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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

HAN HO,

Plaintiff and Appellant,

v.

ERICSSON INC, et al.,

Defendants and Respondents.

H037772

(Santa Clara County

Super. Ct. No. CV174396)

I. INTRODUCTION

Appellant Han Ho is an employee of respondent Ericsson Inc. (Ericsson). After his medical leave of absence was granted, Ho filed an action against Ericsson and its director of software engineering, respondent David Liu. The action was based on Ho's allegations that Liu had a romantic relationship with an incompetent female co-worker, Chao Wang, to whom Liu gave preferential treatment, and Ho suffered retaliation after he opposed Liu's efforts to cover up his paramour's incompetence by blaming another employee, Naresh Singhal. Ho's complaint included four causes of action under the Fair Employment and Housing Act (FEHA) (Gov. Code, §12940 et seq.),¹ as well as causes of action for defamation and unfair business practices.

¹ All further statutory references are to the Government Code unless otherwise indicated.

Ericsson and Liu (hereafter, sometimes collectively defendants) moved for summary judgment on the ground that the undisputed facts showed that defendants' alleged conduct was not actionable under the FEHA, the alleged defamatory statements were privileged, and the unfair business practices claim failed because there was no underlying FEHA violation. The trial court granted the summary judgment motion and entered judgment in defendants' favor.

On appeal, Ho contends that the trial court erred because, as to each cause of action, either defendants failed to meet their initial burden on summary judgment or triable issues of material fact exist. For the reasons stated below, we determine that summary adjudication of all causes of action was properly granted and we will affirm the judgment.

II. FACTUAL BACKGROUND

Our factual summary is drawn from the parties' separate statements of fact and the evidence they submitted in connection with the motion for summary judgment.

Ho is a software engineer who became an employee of Ericsson in 2007. He was promoted to the position of engineering project lead and reported to Singhal, the senior element manager system (EMS) manager. Singhal reported to Liu, the director of software engineering.

In July 2008, Wang, an Ericsson employee who had been promoted to engineering project lead at the same time as Ho, was assigned a high visibility server project. Singhal told Ho that he "did not want [Wang] to take complete ownership of the project because of her well known quality issues in her work on prior projects." During a mid-2008 meeting between Ho, Wang, and Singhal, Ho found that Wang "was incredibly difficult to deal with." After the meeting, Wang complained to Ho that Singhal "was giving her a hard time about her work quality" and she was going to talk to Liu about it. Singhal later told Ho that he might have to complain to Liu's manager that Wang and Liu were

interfering with Singhal's ability to supervise Wang. According to Singhal, Liu pressured him to give Wang higher performance ratings than she deserved.

By August 2008, Ho and some other employees believed that Liu was having a romantic affair with Wang, based on their observations in the workplace. Liu frequently took Wang out to lunch or brought lunch to her desk, which he did not do for other employees; spoke gently to her; and deferred to her in meetings although she was a lower level employee. Liu would also sit or kneel close to Wang in a familiar way when he was at her desk. On one occasion, Ho and another employee saw Wang get into Liu's van in a distant area of the company parking lot, as if they were trying to avoid being seen together at lunchtime. Wang and Liu also went on two business trips together. Ho believed that Liu's favoritism included positioning Wang for success by giving her all the resources she wanted, even if it meant taking resources away from other employees. In their declarations, Wang and Liu denied that they had a sexual or romantic relationship.

Liu had a meeting with Ho in August 2008 in which he asked many questions about Singhal, including whether Ho had any problems with Singhal and whether Singhal was too hard on his team or criticized them publicly. Ho replied that he had not noticed any problems with Singhal. Liu also complained that Singhal was responsible for quality issues with their work product. Ho knew that the quality issues were due to Wang's work performance. He refused to agree with any of Liu's complaints about Singhal because he thought that Liu "was trying to scapegoat [Singhal] for [Wang's] performance issues, because that is what [Liu] always did." When Liu asked Ho if he were interested in a management role, Ho responded that he was happy in his current position. At the end of the meeting, Liu indicated that Ho should not discuss the meeting with anyone else. According to Liu, the purpose of the meeting was to address problems that a customer had discovered with a product.

Sometime later, Ho reported to Singhal that Liu had asked Ho and other employees "very negative questions" about Singhal. Ho also expressed his beliefs that

Liu's questioning was due to Wang's complaints about Singhal, that Liu was trying to set Singhal up for trouble, and that Liu was trying to protect Wang. Singhal told Ho that he was going to talk to Liu's manager, John Neese, "about it."

In September 2008, Singhal had a meeting with Neese, the vice-president of engineering, in which he told Neese that Liu's "widespread favoritism" of Wang and their "extremely close relationship" made it impossible for him to supervise Wang and that he was being blamed for her problems. Neese later told Singhal in an email that he "had left it up to [Liu] to handle." Singhal forwarded the email to Dawn Ehram in the human resources department.

In October 2008, Ho attended meetings in which Liu "turned hostile and harsh toward [him] on every aspect of the project, something he had never done . . . before." Liu also criticized Ho's abilities and made "other negative and humiliating comments" that embarrassed Ho in the presence of his peers. After Liu assumed the role of EMS manager from Singhal, who had left on a medical leave, he continued his negative treatment of Ho. In November 2008, Liu excluded Ho from interviewing new employees for the EMS group.

Ho was interviewed in late 2008 by Tamela Durant, a human resources employee who had been assigned to investigate Singhal's complaints. Since Ho had been walked into the interview room by Ehram, another human resources employee whom Ho believed was "helping [Liu] to get rid of [Singhal]," he did not trust Durant. When Durant asked Ho general questions about the work environment in his group, Ho told her that working with Singhal was fine and Liu was too new to evaluate. At the end of the investigation, Durant told Singhal that she had found no discrimination or improper conduct by Liu.

