

Filed 12/15/16 Hardy v. Watts Healthcare Corp. CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SHARON HARDY,

Plaintiff and Appellant,

v.

WATTS HEALTHCARE  
CORPORATION,

Defendant and Respondent.

B267161

(Los Angeles County  
Super. Ct. No. BC500780)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed in part, reversed in part, and remanded.

Law Offices of Alvin L. Pittman, Alvin L. Pittman, and Christie E. Webb for Plaintiff and Appellant.

ClouseSpaniac Attorneys, Richard R. Clouse, and Erin A. Halas for Defendant and Respondent.

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Sharon Hardy worked for Watts Healthcare Corporation (Watts) at a residential drug treatment facility under the direction of Wendell Carmichael. Hardy believed Carmichael discriminated against her based on her sexual orientation and gender, and retaliated against her. Hardy sued Watts under the Fair Employment and Housing Act (FEHA). (Gov. Code, § 12940.)<sup>1</sup> The trial court granted summary judgment in favor of Watts, and Hardy appealed. We conclude the trial court erred in deciding Hardy had raised no triable issue that she suffered any adverse employment action, but agree Hardy did not raise a triable issue as to a causal link between protected activity and an adverse employment action for purposes of her retaliation claim. Accordingly, we affirm in part and reverse in part, and remand for further proceedings.

#### **FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>**

Watts operates a residential drug treatment facility in Los Angeles called the House of Uhuru. Hardy began working at the House of Uhuru in July 2011 as an “on-call casual” substance abuse counselor, a non-permanent paid intern position. Her immediate supervisor was Rhonda Gray, who in turn reported to Carmichael, the Director of the House of Uhuru, who was an openly gay man.

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<sup>1</sup> All further statutory references are to the Government Code unless otherwise indicated.

<sup>2</sup> The following facts are taken from the evidence supporting and opposing Watts’s motion for summary judgment, with the exception of evidence properly excluded. We view the evidence in the light most favorable to Hardy as the non-moving party.

When Hardy was hired, Carmichael did not provide her with an office or a computer, although those were essential work resources and he provided offices and computers to male employees hired at the same time as Hardy or in the following months. For about a year, Hardy had to conduct her work in common areas and use other employees' computers when possible.

Hardy's non-permanent employment status prevented her from receiving benefits including paid holidays, vacation time, and insurance benefits. Although she was required by Watts policy to be converted to permanent full-time status after 90 days, she remained on non-permanent status throughout the period at issue.

While employed by Watts, Hardy pursued certification as a substance abuse counselor. Certification required her to complete academic courses in certain subjects, which she took at community college. Before the spring 2012 semester started, she requested a work schedule that would allow her to take classes to complete her certification requirements. Gray approved the schedule, but after Hardy had registered and paid for her classes, Carmichael changed her schedule and told her to drop classes or quit her job. Forced to choose between work and school, Hardy withdrew from one class and struggled to complete another, but failed it because of conflicts with her work schedule.

Several times between July 2011 and August 2012, Hardy complained to management employees including Gray, Carmichael, and Tina Walker (Watts's vice president of human resources) about her employment status, her working conditions, and Carmichael treating her differently from male employees. Hardy and other employees observed that Carmichael treated

male and gay employees and clients better than other employees and clients, but felt helpless to stop Carmichael's discriminatory conduct and authoritative management style.

In April 2012, after Hardy complained about Carmichael, he began requiring her to report in with him before she did hourly rounds to check on her clients in the facility. No other counselors were required to do so. Also, Carmichael often treated Hardy rudely and referred to her as "Boo," "Boo Boo," "Ms. Thang," or "Fish."

In May 2012, a House of Uhuru client submitted a written complaint alleging he had seen Hardy kissing and giving money to another client.<sup>3</sup> Such conduct would have violated Watts policy and the code of conduct of the certifying board for substance abuse counselors. Carmichael told Hardy he knew the complaint was false, but laughed and said he would investigate it anyway. Carmichael also demanded that Hardy give him her cell phone records, stating that Watts wanted them for the investigation, but when Hardy contacted Walker, Walker informed her Watts had not requested her phone records. After investigating the client complaint, Carmichael informed Hardy in writing that Watts found the complaint inconclusive and would take no further action on it.

