Filed 2/3/09 Speck v. Pacific Cycle CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DAN SPECK, Plaintiff and Appellant, v. PACIFIC CYCLE, INC., Defendant and Respondent.	B204800 (Los Angeles County Super. Ct. No. BC346669)

APPEAL from a judgment of the Superior Court for Los Angeles County, David L. Minning, Judge. Affirmed.

Ross & Morrison, Gary B. Ross, and Andrew D. Morrison for Plaintiff and Appellant.

Davis DeYoung, Richard W. Davis and Laurie DeYoung for Defendant and Respondent.

Plaintiff Dan Speck appeals from a summary judgment in favor of defendant Pacific Cycle, Inc. (Pacific) in his lawsuit alleging age discrimination, wrongful termination, breach of contract, violation of Business and Professions Code section 17200, and intentional and negligent infliction of emotional distress. Pacific contends that Speck's lawsuit had no merit because Speck's position in the company was eliminated and his employment was terminated as part of a company-wide reduction in force. Speck contends there was no reduction in force and that the termination was motivated by age discrimination. The evidence he produced in opposition to Pacific's motion for summary judgment, however, is insufficient to raise a triable issue of material fact. Accordingly, we affirm the judgment.

FACTUAL BACKGROUND

Speck was employed in the business of bicycle sales for more than 30 years. In September 2001, he received an offer of employment from Pacific Cycles, LLC (predecessor to defendant Pacific). He accepted the offer and was hired as the Regional Sales Manager for the western United States. At the same time Speck was hired, Will Rafter was hired as the Regional Sales Manager for the eastern United States. In May 2003, Rafter left his position as Regional Sales Manager, and his responsibilities were assumed by Nick Andrade. Andrade was Vice President IBD Sales, and was Speck's direct supervisor.[1]

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[1] Apparently, Pacific is organized into multiple divisions. Speck worked in the "IBD" division, which is responsible for sales of Pacific products to independent bicycle dealers. The "mass" division is responsible for sales to mass market retailers such as Walmart.

In or around October 2004, Robert Ippolito became the general manager of the IBD division (his title eventually was Executive Vice President IBD). Shortly thereafter, in mid-December 2004, he hired Jennifer Garner to a newly created position as Director, Product Line Management & Forecasting.[2] Garner was responsible for managing the new product introduction process and for working with the sales and purchasing departments to create and manage sales forecasts and to ensure that orders are placed accordingly.

In February 2005, Andrade asked Ippolito for a reduction in his travel responsibilities. The responsibilities of a Regional Sales Manager, which Andrade had assumed in May 2003, included significant travel, and Andrade needed to spend more time in California so he could care for his grandchildren. In response to Andrade's request, Ippolito created a new position, National Sales Manager, and promoted Speck to that position. As Ippolito explained in an email to Speck and Andrade on February 24, 2005, Ippolito "split up" Speck's and Andrade's responsibilities, with Speck "tak[ing] on the direct line function to manage the outside sales area and [Andrade] . . . tak[ing] on a more strategic role." Speck would have responsibility for forecasting, product selection, dealer management, outside sales force management, and consumer shows.

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[2] There is a conflict in the evidence regarding whether Garner was hired into the IBD division. Heidi Coopman, who was the Human Resources Manager for Pacific at the time Garner was hired, stated in her declaration filed in support of the summary judgment motion that Garner "was not a member of the sales department and was not an additional person in the IBD Division." In the email that Ippolito sent to Pacific employees (including Coopman) announcing Garner's hiring, however, Ippolito stated that Garner (who had worked for Pacific previously in the mass division) "will take on a new position in the IBD that is very similar to one she had before in the mass [division]" and that Garner "will be working exclusively for the IBD." This conflict in the evidence is not material to the resolution of the summary judgment motion; for the purposes of this appeal, we will assume that she was hired into the IBD division.

In that same email, Ippolito noted that he hired another person, Sean Walters, to "manage the operational side of our business, analyze strategic alternatives and manage sales reporting," in addition to other responsibilities.[3] Although the position Walters was hired to fill -- Director IBD Sales Operation -- was new, he was hired in part to fill the position previously held by Mitzi Krone, who had left her position in the IBD division (as Director of Customer Service) in October 2004.