Liu gave Ho his 2008 written performance review in January 2009. Although Ho had received an overall evaluation of " 'Excellent,' " Liu's verbal comments about Ho's performance were harshly critical. Ho was disappointed with his review because he had

received nothing but positive recognition in the past. Then, for the next year and one-half, Liu made Ho's work more difficult by giving him insufficient time to complete projects and depriving him of needed resources, such as server machines. Later in 2009, Liu promoted Wang and gave her resources that he had denied to Ho. As these difficulties continued and Liu threatened to remove Ho from his lead position, Ho felt very stressed.

After Stella Yun replaced Singhal as Ho's manager, she told Ho in November 2009 that Liu had asked her to place him on a performance improvement plan. Ho believed that Liu was trying to get rid of him. In January 2010, Yun gave Ho his 2009 written performance review, which gave him an overall rating of " 'Needs Improvement.' " Yun did not agree that Ho should be put on a performance improvement plan or that his performance needed improvement. She thought that Liu had a grudge against Ho and wanted him to leave the company. However, Yun had weekly meetings with Ho to discuss his performance, which caused Ho much humiliation, embarrassment, stress, and anxiety.

In March 2010, another employee, Hieu Trinh, told Ho that he had met with Ehram and reported the problems that the employees were having with Liu and Wang and their "exceptionally close relationship." On April 7, 2010, Ho met with Ehram and "explained to her" that Liu had been abusing him, that Liu favored Wang, and that Liu and Wang had an "extremely close relationship."

When Yun resigned in April 2010, she submitted an addendum to Ho's 2009 performance review that gave him an overall rating of " 'Good.' " She also told Ehram that Liu and Wang "were creating an abusive work environment." Ho met with Ehram on April 20, 2010, to ask her what she planned to do about his performance review. During the meeting, Ho "told her about what [Liu] had tried to get [him] to do to [Singhal] in August 2008, when [Liu] tried to get [him] to agree to a bunch of negative comments about [Singhal]." Ho "also explained that [Liu] had been retaliating against

[him] since that time because [he] did not go along with what [Liu] had tried to get [him] to do.” Ehrsam responded that she did not think that Liu “ ‘would do that.’ ” Liu stated in his declaration that he did not know that Ho had complained about him until this lawsuit was filed.

Since February 2010 Ho has been receiving medical treatment for work-related depression, anxiety, stress, insomnia, and chronic headaches. On May 28, 2010, Ho went on a medical leave of absence from his job at Ericsson. He did not resign because he wanted “to collect under Ericsson’s disability insurance program.” Although Ho has not returned to work at Ericsson, his employment has not been terminated.

III. PROCEDURAL BACKGROUND

A. The Complaint

In June 2010, Ho filed a complaint naming Ericsson and Liu as defendants. Ho generally alleged that the affair between Liu and Wang had caused a hostile work environment and that Liu had retaliated against him for “refusing to participate in [Liu’s] unlawful scheme to discriminate and retaliate against Mr Singhal.” Ho’s complaint included six causes of action. He asserted four causes of action under FEHA (§12940 et seq.), including retaliation, constructive discharge in violation of public policy, hostile work environment based on gender, and failure to investigate and prevent hostile work environment and retaliation. The other two causes of action were for defamation and unfair business practices.

B. The Motion for Summary Judgment

Defendants filed a motion for summary judgment, or, in the alternative, summary adjudication, arguing that no triable issue of fact existed as to any of Ho’s causes of action.

As to the first cause of action for retaliation, defendants argued that Ho could not make the required prima facie showing under *Yanowitz. v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028 (*Yanowitz*) that he had engaged in a protected activity, that defendants had

subjected him to an adverse employment action, and that a causal link existed between the protected activity and the adverse employment actions.

Defendants explained that even if it was true that Liu and Wang were having an affair, and Ho had refused to participate in Liu's scheme to blame Singhal for Wang's errors, Ho's conduct did not constitute protected activity under the FEHA. Additionally, defendants asserted that Ho had not suffered an adverse employment action since the terms and conditions of his employment had not substantially changed. Defendants further argued that there was no causal link between Ho's alleged protected activity and Liu's alleged retaliation since the alleged retaliatory conduct began in August 2008, before Singhal complained about Liu's favoritism towards Wang to Neese in September 2008 and to the human resources department in October 2008, and well before Ho complained about Liu to Ehram in April 2010.

The second cause of action for constructive discharge in violation of public policy lacked merit, defendants argued, because Ho was on a medical leave of absence and his employment had not been terminated. Alternatively, defendants argued that Ho's working conditions were not intolerable, such that a reasonable person would be compelled to resign, and there was no public policy violation.

Relying on the decision in *Miller v. Department of Corrections* (2005) 36 Cal.4th 446 (*Miller*), defendants further contended that Ho could not establish the third cause of action for hostile work environment based on gender. Not only was the evidence that Liu and Wang were engaged in a workplace affair insufficient, according to defendants, there was no evidence that the alleged sexual favoritism was severe or pervasive enough to alter Ho's working conditions and create a hostile environment based on gender.

With regard to the fourth cause of action for failure to investigate and prevent a hostile work environment and retaliation, defendants argued that the claim failed because Ho conceded that the alleged harassment and retaliation had occurred by the time that he

complained. Alternatively, defendants argued that they could not be liable for failing to prevent harassment and retaliation that did not occur.

