursing registry. A nursing registry, Magtibay testified, reflects a group of people Hospital might hire on a temporary basis when it is short on nurses. Most of the emails were sent to or from Magtibay.

Based on Exhibit 3, Borrego argues: “First Call was placing numerous Registered Nurses and other Healthcare Workers of Filipino descent with St. Rose Hospital during Magtibay’s tenure with the Hospital. . . . First Call was Filipino owned.” But Borrego does not cite any evidence to support the assertion that First Call was Filipino-owned. Nor does she explain how Exhibit 3 shows any plan to hire Filipino nurses instead of Caucasian workers, or that Hospital had a discriminatory motive in laying off Borrego.

In the first place, the First Call emails refer to a number of individuals and job classifications—not just registered nurses like Borrego—so they do not show that any of the referenced individuals were hired to replace Borrego. Furthermore, none of the emails identify the age, race, or national origin of any of the individuals mentioned, so they do not show that Hospital was recruiting younger Filipino nurses to replace existing, older Caucasian nurses.

Moreover, the emails were dated either in or after late January 2013, or in or before February 2012. They do not reflect any *hiring* in 2012. They therefore do not directly contradict Hospital’s evidence that, *at the time of the layoff in October 2012*, Hospital decided to reduce the number of nurses due to its financial condition, in accordance with its written policy. Nor do they reasonably give rise to such an inference, in light of the other evidence in the case. If anything, the emails are consistent with Magtibay’s testimony that the 2012 layoffs had caused other nurses to

leave their employment, and the resulting staff shortages and increased patient population in winter 2012 motivated Hospital in 2013 to *recall the personnel who had been laid off* and to recruit for additional temporary positions as well. In short, the emails do not show any discriminatory intent on the part of Hospital.

Borrego argues: “Fact issues exist in this case as to whether or not Magtibay had a relationship with a Nursing Registry by the name of First Call,” referring us to additional material facts (numbered 8 through 11) and suggesting that Magtibay cannot be believed because he was not candid about his dealings with First Call. The admissible evidence, however, tells a different story.

Borrego’s additional material facts cited Exhibit 2 (the list of names that tells us nothing), Exhibit 3 (the First Call emails), and excerpts from Magtibay’s deposition. Contrary to Borrego’s contention, Magtibay’s testimony does not show he was dishonest about his involvement with First Call: Magtibay testified that he *did* deal with First Call, and particularly with a contact person by the name of “Selena,” and three or four times he accepted applicants suggested by a registry. Borrego does not explain how Exhibit 3 contradicts any of these statements. Further, the record contains a declaration from the president of First Call, stating that First Call did not pay any compensation to Magtibay in connection with the placement of any medical professional at the Hospital in 2010 or thereafter.

d. Other Evidence

Although Borrego’s appellate briefs do not provide record citations to any other evidence to support her claims, our own investigation of the evidence she cited in her

opposition to the summary judgment motion confirms that she failed to raise any triable issue of material fact.²

In purporting to dispute Hospital's assertion that the October 2012 layoffs were due to Hospital's severe financial condition, Borrego claimed that, during the period of the layoff, Hospital was "aggressively" hiring younger Filipino nurses. For this proposition, Borrego's response to Hospital's separate statement of material facts cited Exhibit 3, which we have already discussed. Borrego also cited to her own declaration, which states that "[w]hile searching for work after [her] layoff" she saw an ad for nursing positions at Hospital in *early Spring 2013*. But this was months after Borrego's layoff, and it does not show that Filipinos were targeted, let alone hired. Borrego also cited to excerpts from Magtibay's deposition, but these excerpts indicate only that the employees who had been laid off in October 2012 were recalled because Magtibay had to increase the workforce in winter of 2012 and early 2013 to meet increased patient needs; and once or twice during his tenure he hired someone who was a relative of a then-current Filipino employee. This testimony provides no basis for concluding that Magtibay aggressively hired Filipino nurses, let alone that there was any discriminatory intent in laying off Borrego in October 2012. Lastly, Borrego cites to excerpts from Aug's deposition, but the cited portions of Aug's testimony do not even discuss hiring Filipinos.

No better was the evidence Borrego cited in support of her additional material facts, to the effect that Magtibay had "systematically" hired young Filipino nurses. Aside from Exhibit 1, Exhibit 2, and Exhibit 3 (discussed *ante*), Borrego cited excerpts from Magtibay's deposition, which merely indicate that he hired 30 to 40 out of approximately 200 "RN medical surgical employee[s]." She cites her own deposition

² *None* of the additional material facts Borrego asserted in opposition to the summary judgment motion, or *any* of its assertions disputing Hospital's undisputed material facts, is supported by any admissible evidence cited by Borrego in the trial court, with the exception of additional material fact No. 1 (Magtibay is Filipino and was hired in 2007), additional material fact No. 4 (Borrego earned \$67 per hour), and some of the facts related to the purported offers of full-time employment discussed *post*. We provide only a couple of examples in the text.

testimony, to the effect that she “heard” from other nurses that Magtibay had a registry that was supplying nurses to the Hospital and that he ran it with one of his family members, and at the time of her layoff, another nurse told her the name of the registry was First Call. All of this, however, is inadmissible hearsay. Finally, Borrego testified that Magtibay hired the relatives of existing Filipino employees and “99 percent of the nurses he hired were Filipino,” while others at the Hospital hired Caucasian nurses. But Borrego also testified that Magtibay made the final hiring decisions, thus suggesting he was approving the hiring of *Caucasians* too. In any event, Borrego does not explain how the hiring of Filipino nurses would reasonably lead to an inference of discrimination without evidence of the circumstances in which they were hired (e.g., non-Filipino applicants with commensurate qualifications).

