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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

KAREN L. COLEMAN,

Plaintiff and Appellant,

v.

THE PERMANENTE MEDICAL
GROUP, INC., et al.,

Defendants and Respondents.

A144510

(Alameda County
Super. Ct. No. RG11603906)

While working as a nurse in the emergency department of the Kaiser Permanente Antioch Medical Center (the Antioch medical center), Karen L. Coleman was frequently criticized for nursing errors and poor performance. She was ultimately placed on a performance improvement plan and then terminated. Coleman sued The Permanente Medical Group, Inc. (TPMG), Lowry Mitchell, the emergency department director, and Terri Pillow-Noriega, her supervisor, (collectively defendants) for racial discrimination and harassment, among other things. She now appeals from the trial court's order granting defendants' motions for summary judgment. We affirm.

I. BACKGROUND

A. *Factual Background*

Coleman is African-American. From 2003 to 2007, she worked for Kaiser¹ as a "Care Manager" in Union City and then as a "Staff Nurse II" in an emergency room in

¹ In her declaration, Coleman frequently refers to "Kaiser" and "Kaiser Permanente." It is not always clear whether she means TPMG or another distinct entity.

Oakland. Coleman received a positive performance review from the Oakland emergency department in July 2007. In October 2007, Coleman transferred to the emergency department at the newly opened Antioch medical center.

Before the Antioch medical center opened, Coleman participated in a staff orientation. At the orientation, Pillow-Noriega, who was then the director of emergency services, talked about the type of culture she wanted to foster at the facility. Pillow-Noriega said she “advised all of the staff about the importance of the first impressions they made on people who came into the Emergency Department and that we wanted to set the standard for patient-centered care.” She also talked about “leaving behind whatever baggage [staff] had from their previous experiences working at other locations.” Coleman testified Pillow-Noriega stressed the concept of an “Antioch culture” at the orientation, though she could not remember exactly how that culture was described. According to Coleman, Pillow-Noriega “said . . . we all came from different places: Walnut Creek, Oakland and various places. But she said that all stopped at the door.”

The Antioch medical center opened in November 2007. Coleman initially reported to Pillow-Noriega, though she did not interact with her on a daily basis. Soon after Coleman started work, concerns were raised regarding her performance. Mark Knoblauch, an assistant manager in the emergency department, told Pillow-Noriega that Coleman had difficulty managing her “patient volume,” getting orders done, and using electronic medical records. Further, a patient’s daughter complained directly to Pillow-Noriega that Coleman had failed to properly care for her father. Coleman asserts she did not have any difficulty managing multiple patients. She also asserts she witnessed Caucasian nurses who did have such problems, and those nurses were not disciplined.

On December 13, 2007, Coleman and her union representative met with Pillow-Noriega and Knoblauch to discuss concerns with Coleman’s performance. According to Coleman, Pillow-Noriega told her during this meeting that she was not the “right fit” for the “Antioch facility.” Pillow-Noriega directed Coleman to undergo five days of “re-orientation” in the emergency department. As part of the reorientation, Coleman would work with another staff nurse, a “preceptor,” who would be available to discuss patient

care and assist her. Coleman asserts Pillow-Noriega failed to comply with Kaiser's policy of providing prior notice of any meeting which may result in discipline against an employee. Defendants assert the reorientation was intended to be educational, not disciplinary.

On January 10, 2008, Pillow-Noriega and Knoblauch met with Coleman to discuss her reorientation. They told Coleman she was doing better managing patients, but expressed concerns about patient care as reported by the preceptors. Citing these performance concerns, Pillow-Noriega placed Coleman on an additional five-day reorientation.² After this second reorientation, Coleman's preceptor, Bertha Odhiambo, expressed further concerns about Coleman. Odhiambo believed Coleman "had a block against anyone telling her anything." For example, according to Odhiambo, Coleman incorrectly administered a beta blocker and then "went on the defensive" when this was pointed out to her. Coleman asserts she became ill as a result of a hostile work environment, and she went on medical leave from February 15 through March 6.