Defendants contended that the fifth cause of action for defamation lacked merit because Liu's statements about Ho's job performance were nonactionable statements of opinion, or, alternatively, were privileged under the common interest privilege set forth in Civil Code section 47, subdivision (c). Defendants also contended that the common interest privilege could be defeated only by a showing of malice, and Ho had not presented any evidence of malice on defendants' part.

Finally, defendants argued that summary adjudication of the sixth cause of action for unfair business practices under Business and Professions Code section 17200 must be granted because Ho's underlying claims for violation of the FEHA failed as a matter of law.

C. Opposition to the Motion for Summary Judgment

Ho generally opposed the motion for summary judgment on the ground that triable issues of material fact existed as to each cause of action.

As to the first cause of action for retaliation, Ho argued that the evidence showed that he had engaged in protected activity by refusing to participate in Liu's "attempts to discriminate in favor of Ms. Wang and retaliate against Singhal," that he had suffered an adverse employment action consisting of "a severely disabling psychological injury as a result of Defendant Liu's retaliation," and the causal link between his protected activity and Liu's retaliation was shown by Liu's immediate attitude change after Ho's August 2008 meeting with Liu in which Ho refused to "scapegoat" Singhal.

With respect to the second cause of action for constructive discharge, Ho argued that the evidence showed he was constructively discharged in violation of public policy because he had to leave his job due to "a continuous pattern of abuse, resulting in [him] suffering a severely disabling psychological injury, thereby creating a triable issue of fact as to whether or not the workplace was intolerable."

Regarding the third cause of action for hostile work environment based on gender, Ho contended that his claim had merit because Liu had showed “widespread favoritism” towards Wang, and the evidence was sufficient for a reasonable inference that Liu was having a romantic affair with her.

Ho also argued that since the evidence shows that he had suffered harassment and retaliation by Liu that Ericsson failed to properly investigate or prevent, the fourth cause of action for failure to investigate and prevent harassment and retaliation could not be summarily adjudicated.

The fifth cause of action for defamation also could not be summarily adjudicated, according to Ho, because the evidence showed that Liu knew his statements impugning Ho’s competence as an engineering lead were false and that Liu had “ ‘ill will’ ” towards Ho.

Lastly, Ho argued that since summary adjudication of the other causes of action could not be granted, the sixth cause of action for unfair business practices also could not be summarily adjudicated.

D. The Trial Court’s Order

In its order of September 28, 2011, the trial court granted the motion for summary judgment. As to each cause of action, the court determined that defendants had met their initial burden on summary judgment and that Ho had not demonstrated the existence of a triable issue of material fact.

Specifically, with regard to the first cause of action for retaliation, the trial court ruled that defendants had shown that they were not aware that Ho “had engaged in any alleged protected activity regarding retaliatory conduct by Liu or Ericsson against [Ho]. [Citations.]” Since the court had determined that it was undisputed that defendants had no knowledge that Ho had engaged in any protected activity, the court also determined that defendants had met their initial burden with respect to the second cause of action for constructive discharge in violation of public policy.

As to the third cause of action for hostile work environment based on gender, the trial court ruled that defendants had demonstrated that “there was no widespread sexual favoritism that was severe or pervasive enough to alter [Ho’s] working conditions so as to create a hostile work environment. [Citation.]”

Since the trial court determined that the fourth cause of action for failure to investigate and prevent hostile work environment and retaliation was dependent upon the prior causes of action for which summary adjudication had been granted, the court also granted summary adjudication of the fourth cause of action.

Summary adjudication of the fifth cause of action for defamation was granted because the trial court found that it was undisputed that the allegedly defamatory statements by Liu constituted the attribution of work problems to Ho and were privileged under the common interest privilege of Civil Code section 47, subdivision (c). The court also found that since the evidence did not demonstrate malice, Ho had failed to present a triable issue of material fact with respect to his defamation claim.

Finally, the trial court ruled that the sixth cause of action for unfair business practices was premised on the previous causes of action and in light of the court’s rulings summarily adjudicating those causes of action, summary adjudication of the sixth cause of action was also granted.

Judgment in defendants’ favor was entered in October 2011. Ho filed a timely notice of appeal.

IV. DISCUSSION

On appeal, Ho contends that the trial court erred in granting the motion for summary judgment because either defendants failed to meet their initial burden on summary judgment or triable issues of material fact exist. Before addressing Ho’s contentions, we will outline the applicable standard of review.

A. The Standard of Review

The standard of review for an order granting a motion for summary judgment is *de novo*. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*)). The trial court’s stated reasons for granting summary judgment are not binding on the reviewing court, “which reviews the trial court’s ruling, not its rationale. [Citation.]” (*Ramalingam v. Thompson* (2007) 151 Cal.App.4th 491, 498.)

In performing our independent review, we apply the same three-step process as the trial court. “Because summary judgment is defined by the material allegations in the pleadings, we first look to the pleadings to identify the elements of the causes of action for which relief is sought.” (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 159 (*Baptist*)).

“We then examine the moving party’s motion, including the evidence offered in support of the motion.” (*Baptist, supra*, 143 Cal.App.4th at p. 159.) A defendant moving for summary judgment has the initial burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o); *Aguilar, supra*, 25 Cal.4th at p. 850.)

If the defendant fails to make this initial showing, it is unnecessary to examine the plaintiff’s opposing evidence and the motion must be denied. However, if the moving papers make a *prima facie* showing that justifies a judgment in the defendant’s favor, the burden shifts to the plaintiff to make a *prima facie* showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at p. 849.)