A few days after the client complained about Hardy, Hardy complained to Walker about Carmichael's management style and how he treated her. Watts then initiated an investigation of Carmichael's conduct and his treatment of Hardy. Hardy's attorney also sent a letter to Walker in August 2012, complaining

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<sup>3</sup> Hardy asserted she was not working on the day the client claimed to have seen her with the other client.

about Carmichael. Watts terminated Carmichael in September 2012.

Hardy remained employed with the House of Uhuru and later obtained a permanent position with benefits and a mutually agreed schedule.

On February 8, 2013, Hardy filed this FEHA lawsuit, alleging causes of action for sexual orientation discrimination, gender discrimination, and retaliation. She alleged Carmichael treated “gay males, males, and gay females” more favorably than heterosexual females, including her, and he retaliated against her for opposing his discrimination.

Watts moved for summary judgment, arguing Hardy suffered no adverse employment action and had no evidence of any discriminatory or retaliatory motive. In presenting the facts at issue, Watts focused mainly on the investigation of the client complaint against Hardy and secondarily on the change in her work schedule in spring 2012, and discussed no other alleged adverse employment action.

Hardy opposed the motion, arguing her evidence raised material fact issues that she suffered adverse employment actions, Carmichael discriminated against her based on her sexual orientation and gender, and Carmichael retaliated against her. She submitted declarations from herself, Gray, and two House of Uhuru counselors, Marianna Gallagos and Starr Sanders. These declarations presented evidence about Hardy’s being denied an office and a computer, her being kept on non-permanent status, and Carmichael’s using demeaning names for her and requiring her to report to him before rounds, as well as the schedule change and the investigation of the client complaint.

Hardy's evidence also presented instances in which Carmichael treated men and homosexual individuals better than heterosexual women. Among the preferential treatment Hardy described, Carmichael allowed at least six gay male clients to be readmitted to the substance abuse program immediately following a relapse, violating a Watts policy requiring a 30-day waiting period after a relapse, but did not allow women or heterosexual individuals to do the same. Carmichael also made an openly lesbian employee Queen of the Gay Pride Parade one year, and celebrated her birthday with a cake, something he did not do for any other employee. Gray and Gallagos additionally learned that Carmichael paid a male counselor hired near the same time as Gallagos more than he paid her, although the male counselor had inferior qualifications and experience to hers. Gallagos also remained on non-permanent status for over a year.

In reply, Watts objected to most of Hardy's evidence and asserted that Hardy failed to present admissible evidence raising triable issues. Watts also argued Hardy could not oppose summary judgment based on having been kept on non-permanent status, because she did not allege that as an adverse employment action in the operative complaint.

The trial court sustained a small portion of Watts's evidentiary objections and overruled the rest. The court granted Watts's motion, concluding Hardy raised no triable issue that she had suffered an adverse employment action or that there was a causal link between protected activity and any adverse employment action. After judgment was entered in Watts's favor, Hardy timely appealed.

## DISCUSSION

### I. Evidentiary Rulings

On appeal, Hardy asserts the trial court erred in sustaining five evidentiary objections to portions of her declaration.<sup>4</sup>

The parties dispute the appropriate standard of review for the trial court's rulings on evidentiary objections in the context of a summary judgment motion, with Hardy urging a de novo standard and Watts asserting that abuse of discretion is the appropriate standard. The Supreme Court has not yet decided the issue, but our conclusion would be the same under either standard of review, so we need not resolve the question. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535.)

A declaration submitted in connection with a motion for summary judgment must demonstrate the declarant's personal knowledge and competence to testify to the matters stated. (See Code Civ. Proc., § 437c, subd. (d); *Hayman v. Block* (1986) 176 Cal.App.3d 629, 638.) "Matters which would be excluded under the rules of evidence if proffered by a witness in a trial as hearsay, conclusions or impermissible opinions, must be disregarded in supporting affidavits." (*Hayman v. Block*, at p. 639.) Moreover, assertions of ultimate fact are improper matter in a summary judgment declaration. (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432.) Also, lay opinion is admissible only where details are too complex to be described concretely, so that the opinion is helpful to the fact finder. (*Chatman v. Alameda County Flood Control etc. Dist.* (1986) 183 Cal.App.3d 424, 429.)