On April 1, 2008, after she returned from medical leave, Coleman met with Pillow-Noriega. According to Coleman, Pillow-Noriega told her she "wasn't the right fit for the Antioch culture." Coleman and Pillow-Noriega met again on April 29, 2008, this time with a union representative and a human resources consultant. During the meeting, Pillow-Noriega said she had growing concerns about Coleman's ability to practice safely while working as an emergency department nurse. Coleman asserts Pillow-Noriega did not identify any particular "nursing errors" during this meeting.

In a May 20, 2008 memo, Pillow-Noriega informed Coleman she was being placed on a third reorientation, effective May 24. The memo stated: "This orientation is your last chance to show me that you can succeed as a Staff Nurse in the Emergency

² In her summary judgment declaration, Coleman claimed she called a corporate hotline and complained she had been subject to harassment and a hostile work environment on January 13, 2008, three days after her meeting with Pillow-Noriega and Knoblauch. Defendants objected to this statement, arguing it contradicted her prior sworn deposition testimony about when she contacted the corporate hotline. The trial court sustained this objection.

Department.” Coleman selected the preceptors for the reorientation herself. On May 22, before the reorientation commenced, Coleman took another medical stress leave. Coleman returned to work in or around June 2008, at which time she commenced her third reorientation. The preceptors again reported concerns with Coleman’s performance. Before Coleman could complete the 10-day reorientation, she took another leave of absence, citing stress caused by a hostile work environment.

Coleman asserts her doctor released her to return to work on August 16, 2008, but she could not resume her duties because Pillow-Noriega placed her on “ ‘investigatory leave.’ ” On November 7, Pillow-Noriega informed Coleman she could return to work on November 17, but she would be placed on a performance improvement plan. Coleman was also required to attend training on November 17 and 18, which she did.

On November 12, 2008, the nurses union filed a grievance on Coleman’s behalf for creating a hostile work environment and violations of the union’s collective bargaining agreement. The union asserted Kaiser had refused to pay Coleman for six days of work missed due to negligence in scheduling and prevented Coleman from performing her duties by keeping her on extended investigatory leaves. The union also asserted Kaiser had created a hostile work environment by admonishing and threatening Coleman with termination and issuing multiple performance improvement plans. The grievance was resolved on February 20, 2009. The parties agreed Coleman would return to work on February 23, and would be placed on a performance improvement plan which would last no longer than 60 days or 24 shifts, whichever occurred first.

In the meantime, on December 31, 2008, Coleman called the Kaiser corporate hotline to lodge a complaint. At her deposition, Coleman asserted her complaint concerned “the hostile work environment” and being treated differently from White employees. Kaiser records indicate the complaint raised the same issues as the union grievance. The hotline’s records do not reflect Coleman complained about disparate treatment based on race. Coleman claims she called the hotline again on February 20, 2009, the same day her union grievance was resolved, with “additional issues.” Coleman claims Kaiser would not investigate, and did not follow its own policies of preventing

harassment in the workplace. Coleman also requested a transfer to another facility, but her request was denied.

Coleman returned to the Antioch medical center in late February 2009 to begin her performance improvement plan. In March 2009, preceptors reported Coleman had committed at least three serious nursing errors. On March 5, Michelle Johnson reported Coleman had improperly inflated a Foley catheter in a patient's urethra, causing a tear. Johnson said she saw Coleman dispose of a bloody catheter after leaving the patient's room. In her summary judgment declaration, Coleman claimed she was at lunch during the incident, and a Caucasian nurse was the one who improperly inflated the catheter. On March 18, Katherine Blaisdell, another preceptor, reported Coleman improperly administered the medication vancomycin to a patient. The preceptor was concerned because rapid infusion of the drug is potentially deadly. On the same day, Blaisdell also reported Coleman administered 20 milliliters of Gastrografin at one time, instead of in two doses as prescribed by the physician. Coleman asserts both incidents reported by Blaisdell never occurred, and she administered the medications properly. Coleman was placed on leave so these incidents could be investigated.

