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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CHRISTINE OAKES, Plaintiff and Appellant, v. BARNES & NOBLE COLLEGE BOOKSELLERS, LLC et al., Defendants and Respondents.	H040951 (Santa Clara County Super. Ct. No. 1-11-CV-202029)

Plaintiff Christine Oakes was terminated from her position as manager of a bookstore operated by defendant Barnes & Noble College Booksellers, LLC (Barnes & Noble) on the West Valley-Mission Community College (West Valley College) campus. Plaintiff sued Barnes & Noble and other defendants, alleging wrongful termination, gender discrimination, and other causes of action. Barnes & Noble moved for summary judgment, which the trial court granted. For the reasons stated here, we will reverse the judgment because plaintiff raised a triable issue of fact regarding the wrongful termination (implied contract) cause of action.

I. TRIAL COURT PROCEEDINGS

Barnes & Noble hired plaintiff in 1987. She became a store manager in 1989, and managed the store at West Valley College from 2002 until she was terminated in 2010.

A. FIRST AMENDED COMPLAINT

Plaintiff filed the operative first amended complaint (Complaint) in April 2012 against Barnes & Noble, West Valley College, Laurie Gaskin, and Rhea Kaston. The

Complaint alleges five causes of action: defamation against West Valley College and Gaskin; intentional interference with contractual advantage against West Valley College and Gaskin; "Gender/Age Discriminati[o]n FEHA" against all defendants; wrongful termination based on breach of contract against Barnes & Noble; and wrongful termination based on violation of public policy against Barnes & Noble. (Capitalization omitted.)

Regarding gender and age discrimination, the Complaint alleged that plaintiff was a 53-year old woman and that the defendants engaged in "acts of gender and age discrimination against plaintiffs [*sic*], such acts being unlawful and in violation of California Government Code Sect. 12935, et seq." (Italics omitted.) The Complaint did not allege that plaintiff suffered any sexual harassment, nor did it allege any failure by Barnes & Noble to protect plaintiff from sexual harassment.

B. BOOKSELLER HANDBOOK, PROCEDURE MANUAL, AND RELEVANT TESTIMONY

At various times during her employment, Barnes & Noble provided plaintiff with documents outlining the company's code of conduct and ethics. Those documents contained a page that plaintiff signed to acknowledge receipt. Those pages contained versions of the following disclaimer (taken from an acknowledgment signed by plaintiff in 1999): "I understand that I am free at any time to terminate my employment and am not bound to stay for any definite period of time. I recognize that subject to the provision of law, I am an at-will employee. I also understand that the Company has made no promise to provide me with employment for any definite period of time and that no contract of employment has been created. I understand that all terms and conditions of employment are subject to change without notice."

Counsel for Barnes & Noble read that code of conduct disclaimer to plaintiff at her deposition and asked her: "Did you understand those terms to apply to your employment as a store manager at West Valley?" Plaintiff responded: "Yes." When asked at her deposition to define at-will employment, plaintiff stated: "That basically you have to

have something done to you -- do something to the company to get -- to let you go." Counsel did not seek clarification of that description.

Barnes & Noble also had an employee handbook. The 2009 Barnes & Noble Bookseller Handbook (2009 Handbook) begins with a disclaimer in all capital letters. As relevant here, the disclaimer states:

> "This handbook ... is provided only for reference and is not an employment contract. [¶] The employment relationship is 'at-will,' which means regardless of anything contained in the handbook and regardless of any custom or practice, the company makes no promises and remains free to change policies ... without having to consult anyone or obtain anyone's agreement. Just as any bookseller has the right to terminate his/her employment for any reason, the company retains the absolute power to discharge anyone at any time, with or without cause and without prior notice. [¶] The 'at-will' relationship can only be changed by a written document that 1) is signed by both the president of Barnes & Noble College Booksellers and the bookseller, 2) specifically identifies the bookseller, 3) expressly states that the employee is not employed 'at-will,' and 4) sets forth a specific duration of employment. No person other than the president, executive vice president or vice president, human resources has the authority to adopt new policies or to change or eliminate existing ones ... and no other person has the authority to make any commitment which modifies or contradicts any provision contained in this handbook." (Capitalization omitted.)

The 2009 Handbook describes a policy of progressive discipline, stating that if a manager notes a performance or behavioral issue, that manager "will utilize a coaching process" that "generally starts with one or more conversations (coaching discussions) and, if necessary, proceeds to a Written Coaching Memo and then to a Final Coaching Memo." The policy states that Barnes & Noble has discretion to "repeat any of these steps or bypass one or more step[s]."

Barnes & Noble's progressive discipline policy is described in greater detail in a Procedure Manual. The manual states: "When it is determined that an employee's performance or conduct is not acceptable, a series of progressive measures [is] generally utilized. However, in all instances, management reserves the right to use its discretion to

take action as it deems appropriate for the situation. Depending on the situation, the Company may skip any or all steps in this process." The manual states that "when an employee commits an extremely serious offense," initial steps can be skipped. Further, "if the offense is of such magnitude that the person's continued employment cannot be tolerated, termination can occur without any previous steps having been taken."