First, Watts objected on the ground of lack of foundation to the following sentence in paragraph 2 of Hardy's declaration:

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<sup>4</sup> No other evidentiary rulings are challenged on appeal.

“According to [Watts’s] policy, after 90 day probationary period, my employment status was required to be converted to that of a regular full-time Counselor I.” The trial court properly sustained the objection, as the declaration did not establish a foundation in personal knowledge for this statement.<sup>5</sup>

Second, Watts objected to two sentences in paragraph 5 of the declaration. The first sentence stated, “However, ongoing from around mid July of 2011, [Watts’s] Director Wendel Carmichael began discriminating against me in favor of male employees with respect to work equipment, shift hour preference, work stations, vacant positions and other terms and conditions of employment.” Watts objected on the grounds of lay opinion and legal conclusion. This statement that Carmichael was “discriminating” against Hardy indeed constituted improper lay opinion and legal conclusions, and the trial court properly sustained the objections.

Third, Watts objected to the second sentence in paragraph 5, which stated, “Throughout Carmichael’s tenure at [Watts] until his termination on September 19, 2012, Director Carmichael openly and favorably treated gay males, males and gay females more favorably with respect to in [*sic*] the terms, conditions and benefits of employment than he treated other heterosexual females, including myself.” Watts objected the sentence was lay opinion, lacked foundation and personal knowledge, and was improper conclusion. The information that

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<sup>5</sup> However, Hardy submitted other, admissible evidence that Watts was required to convert Hardy to permanent full-time status after 90 days, in the form of the declaration of Rhonda Gray, a supervisor with personal knowledge of Watts’s personnel policies.

Carmichael was terminated on September 19, 2012, is admissible, as it was within the personal knowledge of Hardy as a House of Uhuru employee; the trial court erred in sustaining the objection as to that portion of the sentence. The objection was properly sustained as to the balance of the sentence, which presented improper lay opinion, ultimate facts, and legal conclusions.

Fourth, Watts objected to paragraph 8 of the declaration, which stated, “In fact, in retaliation for my continued opposition to discrimination, upon information and belief, Carmichael intentionally assigned another more senior employee the less desired evening shift which I had repeatedly requested, and assigned the more desired day shift (suitable for the more senior employee), which conflicted with my school schedule and prevented me from completing my academic studies.” Watts asserted the paragraph was lay opinion, lacked foundation and personal knowledge, and was improper conclusion. The trial court correctly sustained the objections as to the first portion of the paragraph, which stated that Carmichael intentionally assigned her the day shift in retaliation for her opposition to discrimination, because that portion presented improper lay opinion, ultimate facts, and legal conclusion. But the remainder of the sentence presented facts about Carmichael’s assigning a senior employee the evening shift and Hardy the day shift, which conflicted with her school schedule—factual information that was within her personal knowledge. The trial court should have overruled the objection as to that portion of the paragraph.

Lastly, Watts objected to a sentence in paragraph 20, stating, “I witnessed these violations on several occasions,” on the grounds that it was irrelevant, lacked foundation and personal

knowledge, was improper conclusion, and was vague and ambiguous as to “violations.” The trial court erred in excluding that sentence, which established Hardy’s personal knowledge of the preceding statement that Carmichael readmitted gay male clients to the program after they violated Watts policy for substance abuse relapse.

In sum, the trial court properly sustained most of the objections at issue, but erred in sustaining objections to portions of paragraphs 5, 8, and paragraph 20. We will therefore consider, as part of our de novo review, the portions of the declaration to which the objections should have been overruled. (See section II.A, *infra*.)

## **II. Summary Judgment Ruling**

### **A. Standard of Review and Applicable Legal Principles**

A “motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c); accord, *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) 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 v. Atlantic Richfield Co.*, at p. 845.)

