

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

TOSHIA HUSTON,

Plaintiff and Appellant,

v.

AFFINITY MEDICAL SOLUTIONS,
INC.,

Defendant and Respondent.

A145461

(Contra Costa County
Super. Ct. No. C12-01343)

Plaintiff Toshia Huston filed a complaint for racial discrimination against her former employer, defendant Affinity Medical Solutions, Inc. (Affinity), and three Affinity employees, Robin Mims, Lola Trovao, and Scott Ptacnik, based on Affinity's failure to promote her and its eventual termination of her employment. The trial court granted Affinity's motion for summary judgment, concluding Huston had failed to present sufficient evidence to support her claims of discrimination and retaliation. We affirm.

I. BACKGROUND

The operative pleading, Huston's third amended complaint for damages (complaint), alleges she was subjected to discrimination and harassment in the course of her work at Affinity on the basis of her race and physical disability. The complaint contains causes of action for employment discrimination, wrongful termination in violation of public policy, retaliation, harassment, intentional infliction of emotional distress, and negligent supervision. The trial court sustained a demurrer without leave to

amend to the causes of action for harassment and negligent supervision, dismissed Huston's remaining claims against the individual defendants, and struck her reference to discrimination on the basis of physical disability.

In January 2015, Affinity moved for summary judgment, arguing (1) Huston could not demonstrate a prima facie case of discrimination or counter Affinity's nondiscriminatory reason for its conduct, and (2) Huston could not demonstrate a causal nexus between her complaints of discrimination and Affinity's challenged conduct.

The evidence submitted by the parties in connection with the summary judgment motion demonstrated that Huston was hired as a "Senior RN Case Manager" by Affinity in June 2010. The decision to hire her was made jointly by Dr. Richard Sankary, Affinity's chief executive officer (CEO), and Scott Ptacnik, its chief operating officer.

Huston left a stable job to go to Affinity and took the job "with the understanding/promise" that she would be promoted into a management position "after approximately 90 days of employment." The hire was made pursuant to a written job offer, countersigned by Huston, which stated Huston would report to the director of clinical operations, described her "primary responsibilities" at length, and stated her employment would be at will. The offer did not mention promotion to a management position. As a senior case manager, Huston's job was focused primarily on "concurrent review," the evaluation of ongoing medical treatment of hospital patients. She had no supervisory responsibilities.

Initially, Huston reported to a White supervisor, Marilyn Hendricks. Huston felt well-treated by Hendricks. In August 2010, Hendricks was replaced by Robin Mims, an African-American.

One of Huston's fellow employees at Affinity was Colleen Jamieson, a Caucasian contract nurse. Huston believed Jamieson created a "hostile work environment" because Jamieson was outspoken in her disagreement with various company policies and would

have “tantrums” when things “did not go the way she wanted them to go.”¹ Huston complained to Affinity’s management about Jamieson, but nothing was done about her. On the contrary, Ptacnik told Huston that he had no intention of dismissing Jamieson. Eventually, however, Jamieson left the company. Huston speculated that her departure was the result of complaints by a White fellow employee, but Huston admitted in deposition that she had no knowledge of why Jamieson left the company or the significance of the White employee’s complaint.

Ptacnik stated in a declaration that several Affinity employees complained to company management about Jamieson’s conduct, in addition to Huston. After evaluating all of these complaints, Affinity decided to fire Jamieson, but she resigned before the company could “finalize arrangement[s]” for her firing.

In July, Huston talked with Sankary about the management position she believed had been promised to her. He said Mims would make the decision when she arrived. During the conversation, Huston reminded Sankary she had been promised the position and asked for reassurance the company would “follow through.” He said he would “support the promotion.” When Huston raised the issue with Ptacnik soon after, he told her she would be promoted after Mims officially began work. According to the Ptacnik, however, at the time he did not believe the size of the clinical organization justified an additional management position.

Despite the assurances when she was hired, Huston was subsequently told there were no available supervisory positions “nor will there be a future need,” but Mims told Huston her job title would be changed to “Lead” case manager, consistent with the title of a recent hire, Toni Edgeman, who is White. Mims explained in a declaration that Edgeman was hired to focus on “pre-certification,” which involved determining whether particular services are medically necessary and authorizing such services. This was a different job from Huston’s, although, like Huston, Edgeman did not have any

¹ Although Huston referred to Jamieson as creating a “hostile work environment,” a term of art in employment law, there is no claim of racial or gender animus in Jamieson’s conduct. She was simply unpleasant.

supervisory duties. After Huston complained about discrimination on the basis of Edgeman's hiring and asked for a promotion to a supervisory position, Mims offered Huston the same job title, "Lead," as Edgeman. Affinity told Huston they wanted her and Edgeman to "function as peers as lead case managers, but focusing on different areas of the organization." Huston, however, believed the change in title "greatly changed the terms of [her] employment." She later declined the change because it offered no adjustment of salary or management responsibilities.

