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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOANNE WILLIAMS,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES,

Defendant and Respondent.

B226750, B231029

(Los Angeles County
Super. Ct. No. BC411159)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County. Rolf M. Treu, Judge. Judgment and order affirmed.

Lozoya & Lozoya and Frank J. Lozoya IV for Plaintiff and Appellant.

Peterson & Bradford, George E. Peterson, Avi Burkwitz; Greines, Martin, Stein & Richland, Martin Stein and Alison M. Turner for Defendant and Respondent.

Joanne Williams (plaintiff) sued the County of Los Angeles (County or defendant) for race and gender discrimination, harassment, and retaliation, alleging she was demoted from her position as a physician specialist at the University of Southern California Medical Center (USC) department of emergency medicine because of her race and gender, and in retaliation for her previous lawsuit against defendant for race discrimination. The parties stipulated to the dismissal of her claim for gender discrimination. The trial court disposed of her remaining claims by summary judgment, concluding plaintiff had not made a sufficient prima facie showing, that defendant nevertheless demonstrated it had legitimate reasons for its managerial decisions, and that plaintiff failed to demonstrate there were triable issues whether the County's justification for its decisions was pretextual. Plaintiff filed a timely notice of appeal of the resulting defense judgment.

In a consolidated appeal, plaintiff also challenges the trial court's postjudgment order awarding defendant \$183,292.75 in attorney fees, based on the court's conclusion that plaintiff's retaliation and harassment claims were frivolous.

We find that summary judgment was proper, because plaintiff failed to make a prima facie showing of any discriminatory or retaliatory motive. Consequently, we find that attorney fees were properly awarded, because plaintiff's claims for harassment and retaliation lacked any factual basis, and therefore the trial court did not abuse its discretion in finding they were frivolous.

BACKGROUND

The following facts are undisputed. Plaintiff is a physician specialist, board certified in emergency medicine. She was hired by County to work in USC's emergency department in February 2007, but did not begin working there until July 1, 2007. Plaintiff's position involved both clinical work treating patients, and training and assisting medical students and residents. In February 2008, plaintiff was removed from the clinical areas of the emergency department, and assigned academic work, including research, writing, and working on conferences. Plaintiff is the only female African-

American attending physician in the emergency department. Her supervisor, Dr. Edward Newton, is the Chairman of Emergency Medicine at USC. He is Caucasian.

Before beginning at USC, plaintiff worked for the County at the Martin Luther King/Charles R. Drew Medical Center. In 2000, she filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), which was litigated in Federal Court, and ultimately settled in August 2007.

In support of its summary judgment motion, defendant contended plaintiff could not meet her prima facie burden, because she had no evidence that any discriminatory or retaliatory motive influenced defendant's decision to remove her from clinical practice in the emergency department. Dr. Newton stated his employment decisions were not influenced by plaintiff's race or gender, and that he had no knowledge of plaintiff's EEOC complaint or litigation. In her deposition, plaintiff testified that Dr. Newton was courteous to her and that she did not think there was a problem with her relationship with him.

Defendant also introduced evidence that performance problems caused plaintiff's reassignment from the clinical area of the emergency department and not any discriminatory or retaliatory motive. Soon after plaintiff's arrival at USC, Dr. Newton started receiving complaints about her. In October 2007, he received a complaint signed by more than 40 residents about plaintiff's clinical practices, as well as her unprofessional behavior. In one instance, plaintiff used profanity in front of another doctor and a student. Plaintiff "berated residents in front of patients, called residents incompetent, and exhibited unprofessional behavior."

On November 12, 2007, Dr. Newton met with plaintiff to discuss the complaints. In a letter memorializing the meeting, he discussed concerns about "inappropriate clinical judgment," that plaintiff was "arrogant, hostile, and unprofessional and unyielding" in her interactions with residents, and that she used "profanity" and was unwilling to "follow departmental clinical protocols." Yet, the complaints about plaintiff continued. In a January 24, 2008 letter, Dr. Newton advised plaintiff that she was being reassigned to the H. Claude Hudson Urgent Care Center effective February 15, 2008.