On appeal, we apply an independent standard of review to determine whether a trial is required—whether the evidence favoring and opposing the summary judgment motion would support a reasonable trier of fact’s determination in the opposing party’s favor on the cause of action or defense. (*Aguilar v.*

*Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) In doing so we view the evidence in the light most favorable to the opposing party. (*Id.* at p. 843.) We accept as true the facts shown by the evidence offered in opposition to summary judgment, and the reasonable inferences to be drawn therefrom. To defeat summary judgment, the plaintiff must show specific facts and cannot rely on the complaint’s allegations. (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1385-1386.)

The FEHA prohibits an employer from discriminating against an employee in the “terms, conditions, or privileges of employment” on the basis of the employee’s gender or sexual orientation. (§ 12940, subd. (a).) The FEHA also prohibits retaliation against an employee for engaging in activity protected by the statute. (*Id.*, subd. (h).)

One method by which claims of employment discrimination may be evaluated is the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804, which permits discrimination to be inferred from “facts that create a reasonable likelihood of bias and are not satisfactorily explained.” (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) In this analysis, a plaintiff bears the initial burden to establish a prima facie case of discrimination or retaliation, with the specific elements of the prima facie case depending on the particular facts. (*Id.* at pp. 354-355.) Generally, for a discrimination claim, a “plaintiff must provide evidence that (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.” (*Id.* at p.

355.) For a retaliation claim, “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.” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).

“If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises.” (*Guz, supra*, 24 Cal.4th at p. 355.) The burden of production then shifts to the defendant, who must produce evidence that it had a legitimate, nondiscriminatory reason for taking the adverse action against the plaintiff. (*Id.* at pp. 355-356.) If the defendant is successful, the presumption of discrimination disappears, and the burden shifts back to the plaintiff to show that the proffered reason for the action was pretextual “or to offer any other evidence of discriminatory motive.” (*Ibid.*)

Because in summary judgment proceedings the initial burden is on the moving party—typically the defendant employer in employment discrimination cases—the Courts of Appeal have stated that for purposes of summary judgment, if “the employer presents admissible evidence either that one or more of [the] plaintiff’s prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment *unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant’s showing.*” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 309.)

## **B. Discrimination Claims**

Watts argued Hardy could not establish that she suffered an alleged adverse employment action or that Watts had a

discriminatory motive, and argued it had a legitimate, nondiscriminatory reason for any adverse employment action.<sup>6</sup>

### 1. Adverse Employment Action

Watts contends none of the actions of which Hardy complains constituted an adverse employment action. An employer's action constitutes an actionable adverse employment action if it materially affects the terms, conditions, or privileges of employment. (*Yanowitz, supra*, 36 Cal.4th at p. 1052; *McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 386 (*McRae*)). An adverse employment action may include any employment action that is "reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Yanowitz*, at pp. 1053-1054.) Offensive remarks, social slights, and minor changes in working conditions that displease an employee do not rise to the level of an adverse employment action. (*Id.* at p. 1054; *McRae*, at p. 386.) Rather, the plaintiff must show the action "had a detrimental and substantial effect on the plaintiff's employment." (*McRae*, at p. 386.)

In making this determination, "the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally," taking into account the totality of the circumstances. (*Yanowitz, supra*, 36 Cal.4th at pp. 1052 & fn. 11, 1054.) Moreover, separate acts may together constitute an adverse employment action even if each does not do so individually, so long as the acts, considered collectively, are reasonably likely to

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<sup>6</sup> We consider Hardy's two discrimination causes of action together because the prima facie case involves the same elements. The parties raise no dispute regarding the first two elements of the prima facie case of discrimination.

adversely affect an employee's performance or prospects for advancement or promotion. (*Id.* at pp. 1054-1055.)

Hardy argues the following actions by Carmichael were adverse employment actions, viewed either individually or cumulatively: (1) failing to provide her with an office and a computer; (2) requiring her to report to Carmichael while on rounds; (3) accusing her of impropriety with clients; (4) changing her schedule to stop her from completing certification coursework; (5) calling her demeaning names; (6) failing to promote her to permanent status with benefits; and (7) seeking access to her cell phone records. We conclude there is a triable issue about whether the schedule change was an adverse employment action, but no triable issues exist as to any other alleged adverse employment actions.