In determining whether the parties have met their respective burdens, “the court must ‘consider all of the evidence’ and ‘all’ of the ‘inferences’ reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party.” (*Aguilar, supra*, 25 Cal.4th

at p. 843.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Id.* at p. 850, fn. omitted.) Thus, a party “ ‘cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]’ [Citation.]” (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144-1145.)

Keeping the standard of review in mind, we turn to the merits of Ho’s challenge to the trial court’s order granting summary adjudication of each of the six causes of action in his complaint.

B. The First Cause of Action for Retaliation

In his first cause of action for retaliation, Ho alleged that defendant Ericsson “unlawfully retaliated against [Ho] because [Ho] engaged in protected activity, i.e., he refused to participate in an unlawful scheme to retaliate against Mr. Singhal. [¶] . . . The retaliation [Ho] suffered was sufficiently severe to affect the terms and conditions of his employment, and to cause a reasonable person to be inclined not to engage in the protected activity.” Before considering Ho’s contentions on appeal regarding the merits of the trial court’s order granting summary adjudication, we will review the elements of a cause of action for retaliation under the FEHA.

1. Elements of Retaliation Cause of Action

Section 12940, subdivision (h) provides that it is an unlawful employment practice “[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.” The California Supreme Court has instructed that section 12940, subdivision (h) therefore “forbids employers from retaliating against employees who have acted to protect the rights afforded by the [FEHA].” (*Yanowitz, supra*, 36 Cal.4th at p. 1035.)

A cause of action for retaliation under section 12940, subdivision (h) has three elements: “(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. [Citations.]” (*Yanowitz, supra*, 36 Cal.4th at p. 1042.) Because we find it to be dispositive, we will focus on the first element of protected activity.

An employee engages in a protected activity under the FEHA in two circumstances. First, “when the employee opposes conduct that ultimately is determined to be unlawfully discriminatory under the FEHA.” (*Yanowitz, supra*, 36 Cal.4th at p. 1043.) Second, when the employee complains of or opposes “conduct that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA. [Citations.]” (*Ibid.*)

Additionally, the employer must know that the employee’s complaint or opposition was based on the employee’s reasonable belief that the employer’s conduct is discriminatory, even if the employee did not explicitly inform the employer that its conduct was discriminatory. (*Yanowitz, supra*, 36 Cal.4th at p. 1046.) “When an employer knows that the employee’s actions rest on such a basis, the purpose of the antiretaliation provision is applicable, whether or not the employee has told her [or his] employer explicitly and directly that she [or he] believes an order is discriminatory. [Citation.]” (*Ibid.*)

However, “[s]tanding alone, an employee’s unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee’s opposition was based upon a reasonable belief that the employer was engaging in discrimination. [Citation.]” (*Yanowitz, supra*, 36 Cal.4th at pp. 1046-1047.)

2. Analysis

On appeal, Ho argues that the trial court erred in granting summary adjudication because Ericsson has not conclusively negated any element of the cause of action for retaliation. Alternatively, Ho argues that he presented evidence to support each element of a retaliation cause of action.

According to Ho, he engaged in protected activity when he reported “Liu’s unlawful conduct” to Singhal, who in turn reported Liu’s conduct to Neese, the vice-president of engineering and to Ehram, the director of human resources. The “unlawful conduct” that Ho claims he reported was Ho’s suspicion that “Liu was retaliating against Singhal for trying to hold Ms. Wang to the same standards of performance to which Singhal held the other two male Engineering Leads ([Ho] and Quing Zheng) and [he] also believed that Liu was discriminating against Singhal by engaging in yet another instance of Liu’s pattern of widespread favoritism toward Ms. Wang.” (Fn. omitted.)² In short, Ho argues, “[b]y opposing . . . Liu’s discriminatory attempts to scapegoat Singhal, and by reporting the suspected unlawful activity to Singhal in accordance with Ericsson’s own employment policies, [Ho] engaged in protected conduct.”

Ericsson responds that “[r]efusing to participate in a scheme to blame one employee for another employee’s mistakes” does not constitute protected activity under the FEHA. Under the circumstances of this case, we agree. Even assuming that the evidence shows that Ho refused to participate in Liu’s scheme to blame Singhal for the mistakes of Wang, Liu’s alleged paramour, Ho’s conduct does not constitute protected activity under the rules governing actionable sexual favoritism.

² In his declaration, Singhal states only that Ho told him that “he was concerned that [Liu] was pressuring [Ho] . . . to make untrue, negative comments about [Singhal’s] competence because [Singhal] had been trying to get [Wang] to raise her performance to a level consistent with the other engineers.”

In addressing sexual favoritism in the context of a FEHA claim for sexual harassment based upon a hostile work environment, the California Supreme Court in *Miller* followed the guidance of the Equal Employment Opportunity Commission (EEOC). The EEOC stated in a 1990 policy statement³ “that ‘[a]n *isolated* instance of favoritism towards a “paramour” (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII [42 U.S.C. § 2000e et seq.], since both are disadvantaged for reasons other than their genders.’ ” (*Miller, supra*, 36 Cal.4th at pp. 463-464.) Thus, where there is no evidence that a subordinate could obtain favorable treatment from a supervisor by becoming “romantically involved” with him or her and “no conduct other than [the supervisor’s] favoritism toward a paramour,” there is no actionable discrimination under the FEHA. (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1629-1630.) In other words, “by itself preferential treatment of paramours is not actionable by other employees.” (*Id.* at p. 1627.)

