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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BINDYA H.S.B. SINGH, Plaintiff and Appellant, v. COUNTY OF SANTA CLARA et al., Defendants and Respondents.	H043741 (Santa Clara County Super. Ct. No. 13-1-CV244607)

I. INTRODUCTION

Plaintiff Bindya H.S.B. Singh was a physician employed by defendant County of Santa Clara in the neonatology division at Santa Clara Valley Medical Center (VMC or the hospital) from 2007 until she was laid off in 2012. Defendant Balaji Govindaswami, also a physician, was plaintiff's supervisor. Plaintiff filed an action against the county and Govindaswami alleging eight causes of action arising out of the termination of her employment: two causes of action for age and religious discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), one cause of action for harassment in violation of FEHA, and five causes of action for retaliation in violation of FEHA, Labor Code sections 1102.5 and 6310, Business and Professions Code section 2056, and Health and Safety Code section 1278.5.

Defendants filed a motion for summary judgment or, in the alternative, summary adjudication of each cause of action. Defendants contended, among other arguments, that the county had a legitimate nondiscriminatory and nonretaliatory reason for laying off plaintiff and not rehiring her, and that she could not establish her claim of harassment. The trial court granted the motion for summary judgment and entered judgment in defendants' favor.

On appeal, plaintiff contends that the trial court erred because there are triable issues of material fact as to each cause of action. For the reasons stated below, we conclude that the causes of action for (1) retaliation in violation of FEHA (first cause of action) and (2) retaliation in violation of Labor Code section 1102.5 (second cause of action) should not have been summarily adjudicated in the county's favor, but that the remaining causes of action were properly summarily adjudicated in favor of the county and/or Govindaswami.

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 and opposition.

A. *The Layoffs and Rehires*

Neonatology is a hospital-based subspecialty of pediatrics that consists of the care of critically ill or premature infants, usually in a neonatal intensive care unit (NICU). Defendant Govindaswami was the chief of neonatology at VMC. The neonatology division was part of the pediatrics department, which was overseen by the chair of pediatrics, Dr. Steve Harris. Harris reported to the chief medical officer of VMC. During the relevant time, the acting chief medical officer of VMC was Dr. Clifford Wang.

Plaintiff was hired as a neonatologist by Harris and defendant Govindaswami in May 2007. Plaintiff was in her mid-40's at the time.

As of early 2012, defendant county staffed the NICU at VMC with 10 fulltime neonatologists and one chief. The county also had an arrangement to staff O'Connor Hospital's NICU with neonatologists. On June 25, 2012, O'Connor Hospital advised the county that it had awarded the staffing contract to a different provider.

In anticipation that the staffing arrangement with O'Connor Hospital might not continue, the county's proposed 2013 fiscal year budget, which was to become effective on July 1, 2012, eliminated 3.5 physician position "codes" at VMC. Harris and defendant Govindaswami wanted to be involved in the selection of which neonatologists would be let go because the elimination of 3.5 out of 10 fulltime neonatologists would have a significant impact on the neonatology division at VMC. Harris and defendant Govindaswami were advised by a county employee that all the physicians were at-will employees, and that they could choose any neonatologists for layoff as long as they used nondiscriminatory criteria.

Harris felt considerable stress to try to do something that was fair and reasonable, and that met the ongoing needs of the division. Harris and defendant Govindaswami were influenced by the newly formed physician's union at VMC to use a "last in, first out" approach to the layoff. Harris decided, however, that if the division could preserve positions, he would not necessarily continue to follow that approach if he could rehire neonatologists.

On July 2, 2012, written layoff notices were given to the following four neonatologists at VMC in accordance with the "last in, first out" approach: (1) Dr. Brian Scottoline, who transitioned to a full time neonatologist position in late 2010 or early 2011, although he had been hired many years earlier and had worked in various capacities in the hospital; (2) Dr. Sunshine Weiss, who was hired in 2009; (3) Dr. Sudha Rani Narasimhan, who was hired in 2008, and (4) plaintiff, who was hired in May 2007. All the other neonatologists in the division had been hired prior to May 2007. Weiss and Narasimhan were in their late 30's, Scottoline was in his late 40's, and plaintiff turned 50

that year. Govindaswami was one year younger than plaintiff. The layoffs were effective July 29, 2012.

With four physicians being laid off after a budget cut of 3.5 physician positions, there remained a halftime position (0.5 code). A vacant fulltime physician position from general pediatrics was also found (1.0 code). Weiss was given the fulltime physician position (1.0 code) and Narasimhan was given the halftime physician position (0.5 code) effective July 30, 2012. On July 19, 2012, the day after Weiss and Narasimhan were notified in writing about these positions, plaintiff learned that these two physicians had been rehired.

Regarding Weiss's rehire to the fulltime position, VMC Medical Director Dr. Dolly Goel had been vehement about the priority of rehiring her. Goel was responsible for the impending rollout of the county's approximately $200 million investment in an electronic medical record project, which was of paramount importance to the hospital and which would have significant financial consequences if it was unsuccessful. Goel told Harris and defendant Govindaswami that Weiss was integral to the electronic medical record project.

Regarding Narasimhan's rehire to the halftime position, Harris selected her based on defendant Govindaswami's recommendation and Harris's own knowledge of her breastfeeding work and experience. Defendant Govindaswami knew that breastfeeding was an essential, cost-effective intervention to improve the overall health outcome of all newborns. In 2008, he had appointed Narasimhan as director of lactation services. Narasimhan was the only neonatologist who was an "International Board Certified Lactation Consultant." Narasimhan also did research and worked on the implementation of grant-funded quality-improvement projects in breastfeeding. Harris was familiar with Narasimhan's breastfeeding efforts, as well as defendant Govindaswami's position about the importance of her breastfeeding work and the distinction of Narasimhan's international lactation consultant certification. As the chair of pediatrics, Harris also

knew of and supported the nationwide and statewide efforts to increase breastfeeding rates, and he knew that VMC was graded on newborn-breastfeeding rates by government oversight bodies.

On July 19, 2012, the day plaintiff learned that Weiss and Narasimhan had been rehired, plaintiff met with VMC Acting Chief Medical Officer Wang. Plaintiff told Wang that she thought she was being laid off because of her age and " 'probably other reasons,' " but she did not mention religion or retaliation. She also wrote to County Executive Dr. Jeff Smith, questioning the layoff and rehiring decisions and alleging "unethical conduct" by Govindaswami, including "discrimination in intent to rehire instead of any logical procedure," misuse of county funds by permitting a neonatologist to take an unofficial sabbatical while receiving full pay, threatening and intimidating employees during meetings if they spoke against him, and forcing his way onto a publication even though he made no significant contribution. Plaintiff requested an immediate investigation. Plaintiff met with Smith the next day, on July 20, 2012, to talk about her allegations.

On July 23, 2012, plaintiff was notified that she would remain employed until further notice, while defendant county investigated her allegations. On August 16, 2012, plaintiff was notified by the county that an outside investigator had concluded that there was insufficient evidence that the decision to release her from employment was based on any protected status, or based on her complaints against Govindaswami. The county reinstated her release from employment effective the following day, August 17, 2012.

III. PROCEDURAL BACKGROUND

A. *The Complaint*

Plaintiff's operative pleading contained eight causes of action. Two causes of action alleged age and religious discrimination against the county in violation of FEHA. One cause of action alleged harassment based on religion, among other grounds, against the county and Govindaswami in violation of FEHA. The remaining five cause of action

were against the county for retaliation in violation of FEHA, Labor Code sections 1102.5 and 6310, Business and Professions Code section 2056, and Health and Safety Code section 1278.5.

B. *The Motion for Summary Judgment*

Defendants filed a motion for summary judgment or, in the alternative, summary adjudication, arguing that all of plaintiff's causes of action lacked merit. The county contended that plaintiff's retaliation and discrimination claims lacked merit because the county had a legitimate nondiscriminatory reason to lay her off and not rehire her. Specifically, she was laid off due to her at-will status and the loss of the O'Connor Hospital contract, and the two other physicians were rehired because of their roles in important hospital projects. The county also argued that plaintiff had no evidence that the layoff or rehire decision was motivated by her religion or age, and that she could not establish elements of her retaliation claims, including that she engaged in protected activity under each of the relevant statutes. Lastly, regarding the harassment claim, the county and Govindaswami contended that no one had made any comments to her about her age, and that any conduct regarding her religion was not so severe or pervasive to constitute actionable harassment.

C. *Opposition to Motion for Summary Judgment*

Plaintiff contended that she had submitted sufficient evidence to create triable issues of fact that precluded summary judgment. Regarding the retaliation claims, plaintiff argued that the evidence showed she engaged in protected activities under the relevant statutes, and a causal link existed between her protected activities and her layoff. Plaintiff further contended that the evidence showed the county's reason for her layoff and failure to rehire was a pretext for retaliation and discrimination. Plaintiff also argued that the evidence showed she was harassed at her workplace because of her religion.

D. *Reply in Support of Motion for Summary Judgment*

In reply, the county contended that plaintiff failed to provide evidence that she engaged in protected activity that would support her retaliation claims and failed to establish a causal link to her layoff. The county also argued that plaintiff failed to provide evidence that the layoff decision was a pretext for retaliation or discrimination, or otherwise establish that the decision was motivated by her age or religion. Lastly, the county and defendant Govindaswami contended that plaintiff failed to provide evidence that she was subjected to a hostile work environment based on her religion. Defendants made written objections to plaintiff's evidence.

E. *The Trial Court's Order*

The trial court granted defendants' motion for summary judgment. The court determined that the county established that the layoff and rehire decisions were based on legitimate nondiscriminatory reasons, which provided an affirmative defense to plaintiff's five retaliation claims and two claims for religious and age discrimination. The court found that plaintiff had "effectively . . . abandoned" her age harassment claim because she did not have evidence that anyone made a comment about her age. Regarding alleged religious harassment, the court determined that any comments or reactions directed to plaintiff about religion were not sufficiently severe or pervasive to constitute a hostile work environment.

In making its ruling, the trial court also determined that defendants' evidentiary objections were not submitted in compliance with the California Rules of Court. Because the court was only required to rule on objections that were material to the disposition of the motion, and because the court was granting defendants' motion for summary judgment, the court deemed defendants' evidentiary objections, which were not filed in the proper form, to be immaterial to the disposition.

On February 10, 2016, a judgment was entered in favor of defendants and against plaintiff.

IV. DISCUSSION

In analyzing whether the trial court properly granted summary judgment, we first set forth the standard of review. We then consider plaintiff's contentions regarding each cause of action, starting with the age and religious discrimination claims, then the religious harassment claim, and then each of the retaliation claims under FEHA, Labor Code sections 1102.5 and 6310, Business and Professions Code section 2056, and Health and Safety Code section 1278.5.