After Speck was promoted to National Sales Manager, he and Ippolito decided it might be a good idea for Speck to move to the Midwest. Although moving was not required for Speck to perform his job, they both agreed it would be easier for Speck to travel to all parts of the country if he were based in the Midwest. Pacific agreed to assist Speck in his move, but only if he moved to Madison, Wisconsin, where Pacific had its corporate offices. Before agreeing to the move, Speck asked Ippolito if his job was secure, and Ippolito assured him that it was. Ippolito continued to reassure Speck about the security of his job, including at a sales meeting in Madison on June 2, 2005.

Speck put his house in Crestline on the market in April 2005, but got no offers on it. In the meantime, Speck's in-laws sold their house in Crestline and moved to Missouri, where some of their friends lived, based in part upon the information Speck received from Ippolito.

In May or June 2005, the President of Pacific informed Ippolito and other department heads that there needed to be a company-wide reduction in force. Each department head was instructed to identify possible positions that could be

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[3] Although the email was sent on February 24, 2005, it appears Walters did not begin his employment until March 2005.

eliminated and employees who could be laid off.[4] Ippolito examined every position within his division, analyzing the specific skills, experience, and abilities that were required for the position, determining how necessary the position was for the success of the division, and deciding whether there were other employees capable of taking on the responsibilities of the position. He concluded that National Sales Manager was the most superfluous position because the responsibilities of that position could be reassigned to other employees. After he consulted with the human resources department, a decision was made to eliminate the position and terminate Speck's employment. A total of six positions were eliminated (in at least four departments), and eight employees were laid off as part of the reduction in force.

On June 16, 2005, Ippolito told Speck that his position was being eliminated and that his employment was terminated. During that conversation, Ippolito told Speck that there was an open sales position in the southeast that he could apply for, but Speck declined to apply for that position. Speck was 56 years old at the time of his termination.

After Speck's position was eliminated, his responsibilities were divided among other employees. Although there is conflicting evidence regarding which

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[4] There is some ambiguity in the record regarding exactly when the department heads were told about the reduction in force. Ippolito stated in his declaration that he was informed of the reduction in force and was requested to identify positions that could be eliminated "[i]n or about June 2005." However, Coopman, the human resources manager at the time, testified in her deposition that she was told in "[a]pproximately May -- early May 2005, mid May -- I mean, approximately late spring" that department heads had been instructed to identify candidates for layoff. She also testified that she was first informed that Speck was going to be terminated in "[m]id May, late May 2005." This appears to be inconsistent with her testimony that the decision about which of the 20 to 25 candidates for termination would be selected for termination was not made until a meeting held in early June 2005.

employees assumed which responsibilities,[5] it is undisputed that Andrade -- who was 62 years old[6] -- took over a majority of them. It also is undisputed that some of Speck's other responsibilities were assumed by Walters, who was 43 years old. As a result of taking on Speck's responsibilities, Andrade was required to travel significantly once again.

About a year later, in or about May 2006, Andrade again approached Ippolito and again requested a reduction in his travel time. Ippolito concluded that, to accommodate Andrade's request, it would be necessary to reinstate the position of National Sales Manager. After discussing with Andrade possible candidates from within the company to fill that position, Ippolito promoted Terry Elsen from his position as outside salesperson for the Wisconsin/Illinois district to National Sales Manager, effective August 1, 2006. Elsen was 51 years old at that time. Pacific did not fill the position Elsen vacated, but instead assigned his former sales territory and duties to another outside salesman.

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[5] In response to a form interrogatory, Pacific stated that Speck's duties were divided between Ippolito, Walters, Andrade, and Stephen Balsley, the IBD Sales Operations Manager. Balsley testified in his deposition, however, that none of his job duties changed as a result of Speck's termination. Ippolito filed a declaration in support of the summary judgment motion in which he stated that Speck's duties were divided between himself (purchase forecasting), Walters (sales forecast management), and Andrade (management of salespeople in their interaction with dealers, dealer related credit issues, direct dealer interaction, public relations, promotions, and dealer related trouble shooting). But Andrade testified in his deposition that Ippolito did not assume any of Speck's duties, and that Walters took over revising sales forecasting and dealer related trouble shooting.

[6] Although no evidence of Andrade's age was submitted in support of or opposition to the summary judgment motion, counsel for both parties agreed at the hearing on the motion that Andrade was 62 years old.

PROCEDURAL BACKGROUND

Speck filed the instant lawsuit in January 2006. In the operative complaint, he sets forth six causes of action based upon a common set of facts. He alleges he was subjected to a hostile work environment because he was repeatedly referred to as the "old guy," despite his requests that this conduct cease. He also alleges that he was assured of continued employment and encouraged to move his family to the Midwest as late as June 2, 2005, but was terminated two weeks later. Finally, he alleges that his termination was motivated by his age, and that it has caused him severe emotional and physical distress.