Here, the undisputed material facts (as set forth in Ho’s declaration and his deposition testimony) are that prior to Liu beginning his alleged campaign of retaliation against Ho in October 2008, the following occurred: (1) Liu had a meeting with Ho in August 2008 in which Liu asked Ho a number of questions about Singhal’s performance as a manager; (2) Ho did not respond negatively to any of Liu’s questions about Singhal’s performance during the August 2008 meeting; (3) Ho then expressed to Singhal his beliefs that Liu’s questioning was due to Wang’s complaints about Singhal, that Liu was setting Singhal up for trouble, and Liu was trying to protect Wang; and (4) Ho believed that Liu favored Wang because he was having an affair with her.

On these undisputed facts, and following the direction of the California Supreme Court in *Miller, supra*, 36 Cal.4th at pages 463-464, we determine as a matter of law that

³ Office of Legal Counsel, Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism (Jan. 12, 1990) No. N-915-048 in 2 EEOC Compliance Manuel section 615 (EEOC Policy Statement No. N-915-048).

prior to the alleged retaliation, Ho did not oppose any conduct that constituted sex or gender discrimination under the FEHA. “ “[T]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.’ ” [Citation.]’ [Citations.]” (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 203.) Thus, as the federal courts have determined, “ ‘when an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender.’ ” (*Ackel v. National Communications, Inc.* (5th Cir. 2003) 339 F.3d 376, 382 (*Ackel*) [plaintiff did not state claim for sex harassment under Title VII because her transfer was not based on gender but on occupying a position where her supervisor wished to place his favorite]⁴; accord, *Nielsen v. Trofholz Technologies, Inc.* (E.D. Cal. 2010) 750 F. Supp.2d 1157, 1165-1166 [claim of gender discrimination failed as matter of law where supervisor’s favorite given advantages not given to other employees]; *Schobert v. Illinois Dept. of Transportation* (7th Cir. 2002) 304 F.3d 725, 733 [Title VII does not prevent employers from favoring employees because of personal relationships].) Since it is undisputed that Ho only opposed Liu’s discrimination against Singhal in favor of Liu’s alleged paramour, Ho did not engage in protected activity under the FEHA. (See *Miller, supra*, 36 Cal.4th at p. 463-464.)

Based on these authorities, we also determine that no reasonable trier of fact could find that Ho had complained of or opposed conduct by Liu that Ho reasonably believed was discriminatory under the FEHA. Again, it is undisputed that Ho opposed or complained about a supervisor’s discrimination in favor of an alleged paramour, and not sex or gender discrimination. (See *Villanueva v. City of Colton* (2008) 160 Cal.App.4th

⁴ “Our courts frequently turn to federal authorities interpreting Title VII . . . for assistance in interpreting the FEHA and its prohibition against sexual harassment. [Citations.]” (*Miller, supra*, 36 Cal.4th at p. 463.)

1188, 1198-1199 [no evidence that plaintiff ever complained about alleged racial discrimination or implied that racial discrimination was an issue].)

In contrast, the California Supreme Court concluded in *Yanowitz* that the plaintiff's refusal to follow a supervisor's order that she fire a female sales associate whom the supervisor did not find sufficiently physically attractive constituted protected activity under the FEHA. The court determined that the plaintiff's "assessment that [the supervisor's] order represented disparate treatment on the basis of the sex of the sales associate was reasonable. . . . [A] reasonable trier of fact could find that [the plaintiff] reasonably believed that [the supervisor's] order constituted sexual discrimination." (*Yanowitz, supra*, 36 Cal.4th at p. 1045.)

We therefore determine that summary adjudication of the first cause of action for retaliation was properly granted since the undisputed facts show as a matter of law that Ho cannot establish the first element of the cause of action: that he engaged in protected activity under the FEHA because he opposed conduct that was determined to be unlawfully discriminatory under the FEHA or he complained of or opposed conduct that he reasonably believed to be unlawfully discriminatory under the FEHA. (See *Yanowitz, supra*, 36 Cal.4th at p. 1043.)

C. Constructive Discharge in Violation of Public Policy

In his second cause of action for constructive discharge in violation of public policy, Ho alleged that he was "forced to resign his employment" because defendant Ericsson intentionally or knowingly permitted intolerable working conditions that would compel a reasonable person in Ho's position to resign.

On appeal, Ho tacitly acknowledges that he has not resigned his employment because he has been on a medical leave of absence. However, Ho asserts that he has "remained nominally an employee of Ericsson in order to collect his disability insurance benefits." He argues that despite his status as a current employee the trial court erred in granting summary adjudication of his constructive discharge cause of action, relying on

the decision in *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293 (*Colores*). In *Colores*, the appellate court ruled that an employee who was forced by an employer's actions to take disability retirement could maintain an action for constructive discharge. (*Id.* at pp. 1318-1319.)

Defendants argue that the trial court properly granted summary adjudication because Ho could not be constructively discharged in violation of public policy in the absence of a FEHA violation. Alternatively, defendants argued that Ho did not provide any evidence that his working conditions were intolerable.

To evaluate the parties' contentions, we first review the elements of a cause of action for constructive discharge. The California Supreme Court has stated: "In order to establish a constructive discharge, an employee must plead and prove . . . that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 (*Turner*). Thus, "the focus in a constructive discharge case is the employer's knowledge and conduct in forcing the employee to resign in light of the intolerable working conditions." (*Ibid.*)

Further proof is needed to establish a cause of action for constructive discharge in violation of public policy. "Apart from the terms of an express or implied employment contract, an employer has no right to terminate employment for a reason that contravenes fundamental public policy as expressed in a constitutional or statutory provision. [Citation.] An actual or constructive discharge in violation of fundamental public policy gives rise to a tort action in favor of the terminated employee. [Citations.]" (*Turner, supra*, 7 Cal.4th at p. 1252.)