A. *The Standard of Review*

A party may move for summary judgment or, in the alternative, summary adjudication. (Code Civ. Proc. § 437c, subd. (f)(2).) Both motions are "subject to the same rules and procedures" and "[b]oth are reviewed de novo." (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819; accord *DiCarlo v. County of Monterey* (2017) 12 Cal.App.5th 468, 488.) 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 an element of the cause of action cannot be established or there is a complete defense to that cause of action. (Code of Civ. Proc., § 437c, subd. (*o*); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).)

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 of 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.)

B. *Age Discrimination (Seventh Cause of Action)*

In her cause of action for age discrimination against defendant county, plaintiff alleged that the two physicians who were initially laid off and then rehired were younger than 40, while she and the other physician who were laid off were over 40. Plaintiff alleged that her age was a motivating factor in the hospital's decision to lay her off.

We will begin our independent evaluation of the merits of defendants' motion for summary adjudication of this cause of action with a brief overview of the legal framework governing summary adjudication of an employee's claim for age discrimination.

1. The Legal Framework for an Age Discrimination Claim

FEHA makes it unlawful for an employer to refuse to hire or employ, or to discharge from employment, a person "because of" the person's age, if the person is 40 years of age or older. (Gov. Code, § 12940, subd. (a); *id.*, § 12926, subd. (b).) "The phrase 'because of' means there must be a *causal link* between the employer's consideration of a protected characteristic and the action taken by the employer." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 215, italics added (*Harris*).) Under this standard, the employee is not required to show that discrimination was the " 'but for' cause of the employment decision." (*Id.* at p. 230.) However, the employee must at least show that discrimination was a "*substantial* motivating factor, rather than simply *a* motivating factor." (*Id.* at p. 232; accord, *Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 478-479.)

California has adopted the three-stage, burden-shifting test known as the *McDonnell Douglas* test (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792) for determining the merits of a discrimination claim. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*); *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 520, fn. 2 (*Reid*).) "At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination." (*Guz, supra*, 24 Cal.4th at p. 354.) In general, the elements of a prima facie case of discrimination are (1) the plaintiff was a member of a protected class; (2) the plaintiff was performing competently; (3) the plaintiff suffered an adverse employment action, such as termination; and (4) "some other circumstance suggests discriminatory motive. [Citations.]" (*Id.* at p. 355.) "If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. [Citations.]" (*Ibid.*)

If the plaintiff makes the required prima facie showing at trial, the burden shifts to the employer to produce admissible evidence sufficient to show a legitimate, nondiscriminatory reason for the adverse employment action. (*Guz, supra*, 24 Cal.4th at

pp. 355-356.) "If the employer meets this burden, the employee then must show that the employer's reasons are pretexts for discrimination, or produce other evidence of intentional discrimination. [Citation.]" (*Reid*, *supra*, 50 Cal.4th at p. 520, fn. 2.)[1]

With respect to a motion for summary judgment or summary adjudication of a discrimination claim, this court has stated that an employer may meet its burden by showing that one or more of the elements of a prima facie case by the plaintiff are lacking or that the adverse employment action was based on a legitimate, nondiscriminatory reason. (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038 (*Cucuzza*).)

If the employer meets its initial burden in moving for summary judgment, the burden then shifts to the employee to "demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action. [Citations.] '[S]peculation cannot be regarded as substantial responsive evidence.' [Citation.]" (*Cucuzza*, *supra*, 104 Cal.App.4th at p. 1038.)

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[1] The California Supreme Court has stated that the *McDonnell Douglas* framework "presupposes that the employer has a *single* reason for taking an adverse action against the employee and that the reason is either discriminatory or legitimate. By hinging liability on whether the employer's proffered reason for taking the action is genuine or pretextual, the *McDonnell Douglas* inquiry aims to ferret out the 'true' reason for the employer's action." (*Harris*, *supra*, 56 Cal.4th at p. 215, italics added.)

The California Supreme Court has contrasted such single-motive cases with a "mixed-motive[] case," in which "there is no single 'true' reason for the employer's action" but rather a "mix of discriminatory and legitimate reasons" that the trier of fact finds motivated the employer's decision. (*Harris*, *supra*, 56 Cal.4th at p. 215.) In a mixed-motive case, the plaintiff must show that discrimination was a "*substantial* motivating factor" for the employment decision. (*Id.* at p. 232.) The employer may then "demonstrate that legitimate, nondiscriminatory reasons would have led it to make the same decision at the time." (*Id.* at p. 241.) If the employer makes this showing, the employer may still be liable for discrimination but the remedies available to the employee are limited as compared to a single-motive case. (*Id.* at pp. 211, 241.)

None of the parties in this case has argued that the county's decision to lay off and/or rehire certain employees involved mixed-motives.

In *Guz*, the California Supreme Court explained that "an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz, supra*, 24 Cal.4th at p. 361, fn. omitted.) "[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. [Citations.] While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, 'legitimate' reasons [citation] in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*. [Citations.]" (*Id.* at p. 358.)

The California Supreme Court has further explained that "a plaintiff's showing of pretext, *combined* with sufficient prima facie evidence of an act motivated by discrimination, *may* permit a finding of discriminatory intent, and may thus preclude judgment as a matter of law for the employer." (*Guz, supra*, 24 Cal.4th at p. 361.) On the other hand, "even where the plaintiff has presented a legally sufficient prima facie case of discrimination, and has also adduced some evidence that the employer's proffered innocent reasons are false, the fact finder is not *necessarily* entitled to find in the plaintiff's favor. . . . '*Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance*, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.' [Citations.]" (*Id.* at pp. 361-362.)

In sum, a plaintiff's "discrimination claim under the FEHA cannot survive [an employer's] motion for summary judgment unless the evidence in the summary judgment

record places [the employer's] creditable and sufficient showing of innocent motive in material dispute by raising a triable issue, i.e., a permissible inference, that, in fact, [the employer] acted for discriminatory purposes. [Citation.] . . . [S]ummary judgment for the employer may thus be appropriate where, given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Guz*, *supra*, 24 Cal.4th at p. 362.)

2. Analysis

In its motion for summary judgment, defendant county did not dispute three of the four elements of a prima facie case of discrimination: plaintiff, who is over 40 years old, is a member of a protected class; she was qualified and performing competently in the position she held; and she suffered an adverse employment action when she was laid off. The county contended that there was no evidence of a discriminatory motive, and contended that it had a legitimate, nondiscriminatory reason for plaintiff's layoff.

We determine that defendant county met its initial burden of establishing that plaintiff's layoff and the rehiring of others were based on legitimate, nondiscriminatory reasons. (*Cucuzza*, *supra*, 104 Cal.App.4th at p. 1038.) The county's evidence established that the selection of plaintiff and the three other physicians who received layoff notices was in accordance with the "last in, first out" approach advocated by the physician's union. Further, the selection of the two physicians, Weiss and Narasimhan, for rehire was based on those physicians' roles in important hospital projects. In particular, Weiss was integral to the electronic medical record project, VMC Medical Director Goel was vehement about the priority of rehiring Weiss, and Goel made her view known to Harris and defendant Govindaswami. Regarding Narasimhan, her work and experience regarding breastfeeding was important, including her grant-funded quality improvement projects and her international lactation consultant certification.

Defendant county also presented evidence that Harris and defendant Govindaswami knew plaintiff was over 40 years old when they hired her in May 2007. Plaintiff was laid off approximately five years later. " '[W]here the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive.' [Citations.]" (*Horn v. Cushman & Wakefield Western* (1999) 72 Cal.App.4th 798, 809.) "[F]ive years is a relatively short time and is not so long a time as to attenuate the presumption." (*Id.* at p. 809, fn. 7; but see *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 323 [questioning whether five years is a short time in the context of a hiring and firing by the same person].)

Based on these undisputed facts, defendant county established that it laid off and rehired certain employees for legitimate, nondiscriminatory reasons. Consequently, plaintiff "had the burden to *rebut* this facially dispositive showing by pointing to evidence which nonetheless raises a rational inference that intentional discrimination occurred. [Citation.]" (*Guz, supra,* 24 Cal.4th at p. 357.)

On appeal, plaintiff claims that she met her burden to provide evidence from which it could be reasonably inferred that defendant county intentionally discriminated against her due to age, as follows: (1) plaintiff was not among the four individuals initially identified for layoff by defendant county, and it was not until after Harris and defendant Govindaswami became involved in the process that her name was included in the layoff list in place of another physician; (2) the county's stated reasons for retaining Weiss and Narasimhan were pretextual, and (3) statements by Harris and defendant Govindaswami suggest that they are biased against older employees. Based on this evidence, plaintiff contends that triable issues of fact exist as to whether the county laid her off and failed to rehire due to age discrimination, and therefore the trial court erred in granting summary adjudication of her cause of action for age discrimination.

Plaintiff's showing is not sufficient to create a triable issue of fact as to whether defendant county's true reason for laying her off and rehiring others was age discrimination.

First, the fact that plaintiff appeared on the layoff list only after Harris and defendant Govindaswami became involved in the process does not raise an inference of age discrimination. The initial layoff list was based on four VMC physician position codes that were selected by the county's "Office of Budget and Analysis." Undisputed evidence established that (1) Harris and defendant Govindaswami subsequently became involved in the layoff selection process due to the significant impact the layoffs would have on the neonatology division, (2) the "last in, first out" approach taken by Harris and defendant Govindaswami had been advocated by the physician's union, and (3) the four physicians ultimately given layoff notices, including plaintiff, were the "last in" the neonatology division, that is, they had the least seniority in the neonatology division.

Second, plaintiff's evidence is not sufficient to create a triable issue regarding whether the county's stated reasons for rehiring Weiss and Narasimhan were pretextual.

Regarding Weiss's importance to the hospital with respect to the electronic medical record project, VMC Medical Director Goel stated in a declaration that VMC was in the middle of implementation efforts for that project. In January 2012, the county contracted with a company to implement an electronic medical record throughout the Santa Clara Valley Health & Hospital System, including at VMC. Implementation was required to meet federal mandates. The county allocated more than $200 million for the project, and the failure of the project would potentially cost the county millions of dollars. Goel was leading the implementation of the electronic medical record project at VMC, and VMC staff members were assigned to assist with the implementation. Goel was very familiar with Weiss's work on the project since March 2012. Weiss was the "[s]ubject [m]atter [e]xpert" for the neonatology content. This meant Weiss decided how to electronically document all the clinical content, orders, results, and communications

the neonatologists needed to do in the electronic medical records. She also worked with the nursing staff to develop all the clinical work flows to ensure patient safety and high quality care. Goel felt Weiss "was critical to the successful implementation" of the project. Goel informed Harris and defendant Govindaswami that the hospital "could not afford to lose Dr. Weiss at that critical juncture," and Goel "insisted that she be retained."