Hardy submitted evidence that a private office was essential to a counselor's work because it allowed the counselor to meet with clients one-on-one to protect their privacy, and a computer was essential to maintaining files in the required audit-ready form. But she presented no evidence showing that her lack of those resources resulted in negative evaluations or disciplinary action, or otherwise materially impeded her performance or advancement. In fact, she concedes she was never disciplined or reprimanded for failing to keep proper records or preserve client privacy. (Cf. *McRae*, *supra*, 142 Cal.App.4th at pp. 393-394 [lack of a desk does not rise to the level of adverse employment action].) Thus, although failing to provide Hardy with an office and a computer is information relevant to her discrimination claims, it was not an adverse employment action.

Similarly, Hardy presented no evidence of any material effect on her employment as a result of a client's complaint about

potential impropriety by her. Rather, the evidence showed that Watts’s investigation into the complaint was closed with “no further action.” (Cf. *McRae*, *supra*, 142 Cal.App.4th at p. 392 [investigation into employee’s potential misconduct on its own made no material change in terms or conditions of employment].)<sup>7</sup>

Nor is there evidence of a material effect on Hardy’s employment as a result of Carmichael’s requiring Hardy to report to him before doing rounds, calling her demeaning names, or demanding her cell phone records. “Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable.” (*Yanowitz*, *supra*, 36 Cal.4th at p. 1054.) Hardy provided no evidence that any of those actions did more than upset her. Thus, although these actions form part of the background facts to Hardy’s claims of discrimination, they were not adverse employment actions.

Further, the foregoing actions cannot be viewed as collectively constituting an adverse employment action. Those actions are unlike the actions found to have a cumulative effect in *Yanowitz*, where each of the actions at issue—such as negative performance evaluations, criticism levied against Yanowitz without allowing her to respond, and actions that impaired her effectiveness—appeared related to building a case against her

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<sup>7</sup> As discussed below, however, Carmichael’s laughing at Hardy when he informed her that he would investigate the client’s complaint may be evidence of a discriminatory motive on his part. (See section II.B.2, *infra*.)

that “placed her career in jeopardy.” (*Yanowitz, supra*, 36 Cal.4th at 1060.) Hardy presented no evidence or argument for why any of the actions discussed above cumulatively affected the terms and conditions of her employment.

Hardy presented evidence that Watts was required to convert her to permanent status after 90 days, but nevertheless she remained on non-permanent status. She asserts this was an adverse employment action. However, she made no allegations in the first amended complaint related to her employment status. Hardy argues the complaint’s claim that she was discriminated against in the terms, conditions, or privileges of employment encompassed her allegation that Carmichael refused to change her employment status, which thus did not need to be separately alleged. We disagree.

“The complaint limits the issues to be addressed at the motion for summary judgment. The rationale is clear: It is the allegations in the complaint to which the summary judgment motion must respond.” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 (*Laabs*)). Opposition evidence must be directed to the issues raised in the pleadings, and a party may not raise unpleaded theories in opposing summary judgment. (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 420.)

In *Laabs v. City of Victorville*, the plaintiff, who had been injured in a car accident, sued for a dangerous condition of public property, alleging the intersection where the accident occurred had inadequate sight distance and lacked warning signs and signals. (*Laabs, supra*, 163 Cal.App.4th at p. 1250.) In opposing summary judgment, the plaintiff additionally asserted the intersection was dangerous because a light pole was poorly

placed. (*Ibid.*) The court found that the new allegation about the light pole related to a new dangerous condition not referenced in the operative complaint, and “attempt[ed] to predicate liability on a totally different condition, not the least bit involved with” the conditions alleged. (*Id.* at p. 1258.)