In the present case, we need not determine whether Ho was subjected to intolerable working conditions or whether a violation of fundamental public policy is

involved. The FEHA provides that “[d]uring a . . . medical leave period, the employee shall retain employee status with the employer, and the leave shall not constitute a break in service. . . .” (§ 12945.2, subd. (g); see also *Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 735 (*Mullins*) [employee filed constructive discharge action after he resigned then retired when his medical leave was due to expire].) Since it is undisputed that Ho has been on a medical leave of absence and therefore has retained his employee status with Ericsson, as a matter of law Ho cannot establish that he was compelled to resign his employment. (See *Turner, supra*, 7 Cal.4th at p. 1251.) Ho has not provided any authority for the contrary proposition that a medical leave of absence may constitute a resignation for the purpose of establishing a cause of action for constructive discharge.

We are not also persuaded by Ho’s reliance on the decision in *Colores* for the proposition that a medical leave of absence is analogous to a disability retirement for purposes of a constructive discharge claim. The California Supreme Court has emphasized that “constructive discharge occurs only when an employer terminates employment by forcing the employee to resign. [Citations.]” (*Mullins, supra*, 15 Cal.4th at p. 737.) We view *Colores* as limited to its facts, where the plaintiff asserted that the employer’s wrongful actions forced her to take a medical leave and she received a disability retirement after she remained unable to return to work. (*Colores, supra*, 105 Cal.App.4th at p. 1302.) The present case is distinguishable because it is undisputed that Ho is on a medical leave of absence and there is no evidence that he has resigned or received a disability retirement.

We therefore determine that the trial court properly granted summary adjudication of the cause of action for constructive discharge in violation of public policy because, as matter of law on this record, Ho cannot show that he was forced to resign from his employment with Ericsson.

D. Hostile Work Environment Based on Gender

In the third cause of action for hostile work environment based on gender, Ho alleged that Liu's "favoritism of Ms. Wang was due to their romantic relationship, that the favoritism was widespread and lasted for a period of several years, that the favoritism was demeaning to women, and that the favoritism was severe and pervasive enough to alter the working conditions and create a hostile work environment at ERICSSON."

On appeal, Ho relies on *Miller, supra*, 36 Cal.4th 446 to argue that the trial court erred in granting summary adjudication of the cause of action for hostile work environment based on gender because there is evidence of the "widespread favoritism that . . . Liu showed toward Chao Wang," which created a hostile work environment at Ericsson.

Defendants contend that Ho's reliance on *Miller* is misplaced because in this case, unlike the facts in *Miller*, there was no open sexual relationship between Liu and Wang, Ho does not claim that he was denied promotions or lost other employment benefits, and there was no "flagrant boasting by the favored women."

In *Miller* the California Supreme Court noted that "[p]ast California decisions have established that the prohibition against sexual harassment includes protection from a broad range of conduct, ranging from expressly or impliedly conditioning employment benefits on submission to or tolerance of unwelcome sexual advances, to the creation of a work environment that is hostile or abusive on the basis of sex. [Citations.] Such a hostile environment may be created even if the plaintiff never is subjected to sexual advances. [Citation.]" (*Miller, supra*, 36 Cal.4th at pp. 461-462, fn. omitted.)

The *Miller* court also found guidance in the 1990 EEOC policy statement on sexual favoritism, which stated: " 'If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those

who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed that the managers view women as “sexual playthings,” thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is “sufficiently severe or pervasive ‘to alter the conditions of [their] employment and create an abusive working environment.’ ” [Citations.] [Fn. omitted.] . . .’ (EEOC Policy Statement No. N-915-048, *supra*, § C.)” (*Miller, supra*, 36 Cal.4th at p. 464.)

“In addition, according to the EEOC, ‘[m]anagers who engage in widespread sexual favoritism may also communicate a message that the way for women to get ahead in the workplace is by engaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment. [Fn. omitted.] This can form the basis of an implicit “quid pro quo” harassment claim for female employees, as well as a hostile environment claim for both women and men who find this offensive.’ (EEOC Policy Statement No. N-915-048, *supra*, § C.)” (*Miller, supra*, 36 Cal.4th at pp. 464-465.)

The *Miller* court concluded that “[f]ollowing the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment. [Citation.]” (*Miller, supra*, 36 Cal.4th at p. 466.)

The evidence in *Miller* showed that a male prison warden had engaged in sexual affairs with three subordinate female employees over a period of several years, that he promised and granted them unfair employment benefits, and that advancement for women was based upon sexual favors, not merit. (*Miller, supra* 36 Cal.4th at pp. 466-467.) The evidence also suggested that the warden “viewed female employees as ‘sexual playthings’ and that his ensuing conduct conveyed this demeaning message in a manner that had an effect on the work force as a whole.” (*Id.* at p. 467.) The court therefore

determined that a triable issue of material fact existed as to whether the warden's conduct "constituted sexual favoritism widespread enough to constitute a hostile work environment in which the 'message [was] implicitly conveyed that the managers view women as "sexual playthings" ' or that 'the way for women to get ahead in the workplace is by engaging in sexual conduct' thereby 'creating an atmosphere that is demeaning to women.' [Citation.]" (*Id.* at p. 468.)

On the other hand, as a federal appellate court has observed, "[a] sexual relationship between a supervisor and a co-employee could adversely affect the workplace without creating a hostile sexual environment. A supervisor could show favoritism that, although unfair and unprofessional, would not necessarily instill the workplace with oppressive sexual accentuation. The boss could treat everyone but his or her paramour badly and all of the subordinates, save the paramour, might be affected in the same way." (*Drinkwater v. Union Carbide Corp.* (3d Cir. 1990) 904 F.2d 853, 862.)