On appeal, plaintiff contends that she had more than 10 years of experience in "utilizing" electronic medical records, specifically in the NICU, including at different medical centers, and that her own experience "vastly outweighed Weiss's." She cites her own deposition testimony regarding the training she received at other medical centers, her use of electronic notes or electronic medical records at those medical centers, and the feedback she and other physicians provided when electronic medical records were implemented at Good Samaritan Hospital. She also testified that she "introduced" "[e]lectronic notes" in the NICU at VMC, apparently in 2009, and that the electronic notes needed to be "roll[ed] into [an] electronic medical record," although the requisite system did not exist hospital-wide at the time. Plaintiff also attended hospital-wide meetings at VMC when electronic medical record vendors were being considered.

Even assuming, as plaintiff argues, that her prior experience made her equally or more qualified than Weiss "to be a part of" VMC's electronic medical record project, plaintiff fails to create a triable issue of pretext regarding the rehiring of Weiss. Defendant county presented evidence that Weiss was rehired based on her level of involvement in the implementation of the electronic medical record project at VMC in 2012. Plaintiff fails to point to any evidence that she herself was involved in the project's implementation in 2012 to the same extent as Weiss. Alternatively, plaintiff fails to provide evidence that Weiss was not involved in, and did not play a critical role in, the implementation of the project at VMC in 2012. For example, plaintiff failed to present evidence that would create a triable issue as to whether Weiss was one of the VMC staff members assigned to assist with the implementation of the project, whether Weiss was

the subject matter expert for the neonatology content during the project's implementation, or whether Weiss was critical to the successful implementation of the project. Plaintiff thus fails to create a triable issue regarding whether the county's reason for rehiring Weiss was a pretext for age discrimination.

Regarding Narasimhan's importance to the hospital due to her breastfeeding/lactation work, experience, and certification, plaintiff contends that "most neonatology patients are very sick babies who are unable to receive nourishment by being breastfed." She argues that most NICU patients require means of nourishment other than by breastfeeding, such as "Total Parent[er]al Nutrition," and that she has "broad experience and expertise" in that regard. In contrast, Narasimhan's expertise in breastfeeding/lactation had "limited relevance or importance" to VMC's neonatology division.

The deposition testimony of defendant Govindaswami that plaintiff cites does not support her argument. Govindaswami testified that human milk is important for all babies "born anywhere in the world," that the goal is to give human milk to 100 percent of the babies in the NICU within the first few hours of birth, and that breastfeeding is one means by which babies, including those in the NICU, receive the milk. The additional evidence that most babies in the NICU receive human milk by means other than by breastfeeding does not diminish the importance of Narasimhan's breastfeeding/lactation expertise in the NICU or to the hospital as a whole. Indeed, government oversight bodies graded VMC on newborn breastfeeding rates. Govindaswami testified in particular that "[t]he lactation emphasis is for 100 percent of babies born in the institution. It's a house-wide and hospital-wide priority with a lot of regulatory agencies involved, in addition to regulatory agencies overseeing the NICU." Harris similarly testified that Narasimhan "was working on both research and implementation of quality improvement projects in the area of breast feeding in the nursery—which was a high priority, not just for the nursery but for the whole department and the county as a whole." In contrast, total

parenteral nutrition, which involves the intravenous feeding of high-risk newborns, is important, but only applies to a "subset" of NICU patients and does not "have the universal application of . . . human milk." Thus, plaintiff fails to establish a triable issue of fact regarding whether Narasimhan's work, experience, and certification in breastfeeding/lactation had only limited importance or relevance to the NICU in particular or to the hospital as a whole.

Plaintiff also argues that defendant county's asserted reason for rehiring Narasimhan is pretextual because the reason "has changed over time." According to plaintiff, although the county now asserts that Narasimhan was important to retain because of her breastfeeding/lactation work and certification, an undated letter by VMC Acting Chief Medical Officer Wang instead shows that Narasimhan's layoff was rescinded in order to allow coverage of the NICU on nights and weekends. Wang's letter, however, does not create a triable issue of pretext. Wang in his letter proposes the following regarding the rehire of Narasimhan: "Move Dr. Sudha Rani Narasimhan into the 0.5 add back code . . . which the county added in the budget with the release of 4 neonatology codes. She has agreed to go from 1.0 FTE to a 0.5 FTE and work over code to supplement her income as needed by her division. She is needed as we have discontinued the 3 extrahelp physicians who provided coverage of nights and weekends." Although the letter indicates that Narasimhan agreed to "work *over* code to supplement her income" based on the division's need regarding nights and weekends, nothing in the letter indicates that the decision to place Narasimhan in the code itself was based on night and weekend work rather than her work, experience, and certification regarding breastfeeding/lactation. (Italics added.) Indeed, in another letter dated July 5, 2012, regarding the proposed rehire of Narasimhan, Wang states that Narasimhan "has a significant role in funded research," which is consistent with defendant county's assertion on summary judgment that Narasimhan was important to the hospital because of her research and work on the implementation of grant-funded quality-improvement projects

in breastfeeding. Wang also states in the July 5, 2012 letter that there was "plenty of meaningful work" in the neonatology division to support the employment Narasimhan and Weiss, that the contracts of "extrahelp" physicians were not being renewed, and that the "entire division" would be sharing after-hours coverage. The record thus reflects that the decision to rehire Narasimhan was based on her breastfeeding/lactation work, experience, and certification, and that there was "plenty" of work in the division to justify her rehire. Plaintiff fails to establish a triable issue regarding whether the rehiring of Narasimhan was a pretext for age discrimination.

Third, we do not believe that certain statements by Harris and defendant Govindaswami create a triable issue of fact as to whether plaintiff was laid off and not rehired due to her age. Age-based remarks may be relevant evidence of discrimination, including "stray remarks" that are not made directly in the context of an employment decision or are uttered by a nondecision maker. (*Reid*, *supra*, 50 Cal.4th at p. 539.) However, "a slur, in and of itself, does not prove actionable discrimination." (*Id.* at p. 541.) "[W]ho made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered. Thus, a trial court must review and base its summary judgment determination on the totality of evidence in the record, including any relevant discriminatory remarks." (*Ibid*.)

Regarding an age-related comment by Harris, plaintiff relies on an e-mail by Harris that refers to Weiss as being "young." Weiss was one of the two physicians who was rehired after being laid off. The context of Harris's statement is as follows. On July 3, 2012, after Weiss received the layoff letter, she wrote an e-mail to Harris seeking written assurance that her position was being saved. Harris forwarded Weiss's e-mail to VMC Acting Chief Medical Officer Wang, and asked Wang to rescind Weiss's termination. Harris stated in the e-mail to Wang regarding Weiss: "She is incredibly valuable to our program and VMC, for neonatology and informatics. She is young and

very, very skilled and promising. I would hate to lose her during a period of uncertainty as she explores other options. [¶] Can we please put her in the pediatric code vacated by [another physician] and send her another letter rescinding her termination." Harris later testified that he did not know Weiss's age and that he "was most concerned that she was somebody who was mobile and could easily be snatched away by somebody else because of her unique talents."

We are not persuaded that Harris's e-mail is sufficient to create a triable issue as to whether defendant county's layoff and rehiring decisions were "because of" age discrimination. (Gov. Code, § 12940, subd. (a).) As an initial matter, plaintiff relies on the wrong legal standard in arguing that "Weiss's youth was clearly *a* motivating factor in keeping her at the Hospital." (Italics added.) Plaintiff must "show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor" in any employment decision. (*Harris*, *supra*, 56 Cal.4th at p. 232.) Further, Harris's e-mail is insufficient to create a triable issue on this point. Harris expressly stated in the e-mail that Weiss was "incredibly valuable" to "VMC, for neonatology and informatics." Harris did *not* state that Weiss should be rehired because she is young, nor did he state that he preferred rehiring younger physicians over older physicians. Rather, as reflected in the e-mail and in his subsequent deposition testimony, Harris was concerned about Weiss being hired by *someone else* during the period of uncertainty regarding her employment status at VMC because she was young, mobile, and uniquely talented.

Similarly, we are not persuaded that two comments by defendant Govindaswami create a triable issue of fact regarding whether the layoffs and rehirings were "because of" age discrimination. (Gov. Code, § 12940, subd. (a).) Plaintiff testified that she asked Govindaswami why a particular physician was leaving. Govindaswami stated that the physician was retiring because "[h]e's worked for many years." The physician ultimately retired in 2009 with more than 28 years of service with the county. Plaintiff also testified that she asked Govindaswami on another occasion why a particular manager was leaving.

Govindaswami responded, "he's too senior." The manager retired in 2012 with more than 42 years of service with the county. In view of the context of the two comments by Govindaswami, the comments are ambiguous at best regarding whether they reflect age bias by Govindaswami.

Significantly, the California Supreme Court instructed in *Guz* that "summary judgment for the employer may . . . be appropriate where, given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Guz*, *supra*, 24 Cal.4th at p. 362.) In *Guz*, the plaintiff alleged that he had been terminated by his employer due to age discrimination. (*Id.* at p. 357.) The employer moved for summary judgment on the ground that the plaintiff was terminated for reasons unrelated to age bias during a company reorganization. (*Id*. at pp. 359-360.) Although the plaintiff argued that the evidence raised a triable issue of fact as to whether the employer's proffered reasons for his termination were false, our Supreme Court determined that "the record contains no direct evidence, and little if any circumstantial support, for such a finding." (*Id*. at p. 363.) The court concluded, "[The plaintiff's] evidence raised, at best, only a weak suspicion that discrimination was a likely basis for his release. Against that evidence, [the employer] has presented a plausible, and largely uncontradicted, explanation that it eliminated [the plaintiff's business unit], and chose others over [the plaintiff], for reasons unrelated to age. . . . [¶] Under these circumstances we conclude, as a matter of law, that [the plaintiff] has failed to point to evidence raising a triable issue that [the employer's] proffered reasons for its actions were a pretext for prohibited age discrimination." (*Id*. at pp. 369-370.)