Here, Hardy made no reference to her employment status in her first amended complaint.<sup>8</sup> The complaint instead referenced other alleged adverse actions. Thus, while Watts was on notice that the alleged actions might subject it to liability, it had no notice that Hardy claimed her non-permanent status violated the FEHA. To allow Hardy to raise a new theory of liability would create a “moving target” for summary judgment and deprive Code of Civil Procedure section 437c of its procedural viability. (*Laabs, supra*, 163 Cal.App.4th at p. 1258, fn. 7.)<sup>9</sup>

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<sup>8</sup> The record reveals no request by Hardy to amend her complaint before the summary judgment hearing. (See *Laabs, supra*, 163 Cal.App.4th at p. 1258.)

<sup>9</sup> *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, cited in Hardy’s reply brief, is not to the contrary. There, when the party opposing summary judgment presented evidence of facts beyond those it had pled, the moving party failed to object to the introduction of that evidence. (*Id.* at pp. 384-385.) In that specific context, the Court of Appeal considered the opposing party’s evidentiary showing as supplementing the pleading. (*Id.* at pp. 383, 385.) Here, when Hardy introduced evidence related to her non-permanent status in her opposition, Watts appropriately challenged that evidence in its reply papers.

Thus, Hardy cannot rely on her non-permanent employment status as an adverse employment action.<sup>10</sup>

Hardy's remaining claimed adverse employment action—that Carmichael changed her work schedule to interfere with her pursuit of certification—fares better than her others. Hardy submitted evidence that she needed academic units to complete the requirements for certification as a substance abuse counselor and that certification was required for her to remain employed as a counselor. Carmichael knew about her schedule needs but interfered with her ability to take classes by imposing a conflicting work schedule after she registered and paid for classes. When she complained to him, he told her to drop classes or quit her job. She withdrew from one class and attempted to complete another but failed it because of her work schedule. This evidence raises a triable issue about whether the schedule change materially affected Hardy's job performance or career advancement opportunities.

Watts's argument to the contrary is unavailing. Watts argues the schedule change was not the cause of Hardy's failure to complete courses, asserting she "had a habit of failing, dropping, and withdrawing from courses." In support, Watts submitted Hardy's deposition testimony detailing several courses from previous semesters that she had registered for but later dropped, as well as one course she failed and two from which she withdrew. From that evidence, one might infer that Hardy's failure to complete courses was due to poor student habits. But Hardy provided alternative explanations for not completing those

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<sup>10</sup> However, Carmichael's failing to change Hardy's employment status may be evidence that he had discriminatory animus toward her. (See section II.B.2, *infra*.)

courses, which did not reflect poorly on her student habits. Thus, a fact finder could reasonably infer that Carmichael's schedule change, not her student habits, caused Hardy to fail and drop courses during the spring 2012 semester. Further, Watts presented evidence that conflicted with Hardy's evidence that she must be certified to continue her employment: After filing suit, Hardy was still working for Watts as a counselor but had not yet obtained certification. But this merely shows a factual dispute, inappropriate for resolution on summary judgment.

Accordingly, we conclude triable issues exist as to whether the schedule change impaired Hardy's opportunities to advance in her career or otherwise had a substantial detrimental effect on her employment.

## **2. Discriminatory Motive**

We also conclude triable issues exist as to whether Carmichael was motivated by discriminatory animus based on Hardy's sexual orientation or gender. Evidence of discriminatory motive, or animus, is part of the plaintiff's prima facie case of discrimination. (*Guz, supra*, 24 Cal.4th at p. 355.)<sup>11</sup> The prima facie burden on a plaintiff is not onerous, and the evidence needed to meet the burden is minimal. (*Sandell v. Taylor-Listug, Inc., supra*, 188 Cal.App.4th at pp. 310, 322.) In particular, a plaintiff need only offer circumstantial evidence sufficient to

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<sup>11</sup> Evidence of discriminatory motive can also be introduced to show that despite an employer's proffered nondiscriminatory reason, a discriminatory motive underlay the employer's action. (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 755 (*Johnson*)). On summary judgment, Watts argued Hardy could not show discriminatory motive. The trial court did not reach that issue, but we may. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 223.)

create a reasonable inference of discriminatory motive. (*Id.* at p. 310; accord, *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 714 [“it is enough for the plaintiff to present ‘some other circumstance’ that ‘suggests’ a proscribed motive”].) Facts that might not alone constitute sufficient evidence to show discriminatory motive may do so taken together. (Cf. *Johnson, supra*, 173 Cal.App.4th at p. 758.)