The Procedure Manual also addresses termination, stating: "There are generally two ways in which a discharge may occur: [¶] 1. After the employee has been through the indicated coaching steps and no improvement has resulted. In this event, the result is a planned termination. [¶] 2. After the employee commits an offense so serious that his or her continued employment cannot be tolerated, regardless of any previous disciplinary problems. ... This is an unplanned termination."

Plaintiff testified at her deposition that she was instructed by Barnes & Noble's human resources department to use progressive discipline before terminating employees. She stated that if she terminated someone "without the proper paperwork," she "got reprimanded for it." Plaintiff acknowledged that she was never instructed that every disciplinary step had to be used in every termination.

Plaintiff stated in the declaration she filed opposing Barnes & Noble's summary judgment motion that she "never understood that after 20 years of employment and the repeated instructions and direction I had been given on the progressive discipline procedures written in the handbook, that I could be fired, as I was, without any counseling, progressive discipline or any good cause." Plaintiff stated she "was told by my supervisors when instructed on the manual that the stated 'at will' employment policy should 'never be used.' " According to plaintiff, the "head supervisor at B&N at headquarters Ms. Rhea Kaston stated to me on more than one occasion ... that she did not like [California] because she understood that that [*sic*] 'at will' employment in California usually could not apply and that's why all management were instructed not to use it." Plaintiff further stated that at managerial meetings "we were specifically told that we

must use the progressive discipline procedure that was in writing for all employees" and that "at other meetings we were specifically told by management that we should not use an at-will policy to terminate anyone, but should always proceed with the procedures in the Handbook."

Plaintiff's direct supervisor when she was terminated, Lori Schmit, testified at a deposition that she informed the managers she supervised that they should follow the progressive discipline policy if they wanted to terminate or discipline an employee. Plaintiff's counsel asked Schmit if she was "aware of cases where one of your managers went ahead and disciplined one of their employees, terminated them but did not follow that procedure?" Schmit responded: "Nothing comes to mind."

Plaintiff's previous direct supervisor, Russell Markman, testified about the progressive discipline policy. Plaintiff's counsel asked Markman if he had been "told or trained or instructed by the company to -- in dealing with your employees, to follow, as much as you could, this performance management criteria that's established in the handbook?" Markman answered: "I guess, depending upon what the issue was. Correct." Markman elaborated that, "depending upon the issue, one of these steps could be bypassed."

C. PLAINTIFF'S EMPLOYMENT RECORD

Over the course of her 22-year employment relationship with Barnes & Noble, plaintiff's supervisors completed annual performance reviews and gave her periodic salary increases.

Russell Markman was plaintiff's supervisor from 2001 through 2008. In his declaration filed in support of Barnes & Noble's motion for summary judgment, Markman stated that plaintiff lacked communication and organizational skills. He encouraged her to develop her written and verbal communication skills in performance reviews for 2005 and 2006. Plaintiff met or exceeded the standards in every category in her 2005 performance review, which was attached as an exhibit to Markman's

declaration. In her 2006 performance review, plaintiff's overall score met the applicable standards. She met or exceeded standards in most individual categories but was below standards in two categories related to financial measures.

In plaintiff's 2007 review, her overall score still met standards and she met or exceeded standards in most individual categories. However, she was below standards in accountability, communication, and managing performance. Markman encouraged plaintiff to improve her written communication skills and also noted that "greater accountability would be improved by sticking to the timeline, and completing tasks prior to the deadlines." Her performance review in 2008 was similar to 2007, with a "Meets Standards" overall score, generally favorable reviews in many individual categories, and below standards scores in accountability and communication.

Lori Schmit took over as plaintiff's supervisor in December 2008 when Markman was promoted to another position. In her declaration filed in support of Barnes & Noble's motion, Schmit stated that she "observed deficiencies in her performance" once she began supervising plaintiff. She also described the results of store visits, noting that during a visit in May 2009 Schmit discovered plaintiff had $66,000 in excess inventory. Schmit also received complaints from West Valley College students that they were unable to contact plaintiff despite multiple attempts. A Student Government Association representative told Schmit (apparently during that same visit) that plaintiff did not attend the Association's meetings.

Schmit completed plaintiff's 2009 performance review with assistance from Markman because he had supervised plaintiff for part of that fiscal year. Plaintiff received an overall score of "Below Standard" in 2009. She exceeded standards in the categories of driving sales; excess inventory improvement; and payroll as a percentage of sales. She met standards regarding industry knowledge; "Living Our Values"; building relationships; strategic thinking; negotiation; and income after carrying costs. And she was below standards for accountability; customer focus; communication; developing

talent; leadership; execution; financial acumen; managing performance; recruitment and staffing; shrink; and gross margins. Schmit commented in the performance review that plaintiff needed to be more consistent about meeting deadlines and that she should focus on being "a strong leader who is able to give clear direction on a daily basis."