In this case, defendant county presented uncontradicted evidence regarding the nondiscriminatory reasons for the layoffs and rehirings: (1) the loss of the O'Connor Hospital staffing contract necessitated laying off 3.5 physician position codes at VMC,

(2) the four physicians who most recently assumed fulltime positions in the neonatology division were laid off pursuant to the physician's union advocacy of a "last in, first out" approach, and (3) the rehired physicians, Weiss and Narasimhan, had roles in important hospital projects regarding electronic medical records and lactation/breastfeeding. Regarding Weiss's rehiring in particular, VMC Medical Director Goel believed Weiss was integral to the electronic medical record project, and Goel was vehement about the priority in rehiring Weiss. As in *Guz*, plaintiff's evidence in opposition—including (a) Harris's e-mail reference to Weiss being young, skilled, promising, and valuable to the hospital for neonatology and informatics, as well as (b) defendant Govindaswami's comments regarding two retiring employees who had worked for many years or who was too senior—"raised, at best, only a weak suspicion that discrimination was a likely basis for [plaintiff's] release" and failure to be rehired. (*Guz, supra*, 24 Cal.4th at pp. 369-370.) "Under these circumstances we conclude, as a matter of law, that [plaintiff] has failed to point to evidence raising a triable issue that [the county's] proffered reasons for its actions were a pretext for prohibited age discrimination." (*Id*. at p. 370.)

Accordingly, the trial court did not err in granting the county's motion for summary adjudication of plaintiff's seventh cause of action for age discrimination.

C. *Religious Discrimination (Sixth Cause of Action)*

Plaintiff alleged in her cause of action for religious discrimination against defendant county that religion was a motivating factor in her termination. FEHA prohibits discrimination in employment "because of" the employee's "religious creed." (Gov. Code, § 12940, subd. (a).) Religious creed includes "all aspects of religious belief, observance, and practice." (*Id.*, § 12926, subd. (q).)

The evidence reflects that plaintiff holds Hindu, particularly Hare Krishna, and Christian religious beliefs. She describes herself as "deeply religious and open about her Christian and Hindu faith." Harris has described himself as "secular Jewish." Defendant

Govindaswami was raised Hindu, attended Protestant and Catholic schools, and "believes in God." Govindaswami has described himself as more spiritual than religious.

As with the age discrimination claim, defendant county in its motion for summary adjudication of the religious discrimination claim did not dispute the first three elements of a prima facie case of discrimination: plaintiff is a member of a protected class based on her religious beliefs; she was qualified and performing competently in the position she held; and she suffered an adverse employment action when she was laid off. The county disputed, however, that there was evidence of a discriminatory motive, and contended that it had a legitimate, nondiscriminatory reason for plaintiff's layoff.

As we have explained, defendant county met its initial burden of establishing that plaintiff's layoff and the rehiring of others were based on legitimate, nondiscriminatory reasons. (*Cucuzza, supra,* 104 Cal.App.4th at p. 1038.) Defendant county's evidence established that the four physicians, including plaintiff, who received layoff notices was in accordance with the "last in, first out" approach advocated by the physician's union. Further, the selection of the two physicians, Weiss and Narasimhan, for rehire was based on those physicians' roles in important hospital projects – the electronic medical record project and breastfeeding/lactation.

On appeal, plaintiff contends that defendant county discriminated against her in the layoff and rehiring decisions based on her religion. Plaintiff argues that defendant Govindaswami was sarcastic and critical whenever anyone mentioned God, that he felt hostility toward her because of her religious beliefs, that he was motivated to eliminate her from the hospital, and that Harris made the decision to rehire others based on Govindaswami's recommendations. In the trial court, in opposition to defendants' summary judgment motion, plaintiff referred to the following 10 incidents as evidence that the layoff and rehiring decisions were based on religious discrimination.

First, defendant Govindaswami told two physicians to wipe what he thought was "dirt" off their foreheads. Govindaswami was thereafter told that the mark was "the Ash

Wednesday cross" and a Catholic tradition. Govindaswami testified that he made the request because the ash was extending toward the eye and "it was more about the ash possibly entering the eye."

Second, defendant Govindaswami told Harris "that he didn't like hearing about [plaintiff's] prayer in the nursery while the baby was being resuscitated." Regarding the underlying incident, Harris testified that he was told by a physician that plaintiff "had prayed out loud in the neonatology ICU" when a baby was being resuscitated, and that this made the two physicians who were resuscitating the baby "uncomfortable" and "distracted from their work."

Third, in 2010 or 2011, at a NICU celebration, plaintiff said in a partially joking manner that by " 'God's [g]race' [she] and [her] husband had been married for 25 years." Defendant Govindaswami responded, " 'So you have God's grace in you and the rest of us are living in sin?' " Plaintiff believed Govindaswami was mocking her faith in God.

Fourth, sometime between 2011 and 2012, plaintiff displayed a poster in her office of Lord Krishna and Jesus Christ, and she had a caption under it stating, "Everything you do in your thought, word or deed, do it in the name of the Lord." Govindaswami made a "weird face" at the poster, asked where she got it, and asked, "Is that possible that the two can connect?" It was plaintiff's impression that Govindaswami was trying to tell her that the two religious were mutually exclusive. She did not think he was expressing genuine curiosity, based on his tone and facial expressions.

Fifth, in the spring of 2012, plaintiff sent an e-mail to all the NICU staff invoking God or prayer. A neonatologist replied to everyone and chastised plaintiff for using God or prayer in an e-mail.

Sixth, in May 2012, plaintiff told Govindaswami that she was taking a religious pilgrimage to get baptized in the Jordan River, to which Govindaswami "responded 'wow' " and rolled his eyes.

Seventh, in the summer of 2012, plaintiff and Harris talked about plaintiff's planned trip to Jerusalem. Harris told plaintiff about the "Wailing Wall." Plaintiff asked Harris if he wanted any prayers there, and he responded in a condescending manner, "Please don't pray for me."

Eighth, defendant Govindaswami testified at his deposition in this case that "religion has done far more bad than good."

Ninth, in a June 27, 2012 telephone call about the layoffs, plaintiff told Govindaswami, " 'We have to remember to do the right thing because God is watching us all.' " Plaintiff made the statement because she believed Govindaswami felt he could do anything and because she "believe[d] in God." Plaintiff wanted Govindaswami to have "the fear of knowing that a higher power is overseeing all the wrongdoings that he's doing" and "help him stop in his tracks and do the right thing." Govindaswami responded, " 'I don't care about God, who's given you everything and given me nothing.' "

Tenth, Govindaswami was out of the country teaching neonatology at a university between June 30 and July 12, 2012. Harris went on a preplanned vacation out of the country from July 9 through 26, 2012. On July 2, 2012, layoff notices were given to plaintiff and the three other neonatologists. That same day, plaintiff began sending e-mails to more than 100 VMC physicians through the e-mail group of Valley Physician's Group, which is the union that represents physicians employed by Santa Clara Valley Health & Hospital System. Between July 5, and 19, 2012, plaintiff "mass-emailed" the Valley Physician's Group and Govindaswami, invoking God or prayer.

On July 19, 2012, the day plaintiff learned that Weiss and Narasimhan had been rehired, plaintiff "mass-emailed" the Valley Physician's Group and the entire NICU staff, alleging improper conduct by defendant Govindaswami. She also met with VMC Acting Chief Medical Officer Wang. She further wrote to County Executive Smith and other

hospital administrators making allegations against Govindaswami. Plaintiff met with Smith the next day, on July 20, 2012, and verbalized her allegations.

On July 21, 2012, *after* the layoff and rehiring decisions had already been made, defendant Govindaswami returned from his international teaching trip and was in receipt of plaintiff's July 19 written allegations to Smith, as well as her numerous mass e-mails to the Valley Physician's Group e-mail group. Govindaswami e-mailed Wang, "Just got back into the country. Happy to talk to you about the falsity of the accusations, [plaintiff's] emotional stability, religiosity etc." Govindaswami later testified that he was concerned for plaintiff's emotional stability because, as a physician, it was his experience that when people " 'become overtly acutely religious' like [plaintiff] had 'there might be something going on emotionally.' " He further explained that plaintiff "had talked about God will take care of things and so on," that he "didn't know if it was fatalistic coping with horrible stress," and that he "just wanted to be sure that it wasn't an emotional decline or a mental health decline which can happen around events" like a termination.

We determine that the first incident involving Govindaswami's requested removal of a mark on the physicians' foreheads is ambiguous at best regarding whether it shows discriminatory animus by Govindaswami. The record does not reflect that Govindaswami persisted in having the physicians remove the ash from their foreheads after he was told that the mark was part of a Catholic tradition.

The second through seventh incidents reflect that Harris, defendant Govindaswami, and at least one other neonatologist did not like plaintiff's references to prayer, God, or religion in general at work or at a work-related celebration. However, even "a slur, in and of itself, does not prove actionable discrimination." (*Reid*, *supra*, 50 Cal.4th at p. 541.) "[W]ho made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered." (*Ibid*.) The second through seventh incidents did not involve the

layoff or rehiring decisions at issue, or did not involve comments by Harris or defendant Govindaswami.

The eighth incident, regarding defendant Govindaswami's deposition testimony that religion has done more bad than good, similarly was not made in the context of the layoff or rehiring decisions at issue.

Although the ninth incident involved a telephone conversation between defendant Govindaswami and plaintiff about the layoffs a few days prior to the layoff notices being issued, the incident was similar to the prior incidents involving plaintiff and religion: plaintiff invoked religion, specifically God, and the recipient of the comment, in this instance Govindaswami, was not receptive, stating that he " 'd[id]n't care about God.' " Plaintiff admitted in her deposition that she made the comment about " 'God . . . watching us all' " with the intent to cause "*fear*" in Govindaswami, her supervisor, and with the intent to try to change his mind or his course of action regarding the layoffs. (Italics added.)

The evidence reflects that the tenth incident—in which Govindaswami e-mailed Acting Chief Medical Officer Wang and indicated his willingness to discuss the falsity of plaintiff's accusations against Govindaswami and/or the hospital, her emotional stability, and her "religiosity"—did *not* occur when Govindaswami and Wang were discussing candidates for layoffs, as asserted by plaintiff on appeal. Rather, the evidence reflects that Govindaswami made the statement *after* the layoff and rehiring decisions had been made and communicated, and *after* plaintiff talked about God "tak[ing] care of things and so on."

Thus, the ninth and tenth incidents, similar to most of the other incidents, reflect reactions by Govindaswami or others at the hospital to religious-related communications from plaintiff. The less-than-positive reactions by Govindaswami and others to plaintiff's religious-related communications do not directly indicate that religious

discrimination was a "*substantial* motivating factor" in the layoff and rehiring decisions. (*Harris*, *supra*, 56 Cal.4th at p.232.)