Based on the reported incidents discussed above, along with Coleman's failure to acknowledge the problems with her nursing care, Pillow-Noriega concluded Coleman's employment should be terminated. Lowry Mitchell, the emergency department director, terminated Coleman on July 27, 2009. Mitchell also reported Coleman to the California Board of Registered Nursing (BRN).³

³ Defendants request we take judicial notice of materials filed in the BRN proceedings related to Coleman's employment at Kaiser, as well as her subsequent employment at St. Francis Memorial Hospital. Specifically, they request we judicially notice (1) a May 20, 2014 accusation by the BRN; (2) a September 29, 2015 decision by an administrative law judge finding Coleman engaged in two acts of gross negligence and five acts of incompetence, revoking Coleman's nursing license, staying the revocation, and placing Coleman on probation; (3) a March 4, 2015 accusation by the BRN; and (4) a July 27, 2015 order granting a continuance and temporarily suspending Coleman's nursing license. The request for judicial notice is denied as the BRN materials are irrelevant.

B. Procedural History

Coleman filed a charge of discrimination against “Kaiser Permanente” with both the California Department of Fair Employment and Housing (DFEH) and the Equal Employment Opportunity Commission (EEOC) on December 23, 2009. Coleman asserted she had been subject to racial discrimination and retaliation. About 18 months later, in July 2011, Coleman filed an amended DFEH/EEOC charge of discrimination, alleging disability discrimination, along with racial discrimination and retaliation.

On November 10, 2011, Coleman filed the instant action in state court against Pillow-Noriega, Mitchell, and Kaiser Foundation Hospitals (KFH). On May 24, 2012, KFH removed the case to federal court.⁴ On October 11, 2013, Coleman dismissed her claims against KFH with prejudice.

On October 30, 2013, Coleman filed a first amended complaint (FAC) in federal court. The FAC named TPMG, Pillow-Noriega, and Mitchell as defendants. The FAC asserted claims for (1) race discrimination, (2) age discrimination, (3) disability discrimination, (4) discrimination, (5) workplace harassment, (6) retaliation, (7) breach of contract, (8) breach of the implied covenant of good faith and fair dealing, (9) wrongful termination in violation of public policy, (10) defamation, (11) intentional infliction of emotional distress (IIED), and (12) violation of the unfair competition law (UCL; Bus. & Prof. Code, § 17200 et seq.).

The federal court granted defendants’ motion for summary judgment as to Coleman’s claims for breach of contract and breach of the implied covenant of good faith and fair dealing because Coleman failed to exhaust her contractual remedies under the grievance procedure pursuant to the nurses union’s collective bargaining agreement. The court declined to exercise supplemental jurisdiction over Coleman’s other state law claims and remanded the action to Alameda County Superior Court.

⁴ Defendants also request we take judicial notice of various documents from the federal court proceedings which were not introduced below. The request is denied since the documents are irrelevant to the issues raised in this appeal.

After the case was remanded, TPMG, Lowry, and Pillow-Noriega each filed separate motions for summary judgment. Coleman filed oppositions to the three motions, and then filed an ex parte application to continue the summary judgment hearing to allow for additional discovery. The trial court denied the ex parte application and granted the motions for summary judgment. This appeal followed.

II. DISCUSSION

A. Standard of Review

The standard of review for a summary judgment motion in favor of a defendant is well settled. We “independently assess the correctness of the trial court’s ruling by applying the same legal standard as the trial court in determining whether any triable issues of material fact exist, and whether the defendant is entitled to judgment as a matter of law.” (*Rubin v. United Air Lines, Inc.* (2002) 96 Cal.App.4th 364, 372, fn. omitted.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the [plaintiff] in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) The trial court must view that evidence, and any reasonable inferences from that evidence, “in the light most favorable to” the plaintiff. (*Id.* at p. 843.) We review the trial court’s ruling de novo. (*Id.* at p. 860.) The trial court’s evidentiary rulings are reviewed for abuse of discretion. (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.)