In his first cause of action (the FEHA claim), Speck incorporates by reference the previous allegations and, based on those allegations, alleges that Pacific terminated him based on his age, harassed him based on his age, and failed to remediate and prevent that discrimination/harassment "and/or retaliate[ed] against [him] for his complaints," in violation of the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.).

Speck's second cause of action, for wrongful termination, alleges that Pacific's termination of his employment based on his age violated public policy.

The third cause of action alleges that Pacific breached a written, oral, and implied-in-fact contract by terminating Speck without good cause and "for reasons extraneous to the employment," by failing to follow its personnel policies, and by "misleading plaintiff into preparing to move cross country based on promises and assurances of continued employment" only to later terminate him "based on false and discriminatory reasons."

The fourth cause of action alleges that Pacific's conduct constitutes an unlawful and/or deceptive business practice in violation of Business and Professions Code section 17200 (section 17200).

The fifth cause of action for intentional infliction of emotional distress (the IIED claim) is based upon the emotional distress caused by Pacific's alleged discrimination against Speck and its termination of his employment after assuring him that his job was secure and encouraging him to make arrangements to move cross-country.

In the sixth cause of action for negligent infliction of emotional distress (the NIED claim), Speck alleges Pacific was negligent because it failed to (1) take reasonable steps to avoid subjecting Speck to unwelcome age-based comments; (2) take reasonable care to avoid adverse job actions against Speck based on his age; and (3) take reasonable care to avoid falsely assuring Speck that his job was secure, then terminating him, knowing that he had made arrangements to move his family.

Pacific moved for summary judgment and/or summary adjudication. It contended that Speck's termination was part of a legitimate reduction in force, and therefore Speck could not prevail on any of his claims.[7] In opposition to the motion, Speck contended that there was direct evidence of discrimination -- his supervisors referred to him as the "old guy" -- and asserted that Pacific's justification for his termination was pretext for discrimination because there was no reduction in force and his position was never eliminated. He also argued that Pacific's motion was deficient because it failed to address the retaliation portion of his FEHA claim and the false assurances portion of his IIED claim.

The trial court granted Pacific's motion. The court concluded that the evidence Speck presented to support his contention that there was no reduction in force and that his position was not eliminated was insufficient to raise a triable

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[7] Pacific also argued that Speck's NIED claim was barred by the exclusive remedy provisions of the workers' compensation law.

issue, and that Speck's other evidence was insufficient to show that Pacific's decision to terminate his employment was motivated by age. Addressing the harassment portion of Speck's FEHA claim, the court found that Speck failed to dispute Pacific's evidence that that the alleged "old guy" comments did not affect Speck's job performance, and therefore he could not establish a claim for harassment. Based upon its conclusion that the undisputed facts established there was no discrimination or harassment and that there was a legitimate reduction in force, the court found that Speck could not establish his retaliation, wrongful termination, breach of contract, section 17200, or IIED claims. Finally, the court found that Speck's NIED claim was barred by workers' compensation law.

Speck timely filed a notice of appeal from the resulting judgment.

DISCUSSION

On appeal, Speck contends that he presented sufficient evidence to raise triable issues regarding whether there was a reduction in force and whether his position was eliminated. He argues that these triable issues preclude summary adjudication of each of his claims. In addition, argues that summary adjudication of his FEHA claim and his IIED claim was improper because Pacific's motion did not specifically address the retaliation allegation of the FEHA claim or the false assurances allegation of his IIED claim. We disagree.

A. *Summary Judgment Rules and Standard of Review*

A defendant moving for summary judgment must present evidence that one or more elements of the plaintiff's claim cannot be established or that there is a complete defense to the claim. If the defendant meets that burden of production, the burden shifts to plaintiff to show that a triable issue of material fact exists as to that claim or defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826,

850.) The plaintiff shows that a triable issue of material fact exists by pointing to evidence that would allow a reasonable trier of fact to find that fact in favor of the plaintiff. (*Ibid.*) If plaintiff fails to do so, the defendant is entitled to judgment as a matter of law. On appeal from a summary judgment, we make "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

B. *The FEHA Claim*

The operative complaint arguably alleges three grounds for the FEHA claim: age discrimination, harassment, and retaliation.[8] We begin our review with the harassment portion of the claim.