Further, in view of the circumstances of all the incidents, and given the strength of defendant county's evidence showing legitimate, nondiscriminatory reasons for plaintiff's layoff pursuant to a "last in, first out" approach, and the rehiring of Weiss and Narasimhan due to their roles in important hospital projects, we believe plaintiff's "countervailing circumstantial evidence of discriminatory motive" based on religion "is too weak to raise a rational inference that discrimination occurred." (*Guz*, *supra*, 24 Cal.4th at p. 362.) Specifically, the 10 incidents, even when considered in combination, are too weak to raise a rational inference that Govindaswami, Harris, or anyone else involved in the layoff or rehiring decisions made those decisions adverse to plaintiff "because of" her religious beliefs. (Gov. Code, § 12940, subd. (a); see *id.*, § 12926, subd. (q).)

Accordingly, the trial court did not err in granting the county's motion for summary adjudication of plaintiff's sixth cause of action for religious discrimination.

D. *Harassment Based on Religion (Eighth Cause of Action*)

Plaintiff alleged that defendant county and defendant Govindaswami engaged in verbal harassment in violation of FEHA. In the trial court and on appeal, plaintiff contends that the harassment was based on her religion.

FEHA prohibits harassment of an employee based on religious creed. (Gov. Code, § 12940, subd. (j)(1).) To prevail under FEHA, "an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was *severe enough or sufficiently pervasive* to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their [religious creed]. [Citations.]" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462, italics added (*Miller*).) Harassment includes verbal conduct, including derogatory comments. (*Id.* at p. 461; see also Cal. Code Regs., tit. 2, § 11019,

subd. (b)(2)(A).) "[A] workplace may give rise to liability when it 'is permeated with "discriminatory [religious-based] intimidation, ridicule, and insult," [citation], that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment[.]" ' [Citation.]" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279 (*Lyle*).)

"The working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' [Citation.]" (*Miller, supra,* 36 Cal.4th at p. 462.) Further, "all the circumstances" must be considered " 'from the perspective of a reasonable person in the plaintiff's position' [citation]." (*Id.* at p. 468.)

"With respect to the pervasiveness of harassment, courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature. [Citation.] That is, when the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions. [Citations.]" (*Lyle, supra,* 38 Cal.4th at pp. 283-284.)

With respect to the severity of harassment, "[a] single harassing incident involving 'physical violence or the threat thereof' may qualify as being severe in the extreme. [Citations.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1043.) Generally, "conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. [Citations.]" (*Lyle, supra,* 38 Cal.4th at pp. 284-285.) "If, however, the plaintiff neither witnesses the other incidents nor knows that they occurred, those incidents cannot affect his or her perception of the hostility of the work environment. . . . A reasonable person would not perceive a work

environment to be objectively hostile or abusive based on conduct toward others of which she is unaware." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519.)

"[T]he FEHA is 'not a "civility code" and [is] not designed to rid the workplace of vulgarity.' [Citations.] While the FEHA prohibits harassing conduct that creates a work environment that is hostile or abusive on the basis of [a protected characteristic], it does not outlaw . . . language or conduct that merely offends." (*Lyle, supra*, 38 Cal.4th at p. 295.)

In the trial court and on appeal, plaintiff limits her harassment claim to comments made by defendant Govindaswami. Those comments, which plaintiff also relied on to support her religious discrimination claim, included defendant Govindaswami: (1) telling two physicians to wipe "dirt" off their foreheads on Ash Wednesday, (2) responding, " 'So you have God's grace in you and the rest of us are living in sin' " to plaintiff after she stated that by " 'God's [g]race' [she] and [her] husband had been married for 25 years," (3) asking, "Is that possible that the two can connect," in reference to a poster in plaintiff's office of Lord Krishna and Jesus Christ, (4) rolling his eyes when plaintiff told him that she was taking a religious pilgrimage to get baptized in the Jordan River, (5) testifying at his deposition that "religion has done far more bad than good," (6) responding, " 'I don't care about God,' " after plaintiff told him, " 'We have to remember to do the right thing because God is watching us all,' " (7) e-mailing VMC Acting Chief Medical Officer Wang, "Happy to talk to you about the falsity of the accusations, [plaintiff's] emotional stability, religiosity etc.," and (8) suggesting at his deposition that plaintiff was " 'overtly acutely religious' " and that she might have " 'something going on emotionally.' "

Of these eight incidents, the record reflects that plaintiff personally heard or observed defendant Govindaswami in four of the incidents during her employment. Regarding the other four incidents, the record is either unclear or affirmatively reflects that plaintiff was not aware of the incidents while she was employed. These latter four

incidents include when certain physicians were told to wipe "dirt" from their foreheads, when Govindaswami e-mailed Wang about plaintiff's "religiosity," and various statements Govindaswami made about religion during his deposition in this case.

Even assuming plaintiff was aware of all the incidents during her employment (including defendant Govindaswami's beliefs as reflected in his deposition testimony), plaintiff fails to establish a triable issue regarding her religious harassment claim. The evidence reflects that Govindaswami did not have the same religious beliefs as plaintiff, and that at times he did not react positively to her references to religion. However, "[c]onsidering all the circumstances 'from the perspective of a reasonable person in the plaintiff's position' " we do not believe the religious-based incidents involving Govindaswami over the course of several years were sufficiently severe or pervasive to alter the conditions of plaintiff's employment and create an abusive working environment. (*Miller*, *supra*, 36 Cal.4th at p. 468; *see id.* at p. 462; *Lyle*, *supra*, 38 Cal.4th at p. 279.) Regarding the severity of Govindaswami's conduct, the evidence reflects, at most, mere offensive utterances, none of which were physically threatening or humiliating. Even the physicians who were told to wipe the marks off their forehead testified that the incident was not necessarily anti-religious or offensive. Regarding the pervasiveness of Govindaswami's conduct, the incidents occurred on an occasional or sporadic basis, and usually only in response to a religious-related communication initiated by plaintiff. There is no evidence to suggest that Govindaswami's conduct unreasonably interfered with plaintiff's work performance.

We are not persuaded by plaintiff's reliance on *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30 (*Dee*)) for the proposition that a single interaction can create a hostile work environment when the act is committed by a supervisor. In *Dee*, the supervisor used an ethnic slur that was abusive and hostile after the plaintiff employee complained that the supervisor told her to lie. (*Id.* at p. 37.) The appellate court determined that there was a reasonable inference that the supervisor "wished to intimidate

[the plaintiff] so that she would not to complain to higher management about his conduct." (*Ibid.*) The court further determined that "[a] reasonable trier of fact could infer that the racial slur was not an isolated event because it explained [the supervisor's] motivation for creating an abusive working environment for [the plaintiff]. [The plaintiff's] evidence showed that [the supervisor] called her a 'bitch' and 'constantly' used the word 'asshole.' He berated her, 'harassed' her, ordered her to lie and blamed her for tasks he ordered her to perform." (*Ibid.*) The court concluded that the supervisor's "ethnic slur combined with other evidence established a triable issue of fact on the issue of a hostile work environment." (*Id.* at p. 35.) Thus, the determination that a triable issue existed in *Dee* was not based on the use of one slur in a single interaction, but rather was the combination of the slur and other conduct by the supervisor. Further, the conduct by defendant Govindaswami does not rise to level of severity as the supervisor's conduct in *Dee*.

We conclude that the trial court properly granted summary adjudication for defendants on plaintiff's eighth cause of action for harassment.

E. *Retaliation Under FEHA (First Cause of Action)*

Plaintiff alleged a cause of action for retaliation under FEHA against defendant county. She alleged that she opposed improper conduct by defendant Govindaswami, including his "targeting of white employees" in violation of FEHA, and that her employment was terminated in retaliation.

1. Elements of a Retaliation Cause of Action under FEHA

FEHA prohibits discriminating against an employee because of the employee's race. (Gov. Code, § 12940, subd. (a).) FEHA further provides in Government Code section 12940, subdivision (h) that it is unlawful for an employer to discharge or otherwise discriminate against a person "because the person has opposed any practices forbidden under [FEHA]." The California Supreme Court has instructed that Government Code section 12940, subdivision (h) therefore "forbids employers from

retaliating against employees who have acted to protect the rights afforded by the [FEHA]." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1035 (*Yanowitz*).)

"[T]o establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation. [Citation.]" (*Yanowitz*, *supra*, 36 Cal.4th at p. 1042.) Although proximity in time between the plaintiff's protected activity and the adverse employment action may establish a prima facie case of retaliation, temporal proximity alone "does not create a triable fact as to pretext once the employer has offered evidence of a legitimate, nonprohibited reason for its action." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 334, 335 (*Arteaga*); see also *id.* at pp. 353, 357; accord, *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388 (*McRae*); *Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1112 (*Loggins*).)

Regarding the first element of a prima facie case, an employee has engaged in a protected activity under the FEHA if the employee "has complained of or opposed conduct that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1043.) Although the employee need not explicitly inform the employer that its conduct was discriminatory, the employer must know that the employee's opposition was based on the employee's reasonable belief that the employer's conduct is discriminatory. (*Id.* at p. 1046.) "[A]n 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.]" (*Id.* at pp. 1046-1047.) An employer may be held liable for the retaliatory actions of its supervisors. (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 420 (*Wysinger*); Gov. Code, § 12926, subd. (d) [employer under FEHA includes "any person acting as an agent of an employer"].)

2. Analysis

In moving for summary adjudication of plaintiff's retaliation claim under FEHA, defendant county contended that plaintiff could not establish a prima facie case of retaliation because: (1) defendant Govindaswami did not engage in discriminatory conduct that was forbidden by FEHA, (2) plaintiff's response to Govindaswami's conduct did not constitute opposition under FEHA, and (3) there was no causal link between plaintiff's alleged opposition and her 2012 layoff. The county also contended that it had legitimate nonretaliatory reasons for laying off and not rehiring plaintiff.

On appeal, plaintiff contends that the trial court erred in granting summary adjudication of the FEHA retaliation claim because the evidence supports a reasonable inference that her layoff was in retaliation for her complaining about defendant Govindaswami's racially discriminatory behavior. In particular, she contends that Govindaswami engaged in race discrimination in violation of FEHA against (1) a White nurse, (2) a White physician seeking a chair position in another department, and (3) two White physicians in the neonatology division.