D. COMMENTS BY MICHAEL RENZI

Michael Renzi worked for West Valley College as one of its vice presidents. Renzi was West Valley College's primary liaison with the bookstore and plaintiff interacted with him almost every day. Plaintiff testified during her deposition that Renzi regularly made inappropriate comments about women when talking to plaintiff. He commented on the dress of a woman who worked at a coffee machine (though plaintiff could not remember specific comments) and also complained to plaintiff that it was difficult working for a woman. Plaintiff acknowledged that Renzi never touched her inappropriately and also never made "any advances towards" her because she "wouldn't have put up with that."

Plaintiff complained to Schmit about Renzi's comments at some point after Schmit became plaintiff's supervisor. According to plaintiff, Schmit told her she would "have to learn to deal with people like that."

E. PLAINTIFF'S TERMINATION

Renzi and West Valley College President Lori Gaskin contacted Schmit in spring 2010 regarding plaintiff. West Valley College administrators had discussed the bookstore during a retreat and decided that plaintiff was not a good fit for the campus. Gaskin requested that plaintiff be replaced.

Schmit met with her supervisor and they determined that plaintiff should be replaced at the West Valley College bookstore. Schmit attempted to find an alternative position for plaintiff within Barnes & Noble in Northern California but could not find one. Schmit terminated plaintiff on June 1, 2010. Barnes & Noble did not provide

plaintiff advance notice of its decision to terminate her, nor did it engage in progressive discipline as set forth in the 2009 Handbook and the Procedure Manual.

F. MOTION FOR SUMMARY JUDGMENT

Barnes & Noble moved for summary judgment in September 2013, arguing that plaintiff was an at-will employee who was terminated for legitimate business reasons.

Consistent with the Complaint's allegations, plaintiff argued in her opposition that she was fired due to her gender and that she had an implied contract with Barnes & Noble that she would be terminated only for good cause. She also argued that the gender discrimination cause of action encompassed allegations that Barnes & Noble condoned or failed to protect plaintiff from sexual harassment by Renzi. Plaintiff expressly withdrew age discrimination as a theory of liability before the hearing on Barnes & Noble's motion.

The trial court granted summary judgment for Barnes & Noble after a hearing, finding that: Plaintiff failed to allege any specific facts related to her claim for gender discrimination and failed to present evidence to support a triable issue of fact to rebut Barnes & Noble's evidence suggesting a legitimate reason for her termination; plaintiff's "claims that Renzi's actions were ratified or condoned by Schmit ... are not framed by the pleadings in this action"; plaintiff failed to present admissible evidence of an implied contract to support a triable issue of fact to rebut Barnes & Noble's evidence that plaintiff was an at-will employee; and plaintiff's public policy argument failed because it was based solely on her unsupported gender discrimination cause of action.[1]

[1] At plaintiff's request, the entire action was dismissed with prejudice as to Rhea Kaston. West Valley College and Gaskin moved for, and were granted, summary judgment. Plaintiff confines her appeal to arguments related to potential liability of Barnes & Noble.

II. DISCUSSION

A. OBJECTIONS TO EVIDENCE IN PLAINTIFF'S DECLARATION

Plaintiff argues that the trial court erred by not admitting statements in her declaration suggesting that "she was repeatedly instructed by Barnes & Noble that the written at-will policy should never be used." The Supreme Court has not conclusively established a standard of review for evidentiary rulings made in connection with summary judgment motions. But it has suggested that a de novo standard applies: " 'Because summary judgment is decided entirely on the papers, and presents only a question of law, it affords very few occasions, if any, for truly discretionary rulings on questions of evidence. Nor is the trial court often, if ever, in a better position than a reviewing court to weigh the discretionary factors.' " (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535.) We will therefore review the trial court's decision about plaintiff's declaration testimony de novo. (Accord *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451.)

1. Declaration Statements

Plaintiff does not specifically identify the statements from her declaration that she claims the trial court erred in excluding, but she cites paragraphs three, five, and six. Based on our review of those paragraphs, we assume she is referring to the following statements. In paragraph three: "I was told by my supervisors when instructed on the manual that the stated 'at will' employment policy should 'never be used' "; and "The head supervisor at B&N at headquarters Ms. Rhea Kaston stated to me on more than one occasion ... that she did not like [California] because she understood that that [*sic*] 'at will' employment in California usually could not apply and that's why all management were instructed not to use it."[2] In paragraph 5: "I had been told the 'at will' was never to be applied" and "was sternly advised ... always to apply" the progressive discipline

[2] Rhea Kaston was apparently the Director of Employee Relations for Barnes & Noble.

policy. In paragraph 6: "At managerial meetings ... we were specifically told that we must use the progressive discipline procedure that was in writing for all employees"; "at other meetings we were specifically told by management that we should not use an at-will policy to terminate anyone, but should always proceed with the procedures in the Handbook."

Barnes & Noble objected to paragraphs three, five, and six of plaintiff's declaration, arguing, among other things, that they improperly contradicted plaintiff's deposition testimony (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21 (*D'Amico*)) and contained inadmissible hearsay (Evid. Code, § 1200). In its order granting summary judgment, the trial court sustained Barnes & Noble's objection to those paragraphs without stating the basis for its decision.