Huston believed she was treated badly by Affinity management. During a company meeting in late August, for example, Huston made a recommendation about the company's practices. Ptacnik rebuked Huston harshly, but other employees voiced support for Huston's point. The experience demonstrated to Huston "the title/position [she] had been given had no meaning or real value as a senior-level position at Affinity." Huston also states she was "pull[ed] . . . into" other meetings where she "felt uncomfortable" and demands were made that she "comply with the new direction that Affinity was going." Huston believed this to be "intimidating and inhumane."

Soon after Mims's hire, she began an audit of the clinical staff she supervised for the purpose of "evaluat[ing] whether each staff member was in compliance with both internal and external guidelines" imposed by Affinity's rules, state laws and regulations, and the company's clients' standards. At the time, several clients were threatening to terminate their relationship with Affinity due to poor performance. The audits were completed within a few months of Mims's hiring.

When auditing Huston's files, Mims was able to determine what entries in Affinity's computerized records were made by Huston and when they were made. Based on her review, Mims concluded more than half of Huston's cases "were not properly reviewed or closed out, did not contain proper documentation, and did not reflect proper application of clinical criteria to patients." Because Huston was a senior nurse, Mims was "very" concerned by her findings. Through another employee, Mims received complaints from two hospitals about Huston's failure to return phone calls promptly, lack of clarity regarding what documentation was needed, and complaints that Affinity

worked her too hard. At some point, Mims told Ptacnik and the CEO about the results of her audit and relayed her own conclusion that Huston should be fired. On the basis of this information, Ptacnik and Sankary jointly decided to terminate Huston, effective December 14, 2010. The person hired to replace Huston was an African-American contract nurse.

Although Huston believed the failure to promote her was grounded in racial discrimination, she admitted in deposition that she had no reason to think either Ptacnik or Sankary were prejudiced against African-Americans. Neither had made any comment to her suggesting racial animus. Huston believed she was treated differently from the Caucasian staff at Affinity, however, because her complaint about Jamieson was not addressed until a Caucasian employee complained and Jamieson was permitted to resign, whereas Huston was terminated.

The trial court granted the motion for summary judgment. As to the claim for racial discrimination, the court held that Huston “has not established a *prima facie* case of race discrimination. The undisputed evidence shows that she was not performing competently in her position as Senior RN Case Manager. As to the denial of a promotion to a management level position, the undisputed evidence shows that there were no management level positions available in the case management department where Huston worked. . . . [¶] . . . [T]here is no evidence at all that the lack of promotion to a supervisory position had anything to do with race.” As to the claim for retaliation, the court held, “Defendant has established a legitimate, nonretaliatory reason for her termination, and Plaintiff can offer no evidence of intentional retaliation.”

II. DISCUSSION

Huston contends that trial court erred in granting summary judgment.

“ “ “ A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. [Citations.] . . . ’ . . . ” [Citation.] We review the trial court’s decision de novo, liberally construing the evidence in support of the party opposing summary judgment and

resolving doubts concerning the evidence in favor of that party.’ ” (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 705.)

A. Racial Discrimination

On a motion for summary judgment brought by an employer on a claim of employment discrimination, the employer has the initial burden of “conclusively negat[ing] a necessary element of the plaintiff’s case, . . . such that the defendant is entitled to judgment as a matter of law.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*)). Because “[t]he ultimate issue when discriminatory discharge is alleged is what the employer’s true reasons were for terminating the employee,” the employer ordinarily must negate the element of wrongful motive “by producing evidence of one or more reasons for the adverse employment action that were ‘unrelated to unlawful discrimination.’ ” (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1524.) If the defendant is able to carry this burden, to avoid summary judgment “ ‘the employee must demonstrate a triable issue by producing substantial evidence that the employer’s stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action.’ ” (*Id.* at p. 1529.)