Plaintiff and Dr. Newton met on February 5, 2008, to discuss the reassignment. They decided she would be assigned to the jail services emergency department instead of the urgent care facility. However, because jail services were overstaffed, Dr. Newton removed plaintiff from the clinical areas of the emergency department and assigned her to perform academic work, starting February 2008. She retained her same salary, title, and benefits. Plaintiff testified that she enjoyed giving lectures and developing presentations. On August 21, 2008, Dr. Newton decided to proceed with the transfer to urgent care, but the transfer was never implemented because plaintiff was diagnosed with cancer and could not see patients because she was undergoing chemotherapy.

Plaintiff disputed the authenticity of defendant's justification for its management decisions, positing that she at all times acted within the "standard of care," and that Dr. Newton did not engage in a legitimate "peer review" process when he assessed her work. The County's "Medical Staff Peer Review" policy outlines a formal peer review process, designating procedures, objectives, and committees responsible for conducting peer review. She also pointed to evidence of pretext, such as Dr. Newton's deposition testimony where he described plaintiff as "flamboyant," meaning "she would involve a lot of drama in her management of cases." By "drama," Dr. Newton meant that plaintiff would "[g]esticulat[e], talk[] loudly." He also described plaintiff as "very strongly opinionated."

Plaintiff's June 2009 performance evaluation stated that her performance of her duties was "very good." The evaluation, however, was drafted when she was conducting scholarly rather than clinical work, and was working independently rather than with other staff members. Dr. Newton testified that between 2007 and 2009, plaintiff adhered to "County personnel policies," and did not violate any policy. Plaintiff declared that she did not receive accolades in "KUDOS" emails, which are informal emails sent to acknowledge staff accomplishments, or mentions in the department's personnel news. Plaintiff maintained that Dr. Newton knew of her prior litigation with the County because in a March 2007 meeting, he asked her whether her case had settled yet.

During the pendency of defendant's summary judgment motion, which was filed on February 19, 2010, and set for hearing on May 6, 2010, several discovery disputes arose. On March 18, 2010, plaintiff sought an order shortening time on a motion to compel the deposition of administrator Carmen Mota, as well as the production of certain documents specified in her notice of deposition, and to compel Drs. Newton and Sean Henderson (Dr. Newton's second in command) to produce documents requested in their deposition notices which were not produced at their previous depositions. The trial court set the hearing on the motion for April 14, 2010. The trial court also continued the hearing on the motion for summary judgment to May 18, 2010. At the April 14, 2010 hearing on the discovery motion, the trial court granted the motion to the extent that it sought to depose Ms. Mota, and to further depose Drs. Newton and Henderson. The motion was denied as to the request for production of documents, because the court concluded plaintiff's motion was based on an inapplicable section, Code of Civil Procedure, section 2025.410, and because plaintiff had failed to show good cause for the production.

On April 21 and 22, 2010, plaintiff served more discovery requests on defendant, noticing the depositions of three more County employees, and seeking production of various documents. The depositions were to take place on May 3 and 4, 2010.

Plaintiff's opposition to the summary judgment motion was due no later than May 4, 2010. (Code Civ. Proc., § 437c.) She timely opposed the motion, requesting a continuance of the hearing under section 437c, subdivision (h), so that she could complete the discovery she noticed in late April. The trial court continued the May 18 hearing to May 21 on its own motion.

The trial court issued a tentative ruling at the May 21 hearing on the motion for summary judgment, granting the motion and denying the request for a further continuance. At the hearing, plaintiff informed the court that defendant had voluntarily produced redacted patient records (which had been the subject of plaintiff's unsuccessful motion to compel documents identified in her deposition notices to Drs. Newton and Henderson). Plaintiff argued that Dr. Newton based his opinion that plaintiff provided

poor patient care (and therefore “demoted” her) on these records. Plaintiff reasoned the production was inadequate, because the patient files did not include complete test results, and some of the documents were illegible. Plaintiff argued that complete and legible copies of these documents should be provided and that the hearing on the summary judgment motion should be continued. The trial court agreed that complete patient records should be produced, because the records were the basis of Dr. Newton’s opinion that plaintiff provided poor patient care. The court continued the hearing on the summary judgment motion to June 7, 2010, and ordered any supplemental opposition, based on the newly produced documents, to be filed no later than May 28.