2. The Statements Were Not Hearsay

An out-of-court statement offered to prove the truth of the matter asserted is hearsay and is inadmissible unless an exception applies. (Evid. Code, § 1200, subds. (a) & (b).) Rather than identifying an applicable hearsay exception, plaintiff instead argues that the statements she sought to admit were not hearsay at all because they were not offered to prove the truth of any matters asserted.

When a dispute centers on whether a statement was made rather than whether the words in the statement are true, the statement may be admissible as nonhearsay legally operative fact. (*People v. Smith* (2009) 179 Cal.App.4th 986, 1003.) The words of an oral or written contract are generally admissible as legally operative fact because the declarant's veracity is irrelevant to whether a sufficient meeting of the minds created a contract. (See *Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 748–749 (*Faigin*).)

Faigin is instructive. Faigin served as general counsel for a corporation and its subsidiaries for over 17 years. (*Faigin*, *supra*, 211 Cal.App.4th at pp. 731–732.) When a new management group terminated Faigin, he sued for wrongful termination alleging that

his employment agreement contained an implied-in-fact agreement that he could be terminated only for good cause. (*Faigin*, at p. 734.) Over the defendant's hearsay objection, Faigin testified at the jury trial that an outgoing board chairman of a subsidiary corporation had told Faigin that if the subsidiary "hired a new management team, Faigin would continue to have a critical role in the company and that in light of his long history with [the subsidiary], Faigin could expect to be employed there for the rest of his career." (*Id.* at p. 748.) Reviewing that evidentiary decision, the Court of Appeal noted that because "[o]ral assurances of job security relate to the existence of an implied-in-fact agreement to terminate only for good cause," the defendant's "assurances of job security are, in and of themselves, evidence of the existence of such an implied promise." (*Id.* at p. 749.) The court concluded the chairman's statements were not hearsay because Faigin "need not prove that the employer intended to fulfill such a promise, but only that the implied promise was made." (*Ibid.*)

Plaintiff testified in her declaration that she was informed by supervisors and members of Barnes & Noble management—including Director of Employee Relations Rhea Kaston—that the at-will policy should be ignored and that the progressive discipline policy should always be followed. But, like the testimony in *Faigin*, the testimony in plaintiff's declaration was admissible for the nonhearsay purpose of showing that supervising Barnes & Noble employees had made oral promises about the nature of plaintiff's employment relationship with Barnes & Noble (specifically, the applicability of the progressive discipline policy).[3]

Barnes & Noble argues that plaintiff's declaration testimony was properly excluded because it contradicted her deposition testimony. The Supreme Court has stated

[3] Because we find the statements admissible as nonhearsay legally operative fact rather than as hearsay admissible under an applicable exception, we do not address Barnes & Noble's argument that plaintiff failed to lay a foundation for a hearsay exception.

that where " 'there is a clear and unequivocal admission by the plaintiff' " in a deposition, " 'we are forced to conclude there is no *substantial* evidence of the existence of a triable issue of fact.' " (*D'Amico, supra*, 11 Cal.3d at p. 21.) But plaintiff's deposition in this case provided no such clear and unequivocal admission. Though plaintiff acknowledged that the at-will provisions of the company's code of conduct applied to her, she also testified that she believed at-will employment meant she had to "do something to the company" to be fired, suggesting she believed the term "at-will" actually described a status terminable only for cause.

The trial court erred in excluding the evidence in paragraphs three, five, and six of plaintiff's declaration regarding statements made by Barnes & Noble employees.

B. SUMMARY JUDGMENT

Summary judgment is appropriate when there are no triable issues of any material fact such that the moving party is entitled to judgment as a matter of law on all causes of action. (Code Civ. Proc., § 437c, subd. (c); *Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 945–946 (*Jones*).)

We review an order granting summary judgment de novo, applying a three-step analysis. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*); *Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 503.) First, we identify the causes of action framed by the pleadings. (*Jones*, *supra*, 230 Cal.App.4th at p. 945.) Second, we review whether Barnes & Noble as the moving party carried its burden of showing the causes of action have no merit because one or more elements cannot be established, or that an affirmative defense precludes the cause of action. (Code Civ. Proc., § 437c, subd. (o).) The moving party must negate "only those ' "theories of liability *as alleged in the complaint* ... ." ' " (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1254 (*Conroy*), italics in *Conroy*.) Third, if we find the defendant has made a prima facie showing that it is entitled to judgment as a matter of law, the burden of production shifts to the plaintiff and we review whether the plaintiff

has provided evidence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Jones*, at p. 945.) "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.' " (*Jones*, at pp. 945–946.)

1. Gender Discrimination

Plaintiff argues that she presented a triable issue of fact regarding her gender discrimination cause of action, and that her gender discrimination cause of action also encompassed causes of action for sexual harassment, failure to correct sexual harassment, and retaliation. Alternatively, plaintiff requests leave to amend the Complaint to add harassment allegations.

a. Complaint Alleged Only Gender Discrimination, Not Sexual Harassment

"In performing our independent review of a defendant's summary judgment motion, 'we identify the issues framed by the pleadings since it is these allegations to which the motion must respond ... .' " (*Jones*, *supra*, 230 Cal.App.4th at p. 945.)