B. Racial Discrimination

The trial court granted summary judgment on Coleman’s claim for racial discrimination, finding Coleman failed to present competent evidence suggesting any adverse employment action taken against Coleman was motivated by racial discrimination. The court also held Coleman failed to offer specific, substantial evidence demonstrating TPMG’s stated reasons for its actions were untrue or pretextual. Coleman’s attempts to challenge the trial court’s holding are unconvincing.

“Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own

statutes.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 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 [*McDonnell Douglas*], to resolve discrimination claims” (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 520, fn. 2 (*Reid*)). At trial, the employee must first establish a prima facie case of discrimination by providing evidence “(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive.” (*Guz*, at p. 355.) “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.” (*Reid*, at p. 520, fn. 2, italics omitted.)

In the context of a motion for summary judgment brought by the employer, “Assuming 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 2015) ¶¶ 19:728 to 19:729, p. 19-117, 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.) “[T]he 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.’ ” ’ ” (*Horn, supra*, 72 Cal.App.4th at p. 807, italics omitted.)

Here, Coleman contends summary judgment was inappropriate because she offered evidence she was subjected to extreme scrutiny and surveillance. But defendants presented considerable evidence they had legitimate, nondiscriminatory reasons for taking such actions. Soon after Coleman started at the Antioch medical center, Pillow-Noriega received reports Coleman could not manage her patient volume and was improperly caring for patients. Because of these reports, Coleman was directed to take part in three reorientations. The preceptors who observed Coleman during these reorientations, some of whom were selected by Coleman, expressed additional concerns about Coleman’s competency as a nurse. There is also evidence that when Coleman was finally placed in a performance improvement plan she committed at least three serious nursing errors over the course of a few days. One of these errors resulted in a tear in a patient’s urethra, and another could have resulted in a fatality. While Coleman disputes the veracity of the reports of her poor performance, she does not dispute these reports

were made. Moreover, she does not point to any evidence of bias on the part of the various supervisors, preceptors, staff, and patients who made these reports to defendants.⁵

In her appellate briefing, Coleman points to her summary judgment declaration, in which she asserted there were Caucasian nurses who had problems managing multiple patients, and they were not placed in a performance improvement plan or subjected to additional reorientation. But the trial court sustained defendants' objections to this evidence. We cannot conclude the trial court's ruling was an abuse of discretion. Coleman's statement is conclusory and lacks foundation. Coleman does not identify the Caucasian nurses. Nor does she describe the nature or extent of their performance issues or explain how she knows about them. Even if this evidence was admissible, it does not create a triable issue as to pretext. Coleman was not similarly situated to these other nurses as she did not merely have trouble managing multiple patients. As discussed above, there were also reports she made a number of serious nursing mistakes.

Coleman also argues there was evidence defendants acted with discriminatory animus. In support, she points to Pillow-Noriega's reference to an "Antioch culture." But there is no indication this "Antioch culture" was hostile to any particular racial group. Pillow-Noriega stated that, when talking about the type of "culture" she wanted to foster in Antioch, she advised the staff she wanted to set the standard for patient-centered care. Coleman's deposition testimony does not suggest otherwise. She could not specifically recall what Pillow-Noriega said about "Antioch culture," other than that the term was used. Specifically, Coleman testified: ". . . I can't remember exactly what her [(Pillow-Noriega's)] description [of Antioch culture] was. But I do remember her saying the Antioch culture, and she stressed it a couple different times. Because she said whatever—we all came from different places: Walnut Creek, Oakland and various places. But she said that all stopped at the door. It—you know, now we're in a new place, a new facility. And she said Antioch culture." Coleman later continued: "Her

⁵ In her reply brief, Coleman asserts her work was "sabotaged by her co-workers." She does not provide any record citations, or point to any evidence that would support this assertion.

description [*sic*] I cannot remember when she spoke of the culture, but she—when she spoke of it, it wasn't emergency room culture. It was Antioch culture.” Even looking at this testimony in the light most favorable to Coleman, we cannot infer Pillow-Noriega's discussion of Antioch culture raised an inference she was biased against African-Americans on any other protected class.