Plaintiff’s supplemental opposition was filed late on June 1, 2010, without explanation for the delay. Plaintiff again requested a continuance because “documents have not been produced per the Court’s May 21, 2010 order as well as that were requested in discovery and not produced per the deposition notices” (presumably the April discovery, for which no motion to compel appears in the appellate record). “Although Plaintiff believes that there is sufficient evidence proffered in opposition to the summary judgment, should the court think otherwise, Plaintiff would request that the court continue the hearing on this matter so that the deposition can be completed and the documents produced such that they may also be used in opposition to the defendant’s summary judgment motion.” Counsel’s declaration stated that he had not received complete patient charts for the patient files provided by defendant. As for one patient, counsel was informed by defendant that the patient chart had been lost. Consequently, plaintiff’s counsel accused defendant of “spoliation of records” and failure to comply with the court’s May 21 order to produce complete patient records.

Plaintiff also filed a document captioned “Plaintiff’s Amended Objection to Evidence Allegedly In Support of Defendant County’s Motion for Summary Judgment.” In it, she objected to various paragraphs of an unidentified document. The objections did not specify the name of the document being objected to, or its exhibit number or title.

At the June 7, 2010 hearing on the motion for summary judgment, the trial court did not rule on plaintiff’s evidentiary objections, reasoning they did not comply with the

California Rules of Court, because it was unclear what plaintiff was objecting to among the numerous exhibits included in defendant's motion. The court acknowledged that plaintiff's opposition papers were late, but nonetheless considered plaintiff's "supplemental filings in the event review is taken of the Court's ruling." The court found that defendant had complied with its May 21 discovery order, and that plaintiff failed to justify the need for additional discovery in support of the request for a continuance.

The court granted the motion on the basis that plaintiff failed to make a sufficient prima facie showing, because she "present[ed] no evidence or argument to support her conclusion that being flamboyant or strongly opinionated is a racial stereotype." The court also concluded that no adverse employment action was taken against plaintiff because "[p]laintiff's position was never changed and she never received a reduction of pay." The court noted that it was her own diagnosis with cancer that prevented her from seeing patients. The court also found that the County had legitimate business reasons for its decision, namely, the numerous complaints against plaintiff. The court similarly found no evidence of an unlawful animus in support of plaintiff's harassment claim, and no admissible evidence that Dr. Newton knew about plaintiff's previous EEOC complaint or litigation, as plaintiff's evidence in support of this point was directly contradicted by her previous deposition testimony. Judgment for defendant was entered on June 24, 2010, and this timely appeal followed.

On January 7, 2011, the trial court entered an order awarding defendant a portion of its attorney fees incurred in defending plaintiff's claims for harassment and retaliation. (The motion was denied as to the claims for race and gender discrimination). The court concluded that the claims were unfounded. On appeal, plaintiff challenges this order, reasoning her claims were not frivolous. She does not challenge the amount of the fee award, or how it was calculated.

DISCUSSION

1. Summary Judgment

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of

law.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*)). “Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action” (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 850.) The party opposing summary judgment “may not rely upon the mere allegations or denials of its pleadings,” but rather “shall set forth the specific facts showing that a triable issue of material fact exists” (§ 437c, subd. (p)(2).) A triable issue of material fact exists where “the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar, supra*, at p. 850.)

Where summary judgment has been granted, we review the trial court’s ruling de novo. (*Aguilar, supra*, 25 Cal.4th at p. 860.) We consider all the evidence presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We affirm summary judgment where the moving party demonstrates that no triable issue of material fact exists and that it is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

a. Discrimination

The Fair Employment and Housing Act (FEHA) prohibits an employer from discriminating on the basis of race, among other grounds, in the terms and conditions of employment. (Gov. Code, § 12940, subd. (a).) To establish a prima facie case of discrimination, plaintiff must show that she is a member of a protected class, was performing competently in the position held, suffered an adverse employment action, and some other circumstance suggesting a discriminatory motive. (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*)).