The relevant cause of action is titled "Gender/Age Discriminati[o]n FEHA." (Capitalization omitted.) The Complaint alleges that all "of the acts taken against plaintiff by all these named defendants ... and in particular plaintiff's termination, were done, inter alia, as acts of gender and age discrimination against plaintiffs [*sic*], such acts being unlawful and in violation of California Government Code Sect. 12935, et seq." (Italics omitted.)

Setting aside the Complaint's apparent mistake in citing Government Code section 12935 instead of section 12940 (which describes various unlawful employment practices), the Complaint specifies age and gender as the two bases for discrimination.[4] Notably, the Complaint does not allege that sexual harassment occurred; does not argue

[4] Plaintiff expressly abandoned reliance on age as a basis for her termination before the hearing on the summary judgment motions.

that Barnes & Noble failed to protect plaintiff from harassment; does not argue that plaintiff was fired in retaliation for reporting harassment; and does not even mention Renzi. The Complaint instead alleges defamation by a West Valley College employee and then appears to suggest that the defamatory conduct and plaintiff's termination were motivated by her age or gender. Plaintiff could not overcome summary judgment by belatedly raising arguments about sexual harassment in her opposition to Barnes & Noble's motion. Because no issue related to sexual harassment was framed in the Complaint, Barnes & Noble's summary judgment motion did not need to address those issues.

Plaintiff argues that her sexual harassment allegations were effectively within the scope of her gender discrimination cause of action because they "were clearly before the court, having been argued by both sides in the opposing and reply briefs ... and also at the hearing" on Barnes & Noble's motion. But Barnes & Noble bore the burden to negate only those theories alleged in plaintiff's Complaint. Barnes & Noble was "not obliged to ' " ' "refute liability on some theoretical possibility not included in the pleadings," ' " ' simply because such a claim was raised in plaintiff's declaration in opposition to the motion for summary judgment." (*Conroy*, *supra*, 45 Cal.4th at p. 1254.) The trial court correctly limited its discussion to plaintiff's gender discrimination claim.

b. No Triable Issue of Fact Regarding Gender Discrimination

An employer may not discharge an employee based on an employee's gender. (Gov. Code, § 12940, subd. (a).) Generally, at trial a plaintiff states a prima facie case of discrimination by providing "evidence that (1) [she] was a member of a protected class, (2) [she] was qualified for the position [she] sought or was performing competently in the position [she] held, (3) [she] suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).) The *Guz* decision expressly left undecided whether that prima facie burden also

applies to plaintiffs opposing summary judgment because the defendant in *Guz* presented nondiscriminatory reasons for the termination sufficient to shift the burden to the plaintiff to show that those reasons were pretextual. (*Id.* at pp. 356–358, 362.)

Like the defendant in *Guz*, here Barnes & Noble offered nondiscriminatory reasons for plaintiff's termination through evidence of her 2009 performance review and evidence that West Valley College administrators had requested a change in management at the bookstore. In response, plaintiff failed to provide *any* evidence suggesting that she was terminated because she is a woman. Plaintiff argues that a discriminatory motive is shown by "the frequent and pervasive discriminatory conduct of Mr. Renzi" and Barnes & Noble's failure to protect plaintiff from Renzi's conduct. But Renzi's alleged sexual harassment and Barnes & Noble's alleged failure to protect plaintiff from that conduct are not equivalent issues to whether Barnes & Noble terminated plaintiff based on her gender. Plaintiff did not satisfy her burden to present evidence of a triable issue of material fact regarding her gender discrimination cause of action, and the trial court properly decided the issue in Barnes & Noble's favor. (*Aguilar*, *supra*, 25 Cal.4th at pp. 843–845.)

c. No Sua Sponte Duty to Grant Leave to Amend

Despite her failure to request leave to amend the Complaint in the trial court, plaintiff now argues that the trial court erred by not sua sponte granting her leave to amend to add allegations regarding sexual harassment.

As noted above, Barnes & Noble bore the burden to negate only those theories of liability actually alleged in the Complaint, and plaintiff's Complaint contains no allegations about sexual harassment. "A sufficient motion cannot be successfully resisted by counterdeclarations which create immaterial factual conflicts outside the scope of the pleadings; counterdeclarations are no substitute for amended pleadings." (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1065.) " ' "If the motion for summary judgment presents evidence sufficient to disprove the plaintiff's

claims, as opposed to merely attacking the sufficiency of the complaint, the plaintiff forfeits an opportunity to amend to state new claims by failing to request it." ' " (*Conroy*, *supra*, 45 Cal.4th at p. 1254.)