Hardy’s evidence meets this standard.<sup>12</sup> First, she presented evidence that Carmichael treated men and homosexual individuals better than heterosexual women. Declarations by Hardy and Gray set forth that male employees hired at the same time as Hardy or in the following months were assigned offices and computers, while she worked without those resources. Male employees also were not subject to the reporting requirement Carmichael imposed on Hardy. Additionally, Carmichael treated a lesbian employee better than her, and he gave preferential treatment to gay male clients, including by readmitting them to the program within 30 days after a substance abuse relapse contrary to Watts policy and his treatment of other clients. Carmichael also treated another female counselor worse than male employees, including paying her less than a less-qualified male counselor who was hired around the same time as her, and denying her a permanent position for over a year. (See *Johnson, supra*, 173 Cal.App.4th at p. 760 [“courts have routinely sanctioned use of this ‘me too’ type of evidence”].)

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<sup>12</sup> Some evidence Hardy offers to show discriminatory motive is inadmissible and was objected to at the trial court. We disregard such evidence and omit it from our discussion. (See *Mamou v. Trendwest Resorts, Inc., supra*, 165 Cal.App.4th at p. 711.)

Second, Hardy presented evidence that Carmichael treated her badly in ways suggesting an improper motive. Carmichael kept her on non-permanent employment status without benefits. He laughed at her when he told her he would investigate the client complaint against her. He demanded her cell phone records, and claimed Watts wanted them, although that was not true. When Hardy protested the change in her work schedule, Carmichael responded angrily, saying, “I don’t care what you do. You will never make it to be a [c]ounselor if I have anything to do with it. You should quit.” Finally, Carmichael treated Hardy rudely and called her “Boo Boo,” “Ms. Thang,” and “Fish.”

Taken together, the preferential treatment of males and homosexual individuals, along with the negative treatment of Hardy, might allow a fact finder to infer that Carmichael was motivated by discriminatory animus based on her sexual orientation or gender. (Cf. *Johnson, supra*, 173 Cal.App.4th at p. 759, fn. 12 [evidence relating to a gay and lesbian subculture in the workplace are in the mix of evidence whose importance should be determined by the trier of fact].) Further, the names Carmichael called Hardy might allow an inference of discriminatory animus. (*Reid v. Google, supra*, 50 Cal.4th at p. 541 [fact finder should determine the weight of ambiguous or discriminatory remarks]; cf. *Mamou v. Trendwest Resorts, Inc., supra*, 165 Cal.App.4th at p. 714 [finding “more than a suggestion of discriminatory motive” based on references to “rag heads,” and comments about getting rid of Syrians and Arabs]; *Serri v. Santa Clara Univ.* (2014) 226 Cal.App.4th 830, 868 [noting that evidence of supervisor comments and treatment not clearly related to the plaintiff’s ethnicity or national origin raised “only a

weak suspicion [of] discrimination” that “may have sustained [the plaintiff’s] burden of proving a prima facie case”).)

Accordingly, Watts failed to negate any elements of Hardy’s prima facie case of discrimination.

### **3. Legitimate, Nondiscriminatory Reason**

Even where an employer is unable to show an element of a plaintiff employee’s prima facie case of discrimination is lacking, the employer is still entitled to summary judgment if it produces evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason. (*Sandell v. Taylor-Listug, Inc.*, *supra*, 188 Cal.App.4th at p. 309; see *Guz*, *supra*, 24 Cal.4th at p. 357.) Watts argues that it presented such evidence. We conclude otherwise.