We find no basis for disagreeing with the trial court’s resolution of Huston’s claim for discrimination. Huston complains of two adverse employment decisions, the failure to promote her and her termination. As to the promotion, Affinity’s evidence demonstrated that there were no supervisory jobs available at the time Huston sought promotion. Huston provided no evidence to contradict this explanation or suggest it was pretextual, motivated by racial animus, or otherwise the product of improper discrimination. No other employees, of any race, were promoted over Huston. Although Edgeman, a Caucasian, was hired around the same time Huston asked for a promotion, Edgeman was not given supervisory responsibilities. In any event, Affinity offered Huston an equivalent job title to Edgeman to avoid any appearance of preference. There

is simply no evidence to call into question the bona fide nature of Affinity's grounds for denying a promotion to Huston.

As to her termination, Affinity provided undisputed evidence that Huston was fired because an audit found she was not properly performing her job and Affinity's clients had complained about her conduct.² Huston contends this was merely a pretext, but there is no evidence to support an inference of pretext. Huston admitted she had no evidence of racial animus, other than the fact of the termination itself. There were good grounds for terminating Huston, and she provided no evidence to suggest a racial motive.

Huston claims to have presented evidence of discrimination in the way Affinity handled the departure of Jamieson, contending (1) Jamieson did not leave until after a Caucasian employee complained about her and (2) Jamieson was allowed to resign rather than suffer termination. As to the reason for Jamieson's leaving, Huston admitted she has no knowledge about the circumstances that brought it about. Huston demonstrated only that she complained at some point and Jamieson did not leave until a later time. The mere fact Jamieson was not terminated immediately on the basis of Huston's complaint does not suggest racial discrimination. Further, Ptacnik, who made the decision to fire Jamieson, stated the decision was made after many employees complained. There is no contrary evidence. As to the mode of Jamieson's departure, Ptacnik explained Jamieson resigned before he got around to acting on his decision to terminate her. None of the foregoing provides evidence of discrimination in Affinity's treatment of Huston.

In her brief, Huston contends she was subject to different working conditions than Caucasian employees, but she provides no examples of different treatment, and the record contains no evidence at all to support the assertion of different treatment. Similarly,

² Huston contends that the evidentiary support for this claim was insufficient because Mims's accounts of the client complaints were hearsay and no actual audit results were in the record. No audit results were necessary; Mims's account of her audits was sufficient evidence, since she personally performed the audits. Further, Mims's account of the customer complaints was relevant and admissible to show her state of mind in recommending Huston's termination.

Huston contends she was terminated to “silence her threats of reporting Affinity’s poor audit reports,” but the record similarly contains no evidence to support the claim.

B. Retaliation

Under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.), “[i]t is an unlawful employment practice for an employer to ‘discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part’ ” (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 209.) At trial, such a claim is subject to a three-part analysis. Initially, the employee must establish a presumption of wrongful conduct by demonstrating a prima facie case of retaliation. To establish the prima facie case, “ ‘a plaintiff must show (1) he or she engaged in a “protected activity,” (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s action.’ ” (*Ibid.*) “If [the employee] establishes that prima facie case, [the employer] must offer a legitimate, nonretaliatory reason for the adverse employment action,” and the burden shifts back to the employee to prove intentional retaliation. (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 989.) Temporal proximity between protected conduct and an adverse employment action does not alone demonstrate that an otherwise legitimate reason for the action was a pretext for retaliation. (*Id.* at p. 990.)

Huston contends her termination was retaliation for the grievance she filed with respect to the failure to promote her, but she provided no evidence of a causal link between the two. Affinity’s evidence demonstrated the termination was a result of Mims’s audit, which was begun prior to the filing of Huston’s grievance and covered all of the employees under Mims’s supervision, not just Huston. Further, the results of the audit provided undisputed evidence of a legitimate, nonretaliatory reason for Huston’s termination. In response, Huston provided no evidence, other than the temporal proximity of the grievance and the termination, to support a claim of intentional retaliation. That is insufficient to carry her burden.

Because Huston’s claims for discrimination and retaliation fail, her claim for termination in violation of public policy also fails, since she points to no other alleged violation of public policy in her termination. For a similar reason, her claim for intentional infliction of emotional distress fails. Huston alleges no basis for intentional infliction other than racial animus, and she failed to provide evidence of such animus.

III. DISPOSITION

The judgment of the trial court is affirmed. Defendants may recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

Margulies, J.

We concur:

Humes, P. J.

Banke, J.