Plaintiff argues that "if it appears from the materials submitted in opposition to the motion that the plaintiff could state a cause of action, the trial court should give the plaintiff an opportunity to amend the complaint before entry of judgment." But the cases plaintiff cites for that proposition all involved pleadings that contained insufficient factual allegations that might be cured by amendment. (See *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1066–1067 (*Kirby*) [reversing summary judgment and remanding for opportunity to amend complaint where ambiguous allegations in complaint regarding timeliness of action might be cured by amendment]; *Williams v. Braslow* (1986) 179 Cal.App.3d 762, 774 (*Williams*) [reversing summary judgment and remanding for opportunity to amend complaint where defect was the plaintiff's failure to name additional defendants].) Though styled as a motion for summary judgment, the *Kirby* court found that the motion at issue was more akin to a motion for judgment on the pleadings because it challenged the factual sufficiency of the complaint. (*Kirby*, at p. 1067.) The court reversed the grant of summary judgment, finding that the motion "did not negate appellants' claims but merely cast doubt on the [factual] sufficiency of the complaint." (*Kirby*, at p. 1068.) The plaintiffs in *Kirby* also sought leave to amend their complaint in the trial court when the defendant's summary judgment motion indicated the need for factual clarification. (*Id.* at pp. 1063–1064, 1068.)

Unlike in *Kirby*, the parties here had developed the facts of the case through extensive discovery before Barnes & Noble moved for summary judgment. If information supporting new causes of action other than those alleged in the Complaint arose during discovery, plaintiff was free to seek leave to amend. A timely request in the

trial court would have provided the court an opportunity to exercise its discretion and decide whether amendment was proper.

Despite having had the opportunity to do so, plaintiff did not seek to amend the Complaint in the trial court. She provides no explanation on appeal for her failure to do so. And unlike the plaintiffs in *Kirby* and *Williams*, plaintiff's amendment would not merely offer additional factual allegations to an existing cause of action, but would raise entirely new sexual harassment *causes of action*. Granting leave to amend on appeal to add new causes of action—absent any justification for the delayed request—does not serve judicial economy and risks prejudicing defendant. Because plaintiff neither included harassment claims in the Complaint *nor requested leave* in the trial court to do so, she forfeited the opportunity to amend the Complaint to add those claims. (*Conroy*, *supra*, 45 Cal.4th at p. 1254; see also *Lamb v. Lamb* (1955) 131 Cal.App.2d 489, 497 ["After a trial on a theory advanced by a party, that party, because dissatisfied with the outcome, may not claim inadvertence in presenting the theory."].)

2. Wrongful Termination Under Implied Contract

Plaintiff argues that she presented a triable issue of fact regarding the existence of an implied contract that converted her status from at-will to requiring good cause for termination.

a. Employment Contracts in California

The default rule in California is that "employment, having no specified term, may be terminated at the will of either party on notice to the other." (Lab. Code, § 2922.) But because the employment relationship is fundamentally contractual, the statutory presumption of at-will employment can be overcome by the parties "*agreeing* to any limitation, otherwise lawful, on the employer's termination rights." (*Guz*, *supra*, 24 Cal.4th at p. 336.) The parties in an employment relationship "may define for themselves what cause or causes will permit an employee's termination and may specify the procedures under which termination shall occur." (*Ibid.*)

If the parties have a written agreement signed by the employee, that agreement will be enforced. (*Guz, supra,* 24 Cal.4th at p. 340, fn. 10.) Even if not in writing, the parties' understanding "may be *implied in fact,* arising from the parties' *conduct* evidencing their actual mutual intent to create such enforceable limitations." (*Id.* at p. 336.) Several factors (the *Foley*[5] factors) bear on the existence and content of an implied agreement, including: the employer's personnel practices or policies; the employee's length of service; actions by the employer assuring continued employment; and industry practices. (*Guz,* at pp. 336–337.) At-will "provisions in personnel handbooks, manuals, or memoranda do not bar, or necessarily overcome, other evidence of the employer's contrary intent ([citations]), particularly where other provisions in the employer's personnel documents themselves suggest limits on the employer's termination rights." (*Id.* at p. 339.)

" '[C]ourts seek to enforce the *actual* understanding' of the parties to an employment agreement," reviewing the totality of the circumstances to determine whether evidence of an agreement has a tendency in reason to "demonstrate the existence of an actual mutual understanding on *particular* terms and conditions of employment." (*Guz, supra,* 24 Cal.4th at p. 337.) Evidence that logically permits conflicting inferences regarding the terms and conditions of employment will present a triable issue of fact precluding summary judgment. "But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Ibid.*)

The Supreme Court's *Guz* decision is instructive about how those standards are applied. Guz had worked for his employer Bechtel for over 20 years. He sued Bechtel after his entire work unit was terminated as part of a work force reduction. (*Guz, supra,* 24 Cal.4th at pp. 327–328, 348.) Guz alleged that Bechtel breached an implied employment contract that precluded his termination without good cause. (*Id.* at pp. 327–

[5] *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654 (*Foley*).