Coleman also asserts Pillow-Noriega later told her she was “not a right fit for the Antioch culture.” But in her deposition, it appears Coleman could not decide whether Pillow-Noriega used the term “Antioch culture” or “Antioch facility.” In any event, as discussed above, Coleman fails to show Pillow-Noriega was referring to anything but the work culture at the Antioch medical facility. For similar reasons, we cannot infer racial bias from Pillow-Noriega's statements that Coleman was “ ‘unfit’ ” and “ ‘needed to be watched,’ ” which clearly referred to Coleman's performance, not her status as an African-American.

Finally, Coleman asserts she raised a triable issue by submitting declarations from three other Kaiser nurses who also reported experiencing and observing discrimination, Janet Powe-Brown, Djenne Fox, and Yvonne Oquendo. Several courts have found “me too” evidence from other employees to be relevant and admissible in discrimination and harassment cases. (See *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 747; *Pantoja v. Anton* (2011) 198 Cal.App.4th 87.) For example, in *Johnson*, the plaintiff alleged she was terminated because she was pregnant. (*Id.* at p. 744.) In opposition to the defendant's motion for summary judgment, the plaintiff submitted declarations from three employees who stated they worked at the same facility, had the same supervisors, and were fired after it was revealed they were pregnant. (*Id.* at p. 761.) The court held the declarations were admissible because they presented factual scenarios similar to the one presented by the plaintiff, and the probative value of the declarations clearly outweighed any prejudice that would be suffered by the defendant. (*Id.* at p. 767.)

In this case, the “me too” evidence submitted by Coleman did not shed any light on the intent of the defendants. While Powe-Brown worked at the Antioch medical

center, she was assigned to the operating room, not the emergency department where Coleman worked. Moreover, Powe-Brown's declaration does not say anything about Mitchell or Pillow-Noriega, the individual defendants in this case. Likewise, Fox complained about racial discrimination in the Antioch medical center's interventional services department, not the emergency department. And Fox's declaration was drafted for an action she filed against Kaiser Foundation Hospital, Inc. and Susan Dominique, neither of whom are defendants in this matter. Oquendo's declaration was also drafted in connection with Fox's discrimination suit, and like Fox's declaration, focuses on Dominique's alleged misconduct. Oquendo did work in the emergency department, but claims she transferred there to escape Dominique. Accordingly, these declarations are irrelevant to the issue of whether Pillow-Noriega and Mitchell harbored animosity toward African-Americans. The objections to them were properly sustained.⁶

For these reasons, we find the trial court did not err in granting summary judgment on Coleman's racial discrimination claim.

C. Age and Disability Discrimination

The trial court found Coleman failed to exhaust her administrative remedies as to her claims for age and disability discrimination, and it therefore granted summary judgment on those claims. The trial court noted neither of Coleman's DFEH/EEOC charges referred in any way to age discrimination. The trial court also stated that, while Coleman's July 29, 2011 DFEH/EEOC charge did refer to a potential claim for disability discrimination, it did not relate back to Coleman's December 10, 2009 charge, because that earlier charge contained no factual basis to support a claim for disability discrimination.

⁶ At oral argument, Coleman also argued defendants failed to properly investigate her claims of discrimination. As this claim is not raised in her appellate briefing, we need not address it. To the extent Coleman is arguing her "me too" evidence is admissible because defendants also failed to properly investigate the claims of Powe-Brown, Fox, and Oquendo, her claim also fails. As discussed, the declarations of these individuals are irrelevant because they do not shed any light on the intent of the individuals involved in this case.