In sum, Borrego fails to raise a triable issue with respect to any scheme by Hospital to replace Caucasian nurses with young Filipino nurses. An unauthenticated photograph depicting who was present at one point during a 2009 Christmas party, a list of hires that does not identify each hire’s race or age or the circumstances of his or her hiring, and emails in 2013 and 2011 about temporary hires whose race and age are not disclosed, falls woefully short of establishing a triable issue of discriminatory intent.

2. Offers of Full-Time Employment

Borrego asserts she was offered a full-time position at the time of her layoff in October 2012, only to have that offer revoked by Magtibay, and was again offered a full-time position in January 2013, which did not come to fruition. She argues that she was therefore twice offered the option to convert from part-time to full-time status during the layoff process and to work more hours and earn more money, not less. These events, she maintains, raise a triable issue of fact as to whether Magtibay had a pretextual motive to lay off Borrego, and whether Hospital was in dire economic straits.

Borrego misstates the evidence. The evidence presented to the court regarding the October 2012 offer of full-time employment—indeed, from Borrego’s own

deposition testimony—is that nursing supervisor Linda Aug asked Borrego if she was willing to work 32 hours a week, which would categorize her as a full-time employee and thereby spare her from the layoff. Borrego agreed, and Aug said a decision whether she (and another employee) would be given a 32-hour work week would be made by the end of the day. According to Borrego’s own testimony, Aug called Borrego later that day and told Borrego that “*Human Resources* cannot do it.” (Italics added.) Borrego does not point to evidence that Magtibay was part of Human Resources or had a role in this decision; therefore, she fails to show that this event evinced Magtibay’s discriminatory intent. Nor does the evidence show that Hospital rejected Aug’s proposal due to Borrego’s age, race, or national origin.³

Borrego also argues that Hospital’s offer of reinstatement to her in January 2013 is evidence that her selection for layoff in October 2012 was not motivated by economic conditions. But the reinstatement offer does not help Borrego. If indeed the January 2013 offer of reinstatement is relevant to Hospital’s intent behind her layoff in October 2012, the fact that the Hospital offered to *reinstate* Borrego suggests it was *not* seeking to replace Caucasian nurses with younger Filipino nurses. The evidence therefore fails to raise a triable issue regarding discriminatory intent.

As mentioned, the evidence in the record concerning the January 2013 event is that the 2012 layoffs had caused other nurses to leave Hospital employment, and the ensuing staff shortages motivated Hospital to recall personnel who had been laid off and to recruit for additional positions in early 2013. Hospital’s offer of reinstatement in January 2013 is therefore not evidence of pretext. Indeed, the evidence of Magtibay’s role in the January 2013 recall of the nurses laid off in October 2012, and the absence of evidence that he tried to fill those positions with Filipino nurses,

³ Borrego argues in her opening brief, “When Caucasian Female Managers extended the offer to transfer to a full-time position, and Plaintiff accepted that offer, it was withdrawn on instruction from Ramon Magtibay, the Architect of the Racial/Age/National Origin discrimination redesign of the [Hospital] Nursing Staff.” There is, however, no citation to any *evidence* supporting that accusation.

suggests that neither Magtibay nor the Hospital had a discriminatory intent in laying off Borrego.

Borrego failed to establish a triable issue of material fact as to the Hospital's intent in laying her off in October 2012. The trial court did not err in concluding that Hospital was entitled to judgment as a matter of law on Borrego's FEHA claim.

B. Claim for Wrongful Termination in Violation of Public Policy

Although Borrego does not explain her wrongful termination claim in her appellate briefs, the record shows that it was premised on discrimination and retaliation.

As to the discrimination claim, the trial court did not err in concluding there was no triable issue of material fact, for the reasons stated *ante* with respect to her discrimination claim under FEHA.

As to her retaliation claim, Borrego alleged that she was discharged from her employment in retaliation for filing a complaint of discrimination with DFEH. However, the evidence was that Borrego filed her DFEH complaint (complaining *about* the layoff) on October 22, 2012, four days *after* she had been informed of the decision to lay her off on October 18, 2012. Since the layoff occurred before her DFEH complaint, and the DFEH complaint challenged the layoff, the layoff could not have been in retaliation for the DFEH complaint.

Borrego raised a new retaliation theory in the summary judgment proceedings, contending that Hospital had withdrawn an offer of reinstatement in retaliation for her DFEH complaint. The trial court ruled that Borrego could not defeat summary judgment under this theory because it was not alleged in her complaint (and she had not exhausted her administrative remedies). Borrego does not brief this issue in her opening brief, and it is therefore waived.

Borrego fails to demonstrate error in the court's entry of judgment against her.⁴

III. DISPOSITION

The judgment is affirmed.

⁴ Borrego argues that the trial court prevented her from having meaningful oral argument at the summary judgment hearing. However, the reporter's transcript shows no abuse of discretion. Borrego's attorney was given 10 minutes to argue Borrego's position, as counsel saw fit. Borrego does not set forth what her attorney would have said if he had had more time, or why it would have made any difference to the outcome of the motion. In any event, the issue is immaterial since we review the summary judgment ruling de novo.

NEEDHAM, J.

We concur.

SIMONS, Acting P.J.

BRUINIERS, J.