328, 338.) Guz argued that Bechtel had to show good cause to eliminate his work group and, even assuming Bechtel could eliminate the work group, that "his termination nonetheless lacked good cause because Bechtel failed to accord him fair layoff rights set forth in its written personnel rules ... ." (*Id.* at p. 338.) As evidence of an implied agreement, Guz relied on his long service; consistent raises and promotions; positive performance reviews; written personnel policies suggesting that termination for poor performance would be preceded by progressive discipline and providing for placement and reassignment assistance to individuals laid off during a work force reduction; and testimony from a Bechtel executive purporting to announce a company practice to terminate employees only for good cause. (*Id.* at p. 337.)

The *Guz* court determined that Bechtel, moving for summary judgment, had met its initial burden to show that its employment agreement with Guz was at-will, based on an express at-will disclaimer in one of the company's personnel policies. (*Guz*, *supra*, 24 Cal.4th at p. 339.) It then applied the *Foley* factors to determine whether Guz had provided evidence showing a triable issue of material fact on an implied contract theory.

Assessing the *Foley* factors, the court noted that while the express at-will disclaimer did not entitle Bechtel to judgment as a matter of law because it was not part of an integrated employment contract, the disclaimer was nonetheless relevant to determining "whether the parties' conduct was intended, and reasonably understood, to create binding limits on an employer's statutory right to terminate the relationship at will." (*Guz, supra*, 24 Cal.4th at p. 340.) Addressing Guz's reliance on the duration of his employment and his consistent raises and promotions, the court found that "*mere* passage of time in the employer's service, even where marked with tangible indicia that the employer approves the employee's work, cannot *alone* form an implied-in-fact contract that the employee is no longer at will." (*Id.* at pp. 341–342.) The court also noted it was "undisputed that Guz received no individual promises or representations that Bechtel would retain him except for good cause, or upon other specified

circumstances." (*Id.* at p. 341.) Guz also relied on a Bechtel executive's deposition testimony describing a belief that the company only terminated workers "with 'good reason ... .' " (*Id.* at p. 345.) Guz argued that he had presented a triable issue regarding whether Bechtel had an unwritten policy of terminating employees only for cause. (*Ibid.*) The Supreme Court rejected that argument as "insufficient as a matter of law" because there was no evidence that Bechtel employees were aware of that policy and it contradicted the company's written policy. (*Ibid.*) Because none of the foregoing factors supported the existence of an implied contract, the court determined that any evidence of an implied contract would have to flow from Bechtel's written personnel documents. (*Id.* at p. 345.)

The *Guz* court noted that the written personnel policies were somewhat contradictory. One policy stated that "employees had no contracts '*guaranteeing* ... continuous service' (italics added) and were terminable at Bechtel's 'option,' " which the court found "did not foreclose an understanding between Bechtel and all its workers that Bechtel would make its termination decisions within the limits of its written personnel rules." (*Guz, supra,* 24 Cal.4th at p. 346.) The court found that Bechtel's written personnel rules potentially limited Bechtel's discretion in two ways, depending on the manner in which an employee was terminated. The personnel rules contained a progressive discipline policy stating that " '[e]mployees who *fail to perform their jobs in a satisfactory manner* may be terminated, *provided* the employees have been advised of the specific shortcomings and given an opportunity to improve their performance.' " (*Id.* at p. 347.) However, when an entire work unit of employees was laid off due to a reduction in workload (as was the case with Guz), the personnel policy provided for employees to receive "notice to facilitate reassignment efforts and job search assistance," as well as possible reassignment within the company. (*Ibid.*) The court reasoned that because there was no policy applying progressive discipline rules to work unit layoffs, no

evidence supported Guz's theory that Bechtel was required to show good cause to terminate his work unit. (*Id.* at p. 348.)

Because the Court of Appeal had erroneously concluded that the progressive discipline policy applied when terminating Guz's work unit, it did not address "Guz's second theory, i.e., that Bechtel also breached its implied contract by failing, during and after the reorganization, to provide him personally with the fair layoff protections, including force ranking and reassignment help," set forth in Bechtel's personnel policies. (*Guz, supra,* 24 Cal.4th at p. 348.) The Supreme Court remanded the case to the Court of Appeal to resolve that issue, and to determine "what the proper remedy, if any, should be if Guz ultimately shows that Bechtel breached a contractual obligation to follow certain procedural policies in the termination process." (*Ibid.*)

b. Plaintiff Presented A Triable Issue of Fact

The Complaint alleged that plaintiff could not be terminated except for good cause, based on "plaintiff's lengthy tenure, exemplary service, outstanding performance, upward status and responsibilities performed over time, movement into a regionally high management positions [*sic*] with responsibilities for an entire college bookstore, ever increasing earnings and numerous job performance compliments and commendations." The Complaint did not specifically mention the progressive discipline policy as a basis for the implied contract.

Barnes & Noble satisfied its initial burden of showing that plaintiff's cause of action had no merit by providing evidence that plaintiff was an at-will employee. The 2009 Handbook's disclaimer expressly states that the parties' "employment relationship is 'at-will,' which means regardless of anything contained in the handbook and regardless of any custom or practice, the company makes no promises and remains free to change policies ... without having to consult anyone or obtain anyone's agreement." (Capitalization omitted.) Similarly, the code of conduct acknowledgment plaintiff signed states "I recognize that subject to the provision of law, I am an at-will employee."