First, regarding the nurse, plaintiff testified that defendant Govindaswami told her in or about 2007 or 2008 that he did not want a White nurse in an educational video with plaintiff because there were "enough white people in videos" and he wanted plaintiff "to make [a] video with colored people." Govindaswami also told her that he did not want the nurse to go to a teaching event because he was going to have the nurse replaced with

a "colored person." Further, Govindaswami spread a rumor that the nurse had an addiction problem. Govindaswami was not the nurse's supervisor. Plaintiff supported the nurse in meetings and helped the nurse draft an e-mail in October 2010 to the nurse's supervisor and others to protect the nurse's job. The nurse remained employed at the hospital thereafter. Plaintiff did not specifically complain to anyone about Govindaswami's comments or his actions toward the nurse. However, plaintiff knew Govindaswami was "unhappy" with plaintiff because of his negative reaction, including his facial expression and shaking his head, after she had vocalized support for the nurse at a meeting and to Govindaswami after the meeting.

Second, plaintiff testified that defendant Govindaswami told her in 2009 that he did not know if a certain physician would become the chair of another department because he had heard rumors that the physician was a racist. Govindaswami, who was on the search committee for the position, proceeded to repeat the rumor at a division meeting. Plaintiff testified that she sent an e-mail to the physician at issue, letting the physician know that she supported the physician's candidacy and that she knew the physician was not a racist. Plaintiff also gave the physician permission to forward her e-mail to another physician who was on the selection committee or overseeing the selection procedure. Thereafter, Govindaswami approached plaintiff and told her that he was "not happy with what [she] was doing," that "it was going to be difficult to work with [her] if [she] opposed his plans," and that "he did not want a white man in power." Govindaswami stated in a declaration that he supported both the physician and another internal candidate as suitable for the position.

Third, plaintiff testified that in 2011 and 2012, defendant Govindaswami was "harsh" with a physician at neonatology division meetings regarding patient care issues. She also testified that Govindaswami reacted negatively to another physician's "brilliant" ideas at division meetings. Plaintiff believed Govindaswami acted this way because the physicians were White and because Govindaswami had previously told plaintiff that "he

did not want the white club of Stanford taking over our group." Both physicians attended Stanford. Plaintiff defended the physician who was being addressed regarding patient care issues, and she intervened at the meeting involving the other physician by making a "distractive comment," but she did not specifically complain about Govindaswami's conduct as being racially discriminatory at that time. Later, on June 27, 2012, when plaintiff and Govindaswami were talking about the impending layoffs, she complained to him about his harassment and discrimination towards these two physicians. Govindaswami responded that "he can do what he wants." A few days later, on July 2, 2012, plaintiff was given a layoff notice.

Based on this evidence, we determine that triable issues of fact exist as to whether plaintiff can establish a prima facie case of retaliation and whether she can ultimately prove intentional retaliation.

First, there is evidence that defendant Govindaswami engaged in conduct that plaintiff "reasonably believe[d] to be discriminatory." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1043.) Plaintiff testified that defendant Govindaswami made comments indicating that he wanted a White nurse replaced with a "colored person," that he did not like a White physician "in power," and that he did not want White physicians "taking over" the neonatology division. Based on these comments, there is evidence that plaintiff "reasonably believe[d]" Govindaswami was engaging in unlawful race discrimination in employment when he (1) sought to prevent the White nurse from participating in certain projects and spread an unflattering rumor about her apparently in an attempt to affect her employment at the hospital, (2) spread an unflattering rumor about a White physician who was seeking a department chair position, and (3) reacted harshly or negatively to White physicians within the neonatology division at meetings. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1043.)

Second, plaintiff provided evidence that she opposed the conduct by Govindaswami that she reasonably believed was discriminatory. The California Supreme

Court has explained that "[i]t is not difficult to envision circumstances in which a subordinate employee may wish to avoid directly confronting a supervisor with a charge of discrimination and the employee engages in subtler or more indirect means in order to avoid furthering or engaging in discriminatory conduct. . . . 'The relevant question . . . is not whether a formal accusation of discrimination is made but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.' [Citation.]" (*Yanowitz*, 36 Cal.4th at p. 1047.) In this case, there is evidence that plaintiff openly helped and supported the employees who were apparently targeted by Govindaswami because of their race, including the nurse and the physician seeking a chair position. Plaintiff also expressly complained to Govindaswami about discrimination against two physicians in the neonatology division just prior to receiving her layoff notice. Further, there is evidence that Govindaswami understood plaintiff was opposing racially discriminatory conduct, as reflected by his negative reactions to her, including facial expressions and comments that (a) it was going to be difficult for them to work together if she opposed his plans regarding White people and (b) he could do whatever he wanted. (See *ibid*.)

Third, plaintiff provided evidence of a causal link between her opposition and her 2012 layoff. She expressly confronted Govindaswami on June 27, 2012, about discrimination and harassment against the two physicians in their division shortly before she was laid off on July 2, 2012, and Govindaswami's response was that he could "do what he wants." He had also previously expressed displeasure in 2009 with plaintiff's opposition to his actions regarding the White physician seeking a department chair position, telling her that it was going to be difficult to work together if she opposed his plans and that "he did not want a white man in power." Based on this evidence, triable issues of material fact exist as to whether a causal link existed between protected activity by plaintiff and her layoff. (See *Yanowitz*, *supra*, 36 Cal.4th at p. 1042.)

Fourth, although the county presented evidence that it had legitimate nonretaliatory reasons for the layoff and rehiring decisions, and that multiple people besides Govindaswami were involved in the decision-making process, a triable issue of material fact exists as to whether retaliation by Govindaswami was the cause of those employment decisions. A plaintiff "need not demonstrate that every individual who participated in the [employment decision] shared [retaliatory] animus in order to defeat a summary judgment motion. . . . [S]howing that a significant participant in an employment decision exhibited [retaliatory] animus is enough to raise an inference that the employment decision itself was [retaliatory], even absent evidence that others in the process harbored such animus." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 551.) In this case, it is undisputed that Govindaswami participated in the layoff and rehiring decisions. The evidence also reflects that he was unhappy with plaintiff's opposition to his efforts to have a White nurse replaced and his efforts to prevent White physicians from having power or "taking over" at the hospital. In the face of plaintiff's opposition to his efforts, Govindaswami told her that it was going to be difficult for them to work together and, shortly before plaintiff was laid off, he told her that he could "do what he wants." In view of his statements and his expressed displeasure of her opposition, a triable issue of fact exists as to whether Govindaswami retaliated against plaintiff by using the layoffs and the limited rehirings as an opportunity to get rid of her. (See *Wysinger*, *supra*, 157 Cal.App.4th at p. 420 [supervisor's "threat to 'crush' " employees who opposed a pay cut that disproportionately affected older employees showed an intent to retaliate; jurors could reasonably infer that plaintiff later became a target after he filed a discrimination claim challenging the plan]; *Coszalter v. City of Salem* (9th Cir. 2003) 320 F.3d 968, 978 [observing that retaliation may occur within a short period of time, or may be delayed until "the victim is especially vulnerable or until an especially hurtful action becomes possible"].)

In sum, triable issues of material fact exist regarding plaintiff's first cause of action for retaliation under FEHA. The trial court therefore erred in granting summary adjudication of this cause of action.

F. *Retaliation in Violation of Labor Code Section 1102.5 (Second Cause of Action)*

Plaintiff alleged a cause of action for retaliation against the county under Labor Code section 1102.5. Her claim was based on allegations that defendant Govindaswami engaged in unlawful and improper conduct, including by spreading false rumors about colleagues in violation of the public policy against race discrimination; that she complained about the conduct; and that her complaints were a contributing factor in her termination.

In moving for summary adjudication, defendant county contended that plaintiff could not establish a prima facie case of retaliation under Labor Code section 1102.5, and that the county had legitimate nonretaliatory reasons for laying her off and not rehiring her.

On appeal, plaintiff contends that the trial court erred in granting summary adjudication of the Labor Code retaliation claim because she presented evidence that she was terminated in retaliation for the "many complaints she made while employed at the Hospital." In particular, she contends that complained about: (1) Govindaswami's "target[ing]" of the nurse and three physicians based on their race; (2) the hospital's NICU staffing practices, especially during the evenings, with respect to neonatologists, medical residents, and hospitalists; (3) the autonomy afforded to neonatal nurse practitioners; (4) the improper inclusion of Govindaswami's name on an article in which plaintiff was one of the co-authors; (5) the failure of a co-author on the same article to obtain sufficient patient consent to include a photograph of a child patient in the article; (6) Govindaswami's improper approval of paid study leave for a neonatologist; and (7) possible insider trading by Govindaswami, who plaintiff believed was encouraging

the county to purchase products from a company in which he owned stock, in an attempt to raise that company's stock price and personally profit.

We determine that triable issues of material fact exist regarding plaintiff's retaliation claim under Labor Code section 1102.5.

Labor Code section 1102.5, subdivision (b) prohibits an employer from retaliating against an employee for disclosing a violation of law. "Labor Code section 1102.5 is a whistleblower statute, the purpose of which is to 'encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 287 (*Soukup*).)

During the time of plaintiff's employment and through the time of her termination in 2012, former subdivision (b) of Labor Code section 1102.5 provided that "[a]n employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." (Lab. Code, § 1102.5, former subd. (b), as amended by Stats. 2003, ch. 484, § 2; see Lab. Code § 1102.5, subd. (b), as amended by Stats. 2015, ch. 792, § 2.)[2] "A report made by an employee of a

[2] On appeal, plaintiff and defendant rely on the current version of Labor Code section 1102.5 that went into effect after plaintiff's termination. We need not decide whether the version of the statute that was in effect during plaintiff's employment, or after her employment ended, applies to the claims in this case. Under either version we find triable issues of material fact.

During the time of plaintiff's employment, former Labor Code section 1102.5 provided in part: "(b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. [¶] (c) An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. [¶] . . . [¶] (e) A report made by an employee of a government agency to his or her employer is a disclosure of

government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivision[] . . . (b)." (Lab. Code, § 1102.5, subd. (e); see *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548 (*Hager*).)

To establish a prima facie case of retaliation under Labor Code section 1102.5, similar to a prima facie case of retaliation under FEHA, " ' " 'a plaintiff must show that she engaged in protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two.' " ' [Citation.]" (*Soukup, supra,* 39 Cal.4th at pp. 287-288; accord, *McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 468.) "If the plaintiff meets his [or her] prima facie burden, the defendant has the burden to prove a legitimate, nonretaliatory explanation for its actions. To prevail, the plaintiff has to show that the explanation is a pretext for the retaliation. [Citation.]" (*Hager*, *supra*, 228 Cal.App.4th at p. 1540.)

In this case, as we have explained regarding plaintiff's retaliation claim under FEHA, there are triable issues of material fact regarding (1) whether plaintiff had a

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information to a government or law enforcement agency pursuant to subdivision[] . . . (b)." (Stats. 2003, ch. 484, § 2.)