An employer moving for summary judgment on a FEHA claim can shift the burden to the plaintiff by producing evidence of a legitimate, nondiscriminatory reason for the allegedly adverse employment action, or by showing that plaintiff cannot make a prima facie showing. (*Guz, supra*, 24 Cal.4th at pp. 355-356; see also Code Civ. Proc.,

§ 437c, subd. (p)(2) [defendant meets its burden on summary judgment by showing “one or more elements of [plaintiff’s] cause of action, even if not separately pleaded, cannot be established, or [by establishing] a complete defense to that cause of action”].) Once the employer sets forth a nondiscriminatory reason for the decision, the burden shifts to the plaintiff to produce “‘substantial responsive evidence’ that the employer’s showing was untrue or pretextual.” (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735; see also *Guz, supra*, at p. 357.) “[A]n employer is entitled to summary judgment if, considering the employer’s innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer’s actual motive was discriminatory.” (*Guz*, at p. 361.)

In this case, the only evidence offered to demonstrate a discriminatory motive for Dr. Newton’s decision to remove plaintiff from clinical practice in the emergency department was that: plaintiff is the only female African-American attending physician in the department; Dr. Newton described plaintiff as “flamboyant” and “opinionated” during his deposition and engaged in a peer review process that was inconsistent with the formalities of the County’s peer review policy; and that plaintiff did not receive certain informal accolades or commendations. None of this evidence supports a reasonable inference that plaintiff’s race played any role in Dr. Newton’s decisionmaking process.

Plaintiff presented no evidence that Dr. Newton’s facially race-neutral comments might be understood as any kind of racial stereotype, that his investigation of complaints from residents required him to comply with the formalities of an official peer review process (rather than some less formal oversight of her cases in his role as her supervisor), that other attending physicians were treated differently under similar circumstances, or any evidence of her entitlement to accolades or commendations. Plaintiff asks this court to conclude that she was treated differently on the basis of her race even though she provided no evidence of disparate treatment, and no nexus between her race and the treatment she received.

Plaintiff’s cited cases do not compel a different result. In *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, management comments that the plaintiff needed to go to

“charm school” and dress more femininely were evidence of gender stereotyping sufficient to demonstrate gender discrimination when the plaintiff was denied a promotion she was qualified for, because the comments could easily be understood to refer to the plaintiff’s lack of feminine characteristics, and therefore reflected a negative attitude about her gender identity. (*Id.* at p. 256.) The same is not true of Dr. Newton’s comments about plaintiff, which, absent some kind of expert opinion, cannot be understood as racial or gender stereotypes. The characteristics used to describe plaintiff are gender and race neutral. (See also *Back v. Hastings on Hudson Union Free Sch. Dist.* (2d Cir. 2004) 365 F.3d 107, 120.)

To the extent that plaintiff contends there is “no other reasonable explanation” for her changed duties, other than her race, we disagree. (Boldface, italics & underscoring omitted.) There are many nondiscriminatory reasons to reassign an employee, and we cannot conclude that the evidence of changed duties, coupled with plaintiff’s race, reasonably supports an inference of discriminatory motive. There were numerous complaints about plaintiff’s attitude and clinical judgment from residents, physicians’ assistants, and nurses. It is evident that these personality conflicts disrupted working relationships between the practitioners in the emergency department, potentially affecting patient care in an environment where quick decisions, trust, and teamwork are important. Although we acknowledge that plaintiff’s burden in making a prima facie case is minimal, there is simply no evidence of any nexus between defendant’s managerial decisions and plaintiff’s race. (*Arteaga v. Brink’s, Inc.* (2008) 163 Cal.App.4th 327, 353 (*Arteaga*).

b. Harassment

FEHA also makes it unlawful “[f]or an employer . . . because of race . . . to harass an employee.” (Gov. Code, § 12940, subd. (j)(1).) The elements of a claim for harassment are that an employer harassed the employee, on the basis of race, and the harassment was sufficiently severe or pervasive to alter the conditions of employment. (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465.) “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 of a generalized nature.’ [Citation.]” (*Ibid.*, italics omitted.) Harassment, as distinguished from discrimination, ““consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer’s business or performance of the supervisory employee’s job.”” (*Reno v. Baird* (1998) 18 Cal.4th 640, 645-646.)