The burden therefore shifted to plaintiff to produce evidence that would allow a reasonable trier of fact to find that the express at-will language in the 2009 Handbook did not control the parties' employment relationship.[6]

Certain factors discussed in *Guz* support defendant's position that plaintiff was an at-will employee, including the Labor Code section 2922 presumption of at-will employment and the 2009 Handbook's at-will disclaimer. (See *Guz*, *supra*, 24 Cal.4th at p. 340 ["disclaimer language in an employee handbook ... must be taken into account, along with all other pertinent evidence, in ascertaining the terms on which a worker was employed"].) Under its progressive discipline policy (as outlined in the 2009 Handbook and the Procedure Manual), Barnes & Noble retained discretion to forego progressive discipline and terminate employees without cause. The 2009 Handbook states that Barnes & Noble has discretion to "repeat any of these steps or bypass one or more step[s]." The Procedure Manual is more explicit: "[I]n all instances, management reserves the right to use its discretion to take action as it deems appropriate for the situation. Depending on the situation, the Company may skip any or all steps in this process." The Procedure Manual discusses the two ways in which termination generally occurs (after progressive discipline, or summarily without progressive discipline following a serious offense). But that termination provision states that those are "generally" the two methods of termination and does not purport to restrict Barnes & Noble's discretion to terminate an at-will employee.

Notwithstanding the foregoing, other factors addressed in *Guz* support plaintiff's position that her employment relationship with Barnes & Noble was not purely at-will.

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[6] We note at the outset, plaintiff's deposition testimony about the definition of at-will employment and her understanding about whether the company's at-will policies applied to her supports neither party because it appears she thought the term "at-will" actually described a status terminable only for cause. Because we find plaintiff's deposition testimony favored neither party, we do not address Barnes & Noble's claim that her testimony was inadmissible speculation.

Plaintiff had a lengthy term of employment with Barnes & Noble, which included periodic raises and generally favorable performance reviews. (See *Guz, supra,* 24 Cal.4th. at p. 341–342.) As we discussed above, plaintiff produced admissible evidence of direction from her superiors at Barnes & Noble that the progressive discipline policy should be applied in every situation where termination was contemplated. Deposition testimony from Barnes & Noble supervisors also supported the existence of an unwritten policy of always using progressive discipline. Plaintiff's previous supervisor Russell Markman was asked if he had been "told or trained or instructed by the company to ... follow, as much as you could, this performance management criteria that's established in the handbook?" Markman responded, "I guess, depending upon what the issue was. Correct." And plaintiff's final supervisor Lori Schmit could not remember *a single case* where a manager had terminated an employee without following progressive discipline.[7]

Reviewing the totality of the motion, we find that the trial court erred in granting summary judgment. Plaintiff presented a triable issue of material fact as to whether an

[7] We acknowledge that Schmit's deposition testimony about following the progressive discipline policy was not cited in either party's separate statement of facts; the testimony was included as an exhibit to a declaration Barnes & Noble filed with its reply memorandum supporting its motion, and other passages from the testimony were cited by Barnes & Noble. But the issue of whether the progressive discipline policy protected plaintiff from purely at-will termination was raised in plaintiff's opposing separate statement of disputed facts: "Progressive discipline and termination only for good cause was the policy, and Plaintiff had an implied-in-fact contract regarding her employment" with Barnes & Noble. Because Schmit's testimony is relevant to a fact included in plaintiff's separate statement, in our de novo review we decline to apply the " 'Golden Rule' " followed by some courts to limit summary judgment review to only those facts included in separate statements. (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337, superseded by statute on other grounds, as stated in *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 Cal.App.4th 952, 957, fn. 4; see *Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1481–1482 [noting several courts have rejected the rule and recognizing that courts retain discretion to review all evidence submitted regarding summary judgment motions].)

implied contract provided her greater protection than purely at-will employment. Her declaration as well as the deposition testimony of her two direct supervisors suggests that Barnes & Noble had a consistent unwritten practice of applying some form of progressive discipline to *all* employees. That evidence contradicts the discretionary language in the written policies relied on by Barnes & Noble. (See *Guz*, *supra*, 24 Cal.4th at p. 337 [when evidence "logically permits conflicting inferences" regarding the terms and conditions of employment, "a question of fact is presented"]; see also *id.* at p. 339 ["provisions in personnel handbooks, manuals, or memoranda do not bar, or necessarily overcome, other evidence of the employer's contrary intent"].) The trier of fact must determine both the precise terms of the parties' employment relationship and whether Barnes & Noble violated those terms.

III. DISPOSITION

The judgment is reversed. The trial court is directed to enter a new order granting Barnes & Noble's motion for summary adjudication as to the third (gender discrimination) and fifth (wrongful termination based on public policy) causes of action and denying summary adjudication as to the fourth cause of action for wrongful termination based on an implied contract. Each party shall bear its own costs on appeal.

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Grover, J.

WE CONCUR:

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Rushing, P.J.

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Premo, J.