The trial court's analysis was correct. An employee must exhaust administrative remedies by filing an administrative complaint with the DFEH and obtaining a notice of right to sue before bringing a claim for discrimination under the Fair Employment and Housing Act (FEHA). (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724.) "To exhaust his or her administrative remedies as to a particular act made unlawful by [FEHA], the claimant must specify that act in the administrative complaint." (*Ibid.*) "Whether the plaintiff has met that requirement depends on an analysis of the 'fit' between the administrative charge and the lawsuit. [Citation.] The test for that 'fit' is whether the alleged discriminatory acts in the lawsuit are 'like or reasonably related to' the allegations contained in the administrative charge." (*Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1121.) In this case, Coleman's December 2009 DFEH/EEOC charge alleged race discrimination and retaliation, but made no mention of age or disability discrimination.

Citing to *Freeman v. Oakland Unified School Dist.* (9th Cir. 2002) 291 F.3d 632, Coleman argues the legal standard discussed above is no longer good law. Not so. *Freeman* holds that, even when a plaintiff seeks judicial relief for claims not listed in an administrative charge, the plaintiff's complaint " 'nevertheless may encompass any discrimination like or *reasonably related to* the allegations of the [administrative] charge.' " (*Id.* at p. 636, italics added.) Further, the court held "subject matter jurisdiction extends over all allegations of discrimination that either 'fell within the scope of the EEOC's *actual* investigation or an EEOC investigation which *can reasonably be expected* to grow out of the charge of discrimination.' " (*Ibid.*) Here, Coleman has yet to explain how allegations of age and disability discrimination relate in any way to charges of racial discrimination and retaliation. She has also failed to explain why an investigation of age and disability discrimination was likely to grow out of an investigation of race discrimination.

Even if the trial court had jurisdiction to consider these claims, summary judgment was still warranted. As discussed above, defendants presented considerable evidence they had legitimate reasons for the adverse employment actions at issue, including

evidence of negligence on the part of Coleman. Coleman has not presented evidence defendants' reasons were pretextual or that defendants were motivated by discriminatory animus.

D. Harassment

The FEHA provides it is unlawful for “an employer . . . or any other person, because of race, . . . sex, [or] gender . . . to harass an employee Harassment of an employee . . . shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. . . . An entity shall take all reasonable steps to prevent harassment from occurring. . . .” (Gov. Code, § 12940, subd. (j)(1).) This provision of the FEHA is violated “ ‘[w]hen the workplace is permeated with discriminatory intimidation, ridicule and insult that is “ ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment’ ” ’ [Citations.] This must be assessed from the ‘perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.’ [Citation.] And the issue of whether an employee was subjected to a hostile environment is ordinarily one of fact.” (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 263–264.)

“In determining what constitutes ‘sufficiently pervasive’ harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610 (*Fisher*)). “ ‘[W]hile an employee need not prove tangible job detriment to establish a . . . harassment claim, the absence of such detriment requires a commensurately higher showing that the . . . harassing conduct was pervasive and destructive of the working environment.’ ” (*Ibid.*) Hostile work environment claims must be evaluated in light of the totality of the circumstances. (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1529.) Those circumstances may include “ ‘the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an

employee's work performance.' ” (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.)

Here, the trial court found Coleman failed to present any competent evidence she was subject to harassment based on race, or any other basis prohibited by FEHA, “and certainly not any harassment sufficiently severe and pervasive to alter the conditions of her employment. [Citation.] Rather, [Coleman’s] harassment claim is based entirely on personnel management decisions that are not actionable as harassment as a matter of law.” The court also found Coleman had not produced evidence of any “hostile social interactions” affecting the workplace environment because of the offensive personal message they conveyed to Coleman.