Plaintiff’s harassment claim is based on the same acts that she alleged in support of her discrimination claim. Plaintiff argues there was a “concerted effort to isolate [her] from [the emergency department]” and defendant endeavored to “destroy [her] reputation.” However, “[o]stracism . . . does not amount to a hostile environment.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615.) And, in any event, her claim arises from management decisions rather than the type of conduct that is actionable as a harassment claim. Also, as discussed above, there is no evidence that defendant was motivated by any unlawful animus.

c. Retaliation

It is unlawful “[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under [FEHA].” (Gov. Code, § 12940, subd. (h).) To establish a prima facie case of retaliation, plaintiff must show she engaged in “protected activity,” defendant subjected her to an adverse employment action, and a causal link existed between the protected activity and the defendant’s action. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 874.)

Plaintiff maintains Dr. Newton knew about her prior EEOC charge and litigation against the County, and makes the unsupported inferential leap that this was a motivating factor in Dr. Newton’s decision to take her out of clinical practice. She points to no

circumstantial facts, such as proximity in time, that might support such an inference. (*Arteaga, supra*, 163 Cal.App.4th at p. 353.) Indeed, the timing of events does not support a reasonable inference of retaliation. Plaintiff's official hire date at USC was in February 2007. Dr. Newton allegedly mentioned plaintiff's protected activity in a March 2007 meeting. But the decision to reassign her was not made until January 2008.

Moreover, plaintiff's evidence that Dr. Newton knew about her protected activity in advance of any of his employment decisions was properly disregarded by the trial court. Plaintiff's declaration in opposition to defendant's motion stated that in a March 2007 meeting, Dr. Newton asked plaintiff whether her case against the County had settled. However, her earlier deposition testimony discussing this same meeting with Dr. Newton stated that he never asked her about her previous employment with the County, or any problems she had there. A trial court may disregard declarations by a party which contradict his or her own discovery responses (absent a reasonable explanation for the discrepancy). (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1524-1525.)

Plaintiff's only other evidence consists of emails between Dr. Newton and Human Resources staff concerning Dr. Newton's request for advice regarding plaintiff's reassignment. Nothing in the content of these emails implies any retaliatory motive, or imputes knowledge about plaintiff's protected activity to Dr. Newton. Dr. Newton testified that he did not have plaintiff's personnel file from her previous employment with the County until after this litigation was commenced. In short, we cannot reasonably conclude that Dr. Newton harbored any retaliatory motive concerning protected activity at an entirely different employment site that far predated plaintiff's employment at USC.

d. Procedural errors

Plaintiff argues the trial court made a number of procedural errors. She asserts the trial court erred when it failed to rule on her evidentiary objections to Dr. Newton's declaration. A trial court's ruling on evidentiary objections is reviewed for an abuse of discretion. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122.) Plaintiff objected to numerous paragraphs of an unidentified document. The objections did not specify the

name of the document objected to, or its exhibit number or title. The California Rules of Court require objections to evidence to identify the name of the document objected to, and state the exhibit, title, page and line number of the material objected to. (Cal. Rules of Court, rule 3.1354(b).) Defendant's motion for summary judgment contained several exhibits (including more than one declaration). The trial court was not obliged to comb through defendant's evidence in search of the document to which plaintiff objected. We find no abuse of discretion. (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 193 [failing to object in the manner required by the California Rules of Court resulted in a waiver of objections to evidence].)