1. *Harassment*

To prevail on a claim of harassment under the FEHA, a plaintiff must establish that (1) he or she belongs to a protected group; (2) he or she was subject to unwelcome harassment based upon a characteristic protected under the FEHA; (3) the harassment was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (4) respondeat superior. (See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 (*Fisher*) [elements of sexual harassment].) Speck alleged that he was subject to harassment because he was repeatedly referred to as "the old guy" and

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[8] We use the term "arguably" because the allegations of the complaint focus upon the alleged discrimination and harassment, and make only a passing reference to retaliation.

that "defendants" continued to make those comments even after he asked "defendants" to stop.

In support of its summary judgment motion, Pacific presented evidence that Speck could identify only 15 instances in three and a half years in which he was referred to as "the old guy,"[9] and that Speck testified at his deposition that those comments were "just . . . in the back of [his] mind" and did not affect his job performance. Pacific argued in the trial court, and argues on appeal, that this evidence -- particularly Speck's deposition testimony -- is fatal to his harassment claim because he cannot establish that the age-based comments were so pervasive that they altered the conditions of his employment. Speck did not dispute the facts, but instead argued (and argues here) that interference with job performance is not a prerequisite of a harassment claim, and that the altered condition of employment element can be satisfied by showing that the harassing conduct disrupted the employee's "'emotional tranquility in the workplace.'" (Quoting *Fisher*, *supra*, 214 Cal.App.3d at p. 608.)

Speck's reliance upon the quoted language from *Fisher* is misplaced. That language comes from the *Fisher* court's discussion of the Fair Employment Housing Commission's reasoning for recognizing a cause of action for work environment sexual harassment. (*Fisher*, *supra*, 214 Cal.App.3d at p. 608.) Based on that reasoning, the court concluded that "the creation of an offensive or hostile

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[9] That evidence, and the evidence that Speck submitted in opposition to the motion, show that in all but one instance, the comments were made by Andrade, who referred to himself and Speck as "the old guys" (Andrade was six years older than Speck). The other instance took place at a sales meeting on June 2, 2005, shortly before he was terminated. After attending a company function, Speck decided to return to the hotel with his sales representatives rather than join Ippolito, Walters, Garner, and members of the product team, who "wanted to go out and party." Ippolito said, "yes, you old guys have to go back and get your sleep."

work environment due to sexual harassment can violate FEHA irrespective of whether the complainant suffers tangible job detriment." (*Ibid.*) The court then set out the elements for a harassment cause of action and stated that, with regard to the altered condition of employment element, "[t]he plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that [the plaintiff] was actually offended." (*Id.* at pp. 609-610, fn. omitted.)

The trial court in this case found that Speck's testimony that the age-based comments did not affect his job performance precluded his harassment claim. But the fact that Speck's job performance was not affected does not, by itself, preclude his harassment claim. As *Fisher* explains, "'an employee need not prove tangible job detriment to establish a . . . harassment claim.'" (*Fisher*, *supra*, 214 Cal.App.3d at p. 610; see also *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 22-23.) However, "'the absence of such detriment requires a commensurately higher showing that the . . . harassing conduct was pervasive and destructive of the working environment.'" (*Fisher, supra*, 214 Cal.App.3d at p. 610.) To meet that requirement, the plaintiff must show "extreme" conduct: "'simple teasing,' [citation], offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1377, quoting *Faragher v. Boca Raton* (1998) 524 U.S. 775, 788.) Moreover, the harassing conduct "cannot be occasional, isolated, sporadic, or trivial[;] rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Fisher*, *supra*, 214 Cal.App.3d at p. 610; accord, *Jones*, at pp. 1377-1378.)

The undisputed evidence in this case establishes the harassing conduct consisted of 15 instances over three and a half years in which Speck was referred to as an "old guy." In all but one of those instances, the comment was made by Andrade, who referred to himself and Speck as "the old guys." As a matter of law, this is not the kind of extreme conduct that alters the conditions of employment and creates a hostile or abusive work environment. Therefore, Pacific is entitled to summary adjudication of the harassment portion of Speck's FEHA claim.[10]

2. *Discrimination and Retaliation*

The remainder of Speck's FEHA claim must be analyzed under the burden-shifting test first developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. Under that test, a plaintiff alleging discrimination or retaliation has the initial burden to establish a prima facie case. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*) [age discrimination]; *Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1109 (*Loggins*) [retaliation].) For age discrimination, the plaintiff must show that (1) he was a member of a protected class; (2) he was performing competently in the position he held; (3) he suffered an adverse employment action; and (4) some other circumstance suggests discriminatory motive. (*Guz, supra*, at p. 355.) For retaliation, the plaintiff must show that (1) he engaged in a protected activity; (2) he was subjected to an adverse employment action; and (3) a causal link between the protected activity and the employer's action. (*Loggins, supra*, at p. 1109.)