The undisputed facts in this case show that Ho cannot establish a cause of action for hostile work environment based on gender. As we have discussed, Ho at most has shown that Liu's alleged favoritism towards Wang constituted isolated sexual favoritism that disadvantaged other subordinate employees for reasons other than gender. (See *Ackel, supra*, 339 F.3d at p. 382.) There is no evidence that Liu's alleged favoritism involved more than one paramour or that sexual favoritism was widespread in Ho's workplace at Ericsson. (See *Miller, supra*, 36 Cal.4th at p. 464.) Although Ho's alleged showing of favoritism towards Wang and bad treatment of Ho and other subordinates may have been unfair and unprofessional, it did not, as the trial court found, constitute "widespread sexual favoritism [that] was severe or pervasive enough to alter [Ho's] working conditions and create a hostile work environment. [Citation.]" (*Id.* at p. 466.)

Summary adjudication of the cause of action for hostile work environment based on gender was therefore properly granted.

E. Failure to Investigate and Prevent Hostile Work Environment and Retaliation

In the fourth cause of action for failure to investigate and prevent hostile work environment, Ho alleged that Ericsson “failed to take all reasonable steps, as required by . . . section 12940, subdivisions (j)(1) and (k), to prevent the hostile work environment and retaliation against [Ho] based upon his refusal to engage in unlawful conduct and following his good faith reports to ERICSSON that he believed he was being subjected to a hostile work environment, and was being subjected to retaliation.”

Ho contends on appeal that the trial court erred in granting summary adjudication because Ericsson failed to make a showing that it adequately investigated or prevented harassment or retaliation after the reports made by Ho and others to Singhal, Neese, and Ehram.

Ericsson responds that since this cause of action is dependent upon the nonmeritorious causes of action for retaliation and hostile work environment based on gender, it fails as a matter of law. Alternatively, Ericsson argues that since Ho has admitted that he did not complain until April 2010 (during his meeting with Ehram), Ericsson had no knowledge that the alleged harassment and retaliation were occurring.

Under the FEHA, it is an unlawful employment practice “[f]or an employer . . . because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, to harass an employee. . . . Harassment of an employee . . . shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. . . . An entity shall take all reasonable steps to prevent harassment from occurring.” (§ 12940, subd. (j)(1).) “However, because the statute does not create a stand-alone tort, the employee has no cause of action for a failure to investigate unlawful harassment or retaliation, unless actionable misconduct occurred.

[Citation.]” (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 880; see also *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288-289 [construing former § 12940, subd. (i)]; but see *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925, fn. 4 (*Carter*) [recognizing but expressing no view on the issue].)

It is also an unlawful employment under the FEHA “[f]or an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.” (§ 12940, subd. (k).) “[C]ourts have required a finding of actual discrimination or harassment under FEHA before a plaintiff may prevail under section 12904, subdivision (k).” (*Carter, supra*, 38 Cal.4th at p. 925, fn. 4; accord, *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1021.)

In the present case, we have already determined that Ho cannot establish a cause of action under the FEHA for either retaliation, constructive discharge in violation of public policy, or hostile work environment based on gender, and therefore summary adjudication of those causes of action was properly granted. For that reason, we determine, as matter of law, that Ho cannot prevail on the dependent fourth cause of action for failure to investigate and prevent hostile work environment under section 12940, subdivisions (j)(1) and (k) and the trial court did not err in granting summary adjudication.

F. Defamation

In the fifth cause of action for defamation, Ho alleges that defendants “made one or more false statements of fact regarding [Ho], in which Defendant LIU and ERICSSON stated that [Ho] was not competent at his job and attributed to [Ho] errors that Defendant LIU knew were really caused by Chao Wang. [¶] . . . Defendant LIU and ERICSSON made these false statements of fact to persons other than [Ho].”

The parties agree, in their separate statements of fact, that it is undisputed that the statements that Ho claims are defamatory include Liu’s statements in group meetings

with Ho's coworkers, or before an individual co-worker, that Ho was responsible for problems with Ericsson products that Ho believes he did not cause. According to Ho, Liu "always blame[d] [Ho] and [would] make [Ho] look bad and say that [Ho] did not do a good job." Ho also argues on appeal that Liu wrote defamatory statements in Ho's 2008 performance review.

1. Elements of a Defamation Cause of Action

"Defamation constitutes an injury to reputation; the injury may occur by means of libel or slander. (Civ. Code, § 44.) In general, . . . a written communication that is false, that is not protected by any privilege, and that exposes a person to contempt or ridicule or certain other reputational injuries, constitutes libel. (Civ. Code, § 45; [Citation].) A false and unprivileged *oral* communication attributing to a person specific misdeeds or certain unfavorable characteristics or qualities, or uttering certain other derogatory statements regarding a person, constitutes slander. (Civ. Code, § 46; [Citation.]" (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1242.)

Thus, in order to be defamatory, an oral or written communication "must contain a false statement of *fact*." (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600.) A statement of opinion "cannot be false and is outside the meaning of libel." (*Tschirky v. Superior Court* (1981) 124 Cal.App.3d 534, 539.)⁵ Thus, "[t]he crucial question . . . is whether the statement at issue was a statement of fact or a statement of opinion. This is a question of law to be decided by the court. [Citations.]" (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260.)