Currently, Labor Code section 1102.5 states in part: "(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation . . . . [¶] (c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation. [¶] . . . [¶] (e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivision[] . . . (b)." (*Id.*, § 1102.5, subds. (b), (c) & (e).)

reasonable belief that defendant Govindaswami was engaging in racially discriminatory conduct toward the White nurse and physicians, (2) whether plaintiff engaged in protected activity by opposing or disclosing Govindaswami's conduct, (3) whether there was a causal link between her opposition to, or disclosure of, his conduct and her subsequent layoff, and (4) notwithstanding the county's asserted legitimate nonretaliatory reason for the layoffs and the rehire of others, whether her termination was in retaliation for her opposition to, or disclosure of, Govindaswami's conduct.

Defendant county contends that plaintiff's defense of the White physicians at department meetings by making " 'distractive comments' to smooth over tense interactions between" the physicians and defendant Govindaswami was not protected whistleblowing activity under Labor Code section 1102.5.

Labor Code section 1102.5 does not apply to an employee's report or disclosure that involves personnel matters only, such as transferring, writing up, or counseling employees. (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822.) For example, in *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, the appellate court determined that a school principal's disclosures to her district superiors regarding two teachers' misbehaviors toward students did not amount to whistleblowing under the statute. (*Id.* at pp. 1381, 1382, 1384.) The court explained that "the disclosures indisputably encompassed only the context of *internal personnel matters* involving a supervisor and her employee, rather than the disclosure of a legal violation." (*Id.* at pp. 1384-1385.) The principal admitted that she "merely '*forwarded complaints by students of inappropriate conduct* of a . . . teacher . . . *for personnel action*.' " (*Id.* at p. 1385.) The court expressed concern that, "[t]o exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site. [Citation.]" (*Ibid.*)

In this case, plaintiff's opposition to what she believed was racially discriminatory conduct by defendant Govindaswami was not limited to making " 'distractive comments' " at department meetings. Rather, the evidence reflects that she expressly complained to Govindaswami about discrimination against the two White physicians in her division a few days before receiving her layoff notice. There is also evidence that Govindaswami understood plaintiff was opposing his racially discriminatory conduct on this and prior occasions, as reflected by his negative reactions to her, including facial expressions and comments that it was going to be difficult for them to work together if she opposed his plans regarding White people and that he could do whatever he wanted. Race discrimination in employment is prohibited by FEHA. (Gov. Code, § 12940, subd. (a).) A triable issue of material fact exists as to whether plaintiff's opposition to what she perceived was Govindaswami's racially discriminatory conduct against White employees was the disclosure of a legal violation within the meaning of Labor Code section 1102.5. (Lab. Code § 1102.5, subd. (b); *id.*, § 1102.5, former subd. (b), as amended by Stats. 2003, ch. 484, § 2.)

Defendant county also contends that Labor Code section 1102.5 does not protect an employee against retaliation for disclosure of unlawful conduct where the employee's disclosure is made to the wrongdoer.

In *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832 (*Mize-Kurzman*), the appellate court, in determining whether certain jury instructions were legally accurate on other issues, indicated that an employee's disclosure to the supervisor involved in the alleged wrongdoing is not a protected disclosure under Labor Code section 1102.5, former subdivision (b) (as amended by Stats. 2003, ch. 484, § 2). (*Mize-Kurzman, supra,* at pp. 858, 859; see *id.* at p. 848.) The appellate court believed that "criticism delivered directly to the wrongdoers does not further the purpose of . . . the California whistleblower laws to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it." (*Id.* at p. 859.)

However, in a case that directly addressed the issue, the appellate court in *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811 (*Jaramillo*), concluded that disclosing legal violations directly to the wrongdoer "f[e]ll within the literal meaning of Labor Code section 1102.5." (*Id.* at p. 826.) The court explained that under Labor Code section 1102.5, former subdivision (b) (as amended by Stats. 2003, ch. 484, § 2), the plaintiff as an assistant sheriff "did indeed 'disclos[e] information' to a 'law enforcement agency,' namely the Orange County Sheriff's Department (in fact, the very top officer in that law enforcement agency), and the information 'disclose[d]' violations of state and federal statutes." (*Jaramillo*, *supra*, at p. 826.) The court recognized the "anomaly" of "[a] report of wrongdoing to the very person who is engaged in the wrongdoing" and who "may be the last person who might be willing to do anything about it." (*Id.* at p. 827.) The court observed, however, that the "anomaly is properly addressed to the Legislature, not this court." (*Ibid.*)

Based on *Jaramillo* and the evidence in this case, we determine that a triable issue of material fact exists regarding whether plaintiff's statements to defendant Govindaswami regarding his purportedly racially discriminatory conduct was a disclosure of information of a violation of law within the meaning of Labor Code section 1102.5. (*Id.*, § 1102.5, subd. (b); *id.*, § 1102.5, former subd. (b), as amended by Stats. 2003, ch. 484, § 2.) Further, as we have explained, triable issues of material fact also exist regarding whether defendant county retaliated against plaintiff for that disclosure when her employment was terminated and she was not rehired.

Because we have concluded that triable issues of material fact exist regarding whether plaintiff was retaliated against in violation of Labor Code section 1102.5 for disclosing racial discrimination, we need not address whether triable issues exist regarding plaintiff's other claimed disclosures under the statute. (Code Civ. Proc., § 437c, subd. (f)(1) [motion for summary adjudication of a cause of action may "be granted only if it completely disposes of a cause of action"].)

In sum, triable issues of material fact exist regarding plaintiff's second cause of action for retaliation under Labor Code section 1102.5. The trial court therefore erred in granting summary adjudication of this cause of action.

G. *Retaliation in Violation of Labor Code Section 6310 (Third Cause of Action)*

Plaintiff also alleged a retaliation claim under Labor Code section 6310 against defendant county. She claimed that inadequate physician staffing in the NICU caused on-call physicians to travel at unsafe speeds in order to reach patients in the NICU in need of resuscitation. Plaintiff alleged that she complained about this physician safety issue, and that her complaints were a motivating factor in the decision to terminate her employment.

In moving for summary adjudication of plaintiff's claim, defendant county contended that plaintiff could not establish a prima facie case of retaliation under Labor Code section 6310. The county provided undisputed evidence that it was a job requirement to be within 30 minutes of the hospital when on-call, and that no one told plaintiff to drive at unsafe speeds. The county also argued that it had a legitimate nonretaliatory reason for laying her off and not rehiring her.

On appeal, plaintiff contends that requiring physicians to drive at unsafe speeds to attend to a newborn baby constitutes an unsafe working practice under Labor Code section 6310. She contends she complained about this issue to defendant Govindaswami, who in turn informed Harris. According to the deposition testimony plaintiff cites, Govindaswami was supportive of her desire for more onsite physician staffing although Harris was opposed to it. After plaintiff sent an e-mail to Harris about a patient safety concern, "they initiated getting in-house physicians for the NICU."

We determine that plaintiff fails to demonstrate that the trial court erred in granting summary adjudication of her retaliation claim.

Labor Code section 6310 makes it unlawful to discharge or otherwise discriminate against an employee in the terms and conditions of employment "*because* the employee

has made a bona fide oral or written complaint to . . . his or her employer . . . of unsafe working conditions, or work practices, in his or her employment or place of employment." (*Id.*, § 6310, subd. (b), italics added; see also *id.*, § 6310, subds. (a)(1).) This section "reflects a significant public policy interest in encouraging employees to report health and safety hazards existing in the workplace without fear of discrimination or reprisal. [Citations.]" (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1350.)

In this case, the record is not clear as to when plaintiff made a complaint about physicians driving at unsafe speeds and the timing of her termination. Even assuming she complained shortly before the termination decision was made, plaintiff fails to point to evidence creating a triable issue of material fact that the termination decision was "because" of a complaint by her about physicians having to drive at unsafe speeds. (§ 6310, subds. (a)(1) & (b).)

For example, on appeal plaintiff broadly contends that defendant Govindaswami and Harris "threatened [her] for complaining about" various matters "[b]efore and through June 27, 2012." She fails, however, to cite any evidence of a threat by Harris. Regarding two statements by Govindaswami, the evidence reflects that those occurred years earlier in 2009, (1) when Govindaswami said it was going to be difficult for them to work together after plaintiff supported a physician who sought a chair position and who Govindaswami claimed to have heard was a racist, and (2) when Govindaswami told plaintiff that she "would be better off elsewhere" if she was going to complain about him after she raised the issue of him improperly adding his name to an article that she had coauthored. These statements by Govindaswami do not create a triable issue of material fact regarding whether plaintiff's termination was in retaliation for complaining about physicians having to drive at unsafe speeds. The statements by Govindaswami were distant in time to her 2012 termination, the statements were unrelated to any complaint about physicians having to drive at unsafe speeds, and plaintiff indicated in her own

deposition testimony that Govindaswami was *supportive* when she raised the issue of the need for more onsite physician staffing.

Moreover, defendant county provided legitimate nonretaliatory reasons for the decisions to lay off plaintiff and rehire others. At most, plaintiff's evidence establishes that she was terminated sometime after she purportedly complained about physicians having to drive at unsafe speeds. "Although temporal proximity, by itself, may be sufficient to establish a prima facie case of discrimination or retaliation, it does not create a triable fact as to pretext once the employer has offered evidence of a legitimate, nonprohibited reason for its action." (*Arteaga*, *supra*, 163 Cal.App.4th at pp. 334, 335 [affirming summary judgment in favor of employer on claims for FEHA discrimination and wrongful termination in violation of public policy]; see also *id.* at pp. 353, 357; accord, *McRae*, *supra*, 142 Cal.App.4th at p. 388 [FEHA retaliation claim]; *Loggins*, *supra*, 151 Cal.App.4th at p. 1112 [FEHA retaliation claim].)

On this record, we determine that the trial court properly granted summary adjudication of plaintiff's third cause of action for retaliation under Labor Code section 6310.

H. *Retaliation in Violation of Business and Professions Code Section 2056 (Fifth Cause of Action)*

Plaintiff also alleged a retaliation claim under Business and Professions Code section 2056 against defendant county. She claimed that defendant Govindaswami made decisions about NICU operations that impaired patient care, including by failing to have a physician in the NICU at all times. Plaintiff alleged that she complained about the unsafe patient care and conditions, and that the complaints were a principal factor in the decision to terminate her employment.

In moving for summary adjudication, defendant county contended that plaintiff could not establish a prima facie case of retaliation under Business and Professions Code

section 2056, and that the county had a legitimate nonretaliatory reason for laying her off and not rehiring her.