Watts presented no evidence of a nondiscriminatory reason for the change to Hardy’s schedule, which is the only adverse employment action on which Hardy may proceed. Watts claims the evidence shows that when Hardy was hired, she acknowledged her schedule would vary and she was not entitled to a specific schedule. But that only shows that as a general matter, Hardy’s schedule was not hers to control; it is not evidence of the reason Carmichael changed Hardy’s schedule after her supervisor had approved a different schedule in spring 2012. Accordingly, Watts was not entitled to summary judgment on the basis of a legitimate, nondiscriminatory reason.<sup>13</sup>

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<sup>13</sup> Watts produced evidence of a legitimate nondiscriminatory reason only for the investigation of Hardy’s possible misconduct with a client: Watts presented evidence that Carmichael investigated the client complaint for reasons unrelated to a discriminatory motive, based on Watts policy and the code of conduct of the certifying board for substance abuse counselors. Because we have concluded the investigation was not

### C. Retaliation Claim

A prima facie case of retaliation requires a showing that (1) the employee engaged in protected activity, (2) the employee was subjected to an adverse employment action, and (3) a causal link existed between the two. (*Yanowitz, supra*, 36 Cal.4th at p. 1042.) Watts presented evidence to negate the second and third elements. Our prior conclusion that Hardy raised a triable issue as to an adverse employment action applies equally to her claim for retaliation.<sup>14</sup> Because we have concluded Hardy raised a triable issue that she suffered an adverse employment action only with regard to the change in her work schedule, that is the only potential adverse employment action on which a retaliation claim might be premised. However, Hardy failed to raise a triable issue as to the existence of a causal link between protected activity and the schedule change.

“A plaintiff can satisfy his or her initial burden [to show a causal link] by producing evidence of nothing more than the employer’s knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision.” (*McRae, supra*, 142 Cal.App.4th at p. 388.)

In opposition to Watts’s motion, Hardy presented evidence that she complained to management employees, including Gray, Carmichael, and Walker, on multiple occasions between July

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an adverse employment action, we need not consider this evidence further.

<sup>14</sup> The same standard for an adverse employment action applies to discrimination and retaliation claims. (*Yanowitz, supra*, 36 Cal.4th at pp. 1050-1051.)

2011 and September 2012, and through a letter sent to Watts by her attorney in August 2012.

However, her evidence provides the date of only one of these complaints, the attorney's letter. Because that letter was sent after Carmichael changed her schedule, the change cannot have been in retaliation for that protected activity. None of the evidence presented by Hardy identifies a specific complaint made at a specific time before her schedule was changed. Further, the evidence does not identify the person to whom she complained on any given occasion. The evidence therefore does not show she complained to Carmichael recently enough before the schedule change to raise an inference that he made the change in retaliation for the complaint.

For this reason, summary adjudication of Hardy's retaliation cause of action was appropriate.

### **III. Conclusion**

We conclude that with one exception, Hardy raised no triable issue as to whether the adverse employment actions she alleged could support a FEHA discrimination or retaliation claim. We conclude she did raise a triable issue of fact as to whether Carmichael changing her work schedule constituted an adverse employment action. We also conclude Hardy raised a triable issue as to whether Carmichael made the schedule change because of a motive to discriminate based on her sexual orientation or her gender. Finally, Watts failed to meet its burden to present evidence of a legitimate nondiscriminatory reason for the work schedule change. Because Watts showed neither that Hardy's prima facie proof of discrimination was lacking nor that it had a legitimate nondiscriminatory reason for the schedule change, it failed to show that the schedule issue

should be summarily adjudicated in its favor. Therefore, summary judgment must be reversed as to the causes of action for sexual orientation discrimination and gender discrimination.

On remand, Hardy may proceed on the two discrimination causes of action, raising the change in her work schedule as an adverse employment action. Carmichael's other alleged actions are relevant to whether he had a discriminatory motive. We express no opinion as to whether a trier of fact would find Hardy's work schedule change was an adverse employment action, Carmichael had a discriminatory motive for the change based on Hardy's sexual orientation or gender, or Watts had a legitimate nondiscriminatory reason for the action.

Hardy raised no triable issue of a causal link between protected activity and the work schedule change for purposes of her retaliation claim. We therefore affirm summary adjudication as to her retaliation cause of action.

#### **DISPOSITION**

The judgment is reversed as to the causes of action for sexual orientation discrimination and gender discrimination, and the action is remanded to the trial court for further proceedings consistent with this opinion. In all other respects, the judgment is affirmed. Each side is to bear its own costs on appeal.

**NOT TO BE PUBLISHED.**

CHANNEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.