Coleman does not meaningfully challenge the trial court’s ruling on appeal. She argues defendants engaged in a pattern and practice of racially motivated animus, but points to nothing in the record for support other than her own testimony that Pillow-Noriega talked about an “Antioch culture” and told her she was not the “right fit” for that culture. As discussed above, we cannot conclude Pillow-Noriega’s reference to “Antioch culture,” was racially charged. Nor can we conclude Pillow-Noriega’s criticism of Coleman’s job performance amounted to harassment, especially considering the reports Pillow-Noriega had received about Coleman’s inability to manage patient volume, her resistance to feedback, and alleged nursing errors.⁷

E. Retaliation

We next consider and reject Coleman’s contention that the trial court erred in granting summary judgment on her retaliation claim.

⁷ Coleman separately argues defendants created a hostile work environment. Coleman’s contentions on this issue are largely redundant of her arguments concerning harassment. They are also not supported by a single citation to the record. Coleman argues her evidence reflects a work environment “steeped in racial bias,” though she does not specifically identify what that evidence is. Coleman also argues defendants “singled [her] out for criticism, subjected here [*sic*] to unjustified disciplinary action, and fostered the tension and communication problems between them.” But Coleman once again fails to point to any evidence showing defendants’ actions were motivated by racial animus, as opposed to concerns about Coleman’s performance and patient safety.

To establish a prima facie case for retaliation, an employee must show “(1) he or she engaged in a ‘protected activity,’ (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s action.” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) In engaging in protected activity, an employee must oppose conduct he or she “reasonably believes constitutes unlawful discrimination, and complaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct.” (*Id.* at p. 1047.) Like claims for discrimination, retaliation claims are subject to the *McDonnell Douglas* burden-shifting analysis. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1108–1109.) In the context of an employer’s motion for summary judgment, the employer must produce substantial evidence negating an essential element of the plaintiff’s case or showing a legitimate, nondiscriminatory reason for its conduct. (See Chin et al., Cal. Practice Guide: Employment Litigation, *supra*, ¶¶ 19:728 to 19:729, p. 19-117.) The burden then shifts to the plaintiff to rebut the defendant’s showing by producing substantial evidence raising a rational inference that retaliation occurred. (See *ibid.*)

In opposing summary judgment, Coleman asserted she engaged in protected activity by (1) complaining to a corporate hotline about an alleged hostile work environment, and (2) filing a union grievance. The court found the undisputed facts established none of the individuals who made the decision to terminate Coleman’s employment knew she made the call to the corporate hotline. The court also concluded the union grievance did not constitute opposing a practice forbidden by the FEHA or any other action that would give rise to a claim for retaliation.

In her appellate briefing, Coleman asserts she engaged in protected activity by lodging a number of complaints with the corporate hotline. But she points to evidence of only *one* hotline complaint. More importantly, Coleman does not cite to anything in the record suggesting defendants were aware of this complaint or any other complaint she may have made to the hotline. Even if defendants were aware of the complaint, there is

no indication they retaliated against Coleman for making it. In her summary judgment declaration, Coleman asserts the complaint was made on January 13, 2008, and she was placed on her second reorientation almost immediately thereafter. But the hotline's records indicate the only call Coleman placed with the hotline occurred almost a year later, on December 31, 2008. Moreover, the trial court sustained defendants' objections to Coleman's statement concerning the timing of the call, finding it contradicted Coleman's deposition testimony that she could not recall when she made the complaint. Coleman does not challenge that ruling on appeal.

Coleman also relies on her union grievance, but does not acknowledge or otherwise challenge the trial court's finding that the grievance does not constitute protected activity. Even if the grievance does constitute a protected activity, there is not a causal nexus between the grievance and subsequent adverse employment actions. Soon after the grievance was resolved in February 2009, Coleman was suspended and subsequently terminated. However, "temporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the [adverse employment action]. [Citations.] This is especially so where the employer raised questions about the employee's performance before he disclosed his symptoms, and the subsequent termination was based on those performance issues." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353, italics omitted.) Here, defendants repeatedly warned Coleman about her poor performance before she filed her grievance, and Coleman was ultimately terminated because it was reported she had committed several serious nursing errors during her performance improvement plan. As discussed above, Coleman has failed to present evidence showing the reasons given for her termination were pretextual.