On appeal, plaintiff contends that she complained about the NICU being staffed overnight with medical residents or hospitalists, rather than neonatologists. Hospitalists in the NICU are physicians who are "skilled and experienced in critical care intensive care procedures." Plaintiff argues that the medical residents and hospitalists did not meet certain state standards, and that requiring an on-call neonatologist to be within 30 minutes driving distance of the hospital was insufficient to eliminate safety concerns. Plaintiff contends that her complaints regarding safety concerns and NICU staffing and her subsequent termination created triable issues of fact regarding whether defendant county violated Business and Professions Code section 2056.

We determine that plaintiff fails to demonstrate that the trial court erred in granting summary adjudication of her claim.

The purpose of Business and Professions Code section 2056 "is to provide protection against retaliation for physicians who advocate for medically appropriate health care for their patients." (*Id.*, subd. (a).) Under the statute, " 'to advocate for medically appropriate health care' " includes "to protest a decision, policy, or practice that the physician, consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care, reasonably believes impairs the physician's ability to provide medically appropriate health care to his or her patients." (*Id.*, subd. (b).)

Business and Professions Code section 2056, subdivision (c) states that it is against the public policy of this state "to terminate an employment or other contractual relationship with, or otherwise penalize, a physician and surgeon principally for advocating for medically appropriate health care consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the

applicable legal standard of care." Subdivision (c) expressly prohibits terminating or retaliating against a physician "for that advocacy." (Bus. & Prof. Code, § 2056.)

In this case, regarding the use of medical residents, the evidence reflects that defendant Govindaswami, similar to plaintiff, preferred that medical residents no longer staff the NICU at night. In late 2007, Dr. Harris agreed to stop using medical residents at night. Regarding the use of hospitalists, the evidence reflects that the county did not have a neonatologist at the hospital around the clock due to the expense and the "scarcity of the specialists."

The evidence reflects that defendant Govindaswami and plaintiff exchanged e-mails critical of each other in 2007 regarding plaintiff responding while on-call and communication issues within the NICU. Around the same time, plaintiff raised a patient safety issue with Harris, and "they initiated getting in-house physicians for the NICU."

The evidence further reflects that defendant Govindaswami "was not happy" with plaintiff's support for a physician who had failed to respond while on-call, and that Govindaswami told plaintiff that the physician "deserve[d] harsh treatment."

As we have set forth above, defendant county presented evidence of legitimate, nonretaliatory reasons for the layoff and rehiring decisions that resulted in the termination of plaintiff's employment.

In opposition to the motion, plaintiff failed to provide evidence creating a triable issue of material fact regarding whether her employment was terminated "principally for" her advocacy regarding patient care and NICU staffing, or that she was otherwise retaliated against for her advocacy in this regard. (Bus. & Prof. Code, § 2056, subd. (c).) For example, there is no evidence that anyone threatened her job based on her advocacy for having more neonatologists onsite in the NICU instead of medical residents or hospitalists. To the contrary, the undisputed evidence reflects that defendant Govindaswami also preferred that medical residents no longer staff the NICU at night, and that in 2007, approximately five years prior to plaintiff being laid off, Harris agreed

to stop using residents at night. Plaintiff also cites her own deposition testimony, in which she indicated that Govindaswami was *supportive* of her desire for more onsite neonatologists, after she expressed concern about patient care by hospitalists or residents and the resultant need for the on-call neonatologist to arrive quickly. She also cites her own deposition testimony in which she explains that after she sent an e-mail to Harris regarding patient safety, "they initiated getting in-house physicians for the NICU." To the extent plaintiff refers to instances in which Govindaswami had a negative reaction regarding incidents involving on-call physicians, the evidence does not indicate that Govindaswami's negative reaction was due to a complaint by plaintiff about the staffing and patient care issues that she identifies on appeal.

In addition, as we have just explained regarding plaintiff's retaliation claim under Labor Code section 6310, the statements by defendant Govindaswami that (1) it was going to be difficult for them to work together and (2) she would be better off elsewhere, were made distant in time to her 2012 termination, the statements were unrelated to any complaint about NICU staffing, and plaintiff indicated in her own deposition testimony that Govindaswami was *supportive* when she raised the issue of the need for more onsite physician staffing.

Moreover, although she told defendant Govindaswami in a June 27, 2012 phone conversation regarding the layoffs that she was aware of his "wrongdoing" and "unethical" conduct and that she was "not going to stand by," there is no evidence that she referred to the issue of NICU staffing, or that Govindaswami was aware plaintiff was referring to the issue of NICU staffing. Further, as we have recited, the evidence reflected that Govindaswami had in the past been supportive of more on-site staffing of neonatologists.

Lastly, even assuming plaintiff advocated NICU staffing issues shortly before the final decision was made regarding her termination, evidence of the timing of such a complaint alone is not sufficient to withstand summary judgment in view of the evidence

of the county's legitimate, nonretaliatory reasons for laying off plaintiff and rehiring others. (See *Arteaga, supra,* 163 Cal.App.4th at pp. 334, 335, 353, 357 [affirming summary judgment in favor of employer on claims for FEHA discrimination and wrongful termination in violation of public policy]; *McRae, supra,* 142 Cal.App.4th at p. 388 [FEHA retaliation claim]; *Loggins, supra,* 151 Cal.App.4th at p. 1112 [FEHA retaliation claim].)

Accordingly, we determine that the trial court properly granted summary adjudication of plaintiff's fifth cause of action for retaliation under Business and Professions Code section 2056.

I. *Retaliation in Violation of Health and Safety Code Section 1278.5 (Fourth Cause of Action*)

Plaintiff also alleged a retaliation claim under Health and Safety Code section 1278.5 against defendant county. She claimed that defendant Govindaswami engaged in improper conduct, including by failing to have a physician in the NICU at all times and encouraging the independent practice of nurse practitioners, and that his conduct resulted in unsafe patient care and conditions. Plaintiff alleged that she complained about the conduct, and that the complaints were a motivating factor in the decision to terminate her employment.

In moving for summary adjudication, defendant county contended that plaintiff could not establish a prima facie case of retaliation under Health and Safety Code section 1278.5, and that the county had legitimate nonretaliatory reasons for laying her off and not rehiring her.

On appeal, plaintiff contends that she complained about (1) NICU staffing with respect to medical residents, hospitalists, and neonatologists, and (2) the autonomy afforded to neonatal nurse practitioners (NNPs). Regarding the latter contention concerning NNPs, plaintiff argues that allowing them to work independently from a physician, "including affording NNPs the ability to work on risky procedures," violated

patient safety obligations under state standards, although NNPs at the county are licensed and credentialed to independently perform procedures such as intubation and venous line placement. Plaintiff contends that she complained about this patient safety issue in 2011 or 2012 at department meetings, following an incident where an NNP attempted to perform a "central venous line placement" on an infant who subsequently went into cardiac arrest. Plaintiff contends that she defended a physician at a meeting when she believed the physician was wrongfully blamed for the NNP's error, which resulted from the hospital's practice. Plaintiff argues that her complaints regarding (1) NICU staffing and (2) the autonomy of NNPs, followed by her termination of employment, created triable issues of fact regarding whether defendant county violated Health and Safety Code section 1278.5.

We determine that plaintiff fails to demonstrate that the trial court erred in granting summary adjudication of her claim.

Health and Safety Code section 1278.5 is a "health care facility whistleblower statute" (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal. 4th 655, 667 (*Fahlen*)) that declares it is the public policy of this state "to encourage patients, nurses, members of the medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions." (Health & Saf. Code, § 1278.5, subd. (a).) To this end, subdivision (b)(1) of Health and Safety Code section 1278.5 provides that "[n]o health facility," or entity that owns or operates a health facility, "shall discriminate or retaliate, in any manner, against any patient, employee, member of the medical staff, or any other health care worker of the health facility because that person has . . . [¶] [p]resented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, . . . or to any other governmental entity." (*Id.*, § 1278.5, subd. (b)(1)(A); see *id.*, § 1278.5, subd. (b)(2).) The complaint must involve "concerns about the quality of patient care." (*Fahlen*, *supra*, at p. 667, fn. 6.) Prohibited discriminatory treatment includes "discharge . . . or any unfavorable

changes in . . . the terms or conditions of . . . employment, . . . or the threat of any of these actions." (Health & Saf. Code, § 1278.5, subd. (d)(2).) "If such a discriminatory act, known to hospital officials, occurs within 120 days after the medical staff member has reported a grievance or complaint related to patient health, care, or safety, there is a 'rebuttable presumption' that the act was done in retaliation for the complaint. (*Id.*, [§ 1278.5,] subd. (d)(1).)" (*Fahlen*, *supra*, at p. 676.)

Plaintiff's retaliation claim under Health and Safety Code section 1278.5 is based on her complaints about (1) NICU staffing with respect to medical residents, hospitalists, and neonatologists, and (2) the autonomy afforded to NNPs. Plaintiff's NICU staffing complaints were also the basis for her retaliation claim under Business and Professions Code section 2056. For the reasons we have set forth regarding the absence of a triable issue of material fact on the Business and Professions Code section 2056 claim, we similarly determine that plaintiff fails to create a triable issue regarding whether she was terminated "because" she complained about those same NICU staffing and patient care issues in violation of Health and Safety Code section 1278.5. (Health & Saf. Code, § 1278.5, subd. (b)(1).)

We also determine that plaintiff fails to create a triable issue regarding whether she was terminated "because" of her complaints about the autonomy afforded to NNPs. (Health & Saf. Code, § 1278.5, subd. (b)(1).) There is no evidence that anyone threatened her job based on any complaint by her about the autonomy afforded NNPs, or that any negative response by defendant Govindaswami was because of such a complaint by plaintiff. Moreover, although she told defendant Govindaswami in a June 27, 2012 phone conversation regarding the layoffs that she was aware of his "wrongdoing" and "unethical" conduct and that she was "not going to stand by," there is no evidence that she referred to the issue of NNP autonomy, or that Govindaswami was aware plaintiff was referring to the issue of NNP autonomy.

Accordingly, we determine that the trial court properly granted summary adjudication of plaintiff's fourth cause of action for retaliation under Health and Safety Code section 1278.5.

V. DISPOSITION

The judgment is reversed, and the matter is remanded with directions to vacate the order granting summary judgment. The trial court is directed to enter a new order: (1) denying summary adjudication as to the first cause of action for retaliation in violation of FEHA and the second cause of action for retaliation in violation of Labor Code section 1102.5, and (2) granting summary adjudication as to all the other causes of action. The parties shall bear their own costs on appeal.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.