In the employment context, it has been held "that unless an employer's performance evaluation falsely accuses an employee of criminal conduct, lack of

⁵ A statement phrased as an "opinion" may nonetheless imply false and defamatory facts (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 20-21), and it may be actionable depending on its context. (See *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 346.)

integrity, dishonesty, incompetence or reprehensible personal characteristics or behavior [citation], it cannot support a cause of action for libel. This is true even when the employer's perceptions about an employee's efforts, attitude, performance, potential or worth to the enterprise are objectively wrong and cannot be supported by reference to concrete, provable facts." (*Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 965 (*Jensen*)). Further, a statement of opinion is not actionable as libel even where the statement is "objectively unjustified or made in bad faith." (*Id.* at p. 971.)

In *Jensen*, the appellate court concluded that the statements in the plaintiff employee's performance evaluation did not constitute libel, since none of the statements suggested that the plaintiff "lacked honesty, integrity or the inherent competence, qualification, capability or fitness to do his job, or that he had reprehensible personal characteristics." (*Jensen, supra*, 14 Cal.App.4th at pp. 970-971.) The statements deemed to be nonactionable opinion in the plaintiff's performance evaluation included, among others, the following: Plaintiff "had a productivity 'perceived as low' due to his 'lack of personal ownership of tasks'; displayed 'questionable judgment' in pursuing personal 'vindication' concerning 'behavioral problems' . . . ; and was the subject of a 'tremendous amount of negative feedback.'" (*Id.* at p. 971, fn. 14.)

In contrast, in *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, the appellate court reached a different result regarding a statement made by the plaintiff's manager to employees of another company that the plaintiff had " 'made a \$100,000 error in the estimating' " of a bid. (*Id.* at p. 1153.) The court concluded that "[t]his statement would tend to injure [the plaintiff] by imputing to him incompetence in his trade. [Citations.] Furthermore, it is a statement of fact susceptible to proof or refutation by reference to concrete, provable data. [Citations.]" (*Id.* at p. 1154.)

2. Analysis

On appeal, Ho argues that the trial court erred in granting summary adjudication of the defamation cause of action because false statements in a performance evaluation or

regarding the employee's specific errors are actionable as defamation. Ho asserts that Liu made false statements in Ho's 2008 performance review accusing Ho of errors that cost the company money and threatened the loss of a major customer account.

Defendants disagree, arguing that Liu's statements were critical of Ho's performance and therefore constitute nonactionable statements of opinion.

To evaluate Ho's contentions, we turn to the evidence submitted in connection with the motion for summary judgment. It was undisputed that (1) Ho claimed that Liu blamed Ho "during group meetings with coworkers—for problems that arose when [Ho's] 'HA' product integrated with Wang's 'embedded Oracle' product"; (2) Ho claimed that "in the group setting at my desk [Liu] would come and blame me for problems when we did the demo to . . . AT&T, but, in fact, when we investigate that further, it has nothing to do with my work, it was some problems introduced by the Beijing team"; and (3) in Ho's 2008 performance review, Liu wrote that "[Ho] did not deliver an acceptable design and schedule for R6.2 HA feature on time. As a result, the feature is delayed to R7.0 and we missed a committed customer milestone that has [a] penalty associated with it. As a lead, [Ho] needs to understand the timeline constraints and communicate to his team so proper design trade off can be made."

Our review of the evidence regarding the allegedly defamatory statements shows that Ho has complained that Liu blamed him for problems with product integration and problems with a product demonstration. Ho also complains that Liu criticized Ho's product design as unacceptable and blamed him for causing the company to miss a customer deadline as a result. We find that these statements constitute a supervisor's statements of opinion about Ho's job performance, not false statements of fact, even if we assume that the statements were "objectively unjustified or made in bad faith." (*Jensen, supra*, 14 Cal.App.4th at p. 971.) Moreover, the statements did not suggest that Ho "lacked honesty, integrity or the inherent competence, qualifications, capability or fitness to do his job, or that he had reprehensible personal characteristics." (*Id.* at pp. 970-971.)

Accordingly, as a matter of law the statements at issue constitute nonactionable opinion and cannot serve as the basis for a defamation cause of action. Summary adjudication of the defamation cause of action was therefore properly granted. Having reached this conclusion, we need not address the parties' contentions regarding the common interest privilege codified at Civil Code, section 47, subdivision (c).

G. Unfair Business Practices

In the sixth cause of action for unfair business practices under Business & Professions Code section 17200, Ho alleges that Ericsson committed unfair business practices by violating the FEHA. Specifically, Ho claims that Ericsson's unfair business practices include a pattern and practice of retaliation, constructive discharge in violation of public policy, creation of a hostile work environment based on gender, failure to investigate and prevent harassment, discrimination, and defamation.

On appeal, Ho maintains that since summary adjudication of the other causes of action in his complaint should have been denied, summary adjudication of the unlawful business practices cause of action should also be denied. Defendants argue to the contrary that since summary adjudication of the other causes of action was properly granted, summary adjudication of the unfair business practices cause of action must also be granted. We agree.

“ ‘[A]n action based on Business and Professions Code section 17200 to redress an unlawful business practice “borrows” violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under [Business and Professions Code] section 17200 et seq. and subject to the distinct remedies provided thereunder.’ ” (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383.) A violation of FEHA is an unlawful employment practice that may support a cause of action under Business and Professions Code section 17200. (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 400-401.)

In this case, we have already determined that summary adjudication of all of the other causes of action were properly granted. Since the claims of statutory violations that underlie Ho's unfair business practices claim therefore lack merit as a matter of law, the cause of action for unfair business practices under Business & Professions Code section 17200 must also fail as a matter of law. (See, e.g., *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1505.) The trial court therefore did not err in granting summary adjudication.

V. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.