For these reasons we find summary judgment on Coleman's retaliation claim was proper.

F. *Wrongful Termination in Violation of Public Policy*

Coleman asserts her termination violated the public policy against discrimination on the basis of race. As we conclude Coleman failed to raise a triable issue that any of

the adverse employment actions at issue were motivated by racial animus, Coleman cannot prevail on her wrongful termination claim. (See *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 229 [“[B]ecause Hanson’s FEHA claim fails, his claim for wrongful termination in violation of public policy fails.”].)

G. Defamation

The trial court found all of the allegedly defamatory statements Coleman identified were made to the BRN or in the course of evaluating Coleman’s workplace performance. The court held statements to the BRN were absolutely privileged under Civil Code section 47, subdivision (c), and statements made in evaluating Coleman’s performance were conditionally privileged under the common interest privilege. Coleman now argues the trial court erred because many of the allegedly defamatory statements had nothing to do with evaluating her workplace performance. She identifies only one of these statements: Knoblauch allegedly referred to Coleman as “ ‘unfit’ ” in the presence of her union representative.⁸ But this comment appears to be directly related to Coleman’s performance. Moreover, a defamation claim based on the comment is time-barred. According to Coleman, the comment was made in December 2007, and Coleman did not file this action until November 2011. The statute of limitations for a defamation claim is one year.^{9, 10} (Code Civ. Proc., § 340, subd. (c).) Accordingly, summary judgment on the defamation claim was proper.

⁸ The evidence cited by Coleman, indicates Pillow-Noriega, not Knoblauch, called Coleman “unfit.”

⁹ The trial court held the defamation claim was not time-barred because Coleman may not have discovered the allegedly defamatory statements until later. But it is undisputed Coleman was present at the meeting where the “unfit” comment was allegedly made.

¹⁰ At oral argument, Coleman argued her claim is not time-barred because defendant later repeated the purportedly defamatory statements. However, she did not specify when these statements were repeated.

H. IIED

The trial court rejected Coleman's IIED claim on several independent grounds. First, to the extent the claim is based on personnel management activity, such as Coleman's termination and the imposition of a performance improvement plan, the court found such activity could not support a claim for IIED. Second, the IIED claim could not be based on a violation of FEHA, because Coleman's FEHA claims failed as a matter of law. Moreover, to the extent the claim is based on workplace conduct that does not violate FEHA, Coleman's exclusive remedy was worker's compensation. Third, the IIED claim was time-barred to the extent it was based on defendants' conduct during Coleman's employment. On appeal, Coleman takes issue with only the first rationale, arguing defendants' discrimination, harassment, and retaliation did not arise while they were in the process of effectuating a personnel matter. Coleman provides no supporting record citations. Nor does she describe the evidence on which she is relying. Even assuming Coleman is correct, her IIED claim still fails for the other reasons discussed by the trial court. We find no error.

I. UCL

Coleman failed to discuss her UCL claim in her opening brief and therefore waived any challenge to the trial court's grant of summary judgment on that claim. (See *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 ["Courts will ordinarily treat the appellant's failure to raise an issue in his or her opening brief as a waiver of that challenge."].) In her reply brief, Coleman asserts for the first time that we should reverse the trial court's ruling because defendants' motion for summary judgment did not put forward any argument with respect to the UCL claim. " 'Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant.' " (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) In any event, Coleman's contention is meritless. In their summary judgment motion, defendants argued the UCL claim failed because "it is predicated upon purported violations of other laws that cannot be established . . . as a matter of law." We agree. Since Coleman failed

to raise a triable issue as to any of her other theories of liability, her UCL claim necessarily fails.

III. DISPOSITION

The judgment is affirmed. Costs are awarded to defendants.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.