Plaintiff also complains the trial court erred when it denied her motion to compel production of documents that were not produced at the depositions of Drs. Newton and Henderson. "A trial court's determination of a motion to compel discovery is reviewed for abuse of discretion. [Citation.] An abuse of discretion is shown when the trial court applies the wrong legal standard." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) Plaintiff does not contend that the court applied the wrong standard in ruling on her motion.

In any event, plaintiff has failed to show she was prejudiced by the order. (*Costco Wholesale Corp. v. Superior Court, supra*, 47 Cal.4th at p. 741.) Contrary to plaintiff's contention on appeal, none of the requested documents concerned the race of attending physicians, or discipline of attending physicians, and therefore would not have been helpful in making a prima facie showing of disparate treatment. The discovery concerned complaints against plaintiff, hospital policies, and patient records. The bulk of these documents were eventually produced to plaintiff, and they did not aid plaintiff in making her prima facie case.

In a related argument, plaintiff makes the specious claim that defendant "spoliated" patient records and peer review notes. We have no reason to infer the records were destroyed maliciously, or that any material evidence was lost. (*Thor v. Boska* (1974) 38 Cal.App.3d 558, 567-568.) Although the patient charts and notes were perhaps relevant to the issue of plaintiff's clinical judgment, it was plaintiff's unprofessional

attitude that was the primary basis for her reassignment. Dr. Newton proposed transferring plaintiff to urgent care, or jail services, which would permit her to continue to treat patients. This belies any claim that her treatment of patients was his foundational concern, instead of the strained relationships in the emergency department.

Plaintiff also complains that the trial court abused its discretion when it denied her request for a continuance of the June 7 hearing on the summary judgment motion under Code of Civil Procedure section 437c, subdivision (h). However, plaintiff's supplemental declaration requesting the continuance was filed late, in violation of the court's filing order. The court was free to disregard the late-filed declaration. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 255.) The declaration also failed to explain why the discovery was not conducted sooner. (*Ibid.*) The trial court acted well within its discretion in denying the request for a *second* continuance, when the hearing on the motion had already been delayed more than a month from its original hearing date, and it was not clear the evidence would have been of any consequence.

2. Attorney Fees

Code of Civil Procedure sections 1033.5, subdivision (a)(10)(B) and 1032 permit a prevailing party to recover its attorney fees as an allowable cost when authorized by statute. FEHA permits recovery of attorney fees. (Gov. Code, § 12965, subd. (b) ["the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs"].) However, different rules apply to the recovery of fees depending upon whether they are sought by a prevailing plaintiff or a prevailing defendant. "[A] prevailing plaintiff should ordinarily recover attorney fees unless special circumstances would render the award unjust, whereas a prevailing defendant may recover attorney fees only when the plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith." (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985, italics omitted.) An order awarding attorney fees under Government Code section 12965 is reviewed for abuse of discretion. (*Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 Cal.App.4th 762, 765-766.)

The trial court concluded that plaintiff's claims for harassment and retaliation were frivolous, and that plaintiff engaged in bad faith tactics by introducing a declaration that contradicted her earlier deposition testimony. As for the harassment claim, the court found there was no evidence that plaintiff was harassed. As discussed above, we agree. There was no evidence that anyone at USC harbored any discriminatory animus, and there was no conduct which could be characterized as sufficiently severe and pervasive to constitute harassment. Because plaintiff was the chief witness for any harassment claim, it should have been obvious to her, at the outset, that no colorable harassment cause of action existed.

We also agree plaintiff did not make a prima facie case of retaliation, and plaintiff improperly sought to contradict her deposition testimony with a declaration in opposition to the summary judgment motion. Manifestly, the trial court did not abuse its discretion, as it is well established that a prevailing defendant may recover attorney fees when the plaintiff did not establish a prima facie case, and the trial court correctly understood the scope of its discretion and the applicable law. (See *Gonzales v. MetPath, Inc.* (1989) 214 Cal.App.3d 422, 426; see also *Bond v. Pulsar Video Productions* (1996) 50 Cal.App.4th 918, 924.)

DISPOSITION

The judgment and order are affirmed. Respondent is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

SORTINO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.