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[10] Because we affirm the summary adjudication on a ground not relied upon by the trial court, we afforded both parties an opportunity to submit supplemental briefs on this issue. (Code Civ. Proc., § 437c, subd. (m)(2).)

If the plaintiff establishes a prima facie case, a presumption of discrimination or retaliation arises, and the burden shifts to the defendant to provide evidence sufficient to establish that its action was taken for a legitimate, nondiscriminatory (or nonretaliatory) reason. If the defendant sustains this burden, the presumption of discrimination or retaliation disappears and the burden shifts back to the plaintiff to provide evidence that the defendant's proffered reason was untrue or pretextual. (*Guz*, *supra*, 24 Cal.4th at pp. 355-356; *Loggins*, *supra*, 151 Cal.App.4th at p. 1109.) Even if the plaintiff can show that the defendant's proffered reason was pretextual, however, "[t]he ultimate burden of persuasion on the issue of actual discrimination [or retaliation] remains with the plaintiff." (*Guz, supra*, at p. 356.)

In support of its summary judgment motion in this case, Pacific presented substantial evidence that it terminated Speck's employment for a legitimate, nondiscriminatory or nonretaliatory reason: his position was eliminated as part of a reduction in force, and he was chosen for termination because his responsibilities could be assumed by other employees. Speck argues that the evidence he produced in response to the motion shows there was no reduction in force and his position was not eliminated. In addition, he points to facts from which he contends a trier of fact could infer that the real reason he was terminated was age discrimination.[11] He is mistaken.

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[11] We note that in his briefs on appeal, Speck fails to cite to any *evidence* in support of his arguments. Instead, he cites only to the facts set forth in his separate statement of facts and not the evidence supporting those facts. Although we have discretion to disregard any contentions unsupported by proper page cites to the record, we will disregard Speck's failure to comply with appellate rules in this instance. (See Cal. Rules of Court, rule 8.204(a)(1)(C); *Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1024-1025.)

a. *Speck's contention that there was no reduction in force*

Speck's argument that there was no reduction in force is based upon the fact that Pacific hired two employees -- Garner and Walters -- into newly created positions in the IBD division in the months before he was terminated. Thus, he contends there was an expansion of the division rather than a downsizing. In fact, there was at most only one additional employee in the IBD division, since Walters replaced another employee, Mitzi Krone, albeit with a different title. But in any event, Garner and Walters were hired in December 2004 and March 2005, respectively, and the undisputed evidence shows that the department heads were not told about the reduction in force until May or early June 2005. As the trial court correctly noted, the addition of one or two employees to a division several months before a company-wide reduction in force does not tend to refute the contention that there actually was a reduction in force. In fact, the undisputed evidence shows that in June 2005, Pacific eliminated six positions and terminated eight employees in several departments. Thus, Speck failed to raise a triable issue as to whether there was a reduction in force.

b. *Speck's contention that his position was not eliminated*

Speck's attempt to raise a triable issue as to whether his position was eliminated also is unavailing. First, he argues that Pacific's contention that it eliminated the position of National Sales Manager in June 2005 is "undermined" by the fact that it reinstated the position in August 2006, but never considered rehiring Speck for the position.[12] While this fact may show that Pacific's decision in June 2005 to eliminate the position was not a wise one, it has no relevance to

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[12] We note that at the time Pacific reinstated the position, this lawsuit had already been filed.

whether the position was in fact eliminated. (See *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 ["It is not enough for the employee simply to raise triable issues of fact concerning whether the employer's reasons for taking the adverse action were sound"].)

Speck also argues that he raised a triable issue by producing deposition testimony from Terry Elsen, the person promoted to National Sales Manager in August 2006, that the position of National Sales Manager was never eliminated. But that testimony must be read in context. Earlier in his deposition, Elsen testified that *Andrade* was National Sales Manager and Speck was the Regional Sales Manager. He said he did not recall being told that Speck was National Sales Manager, and at no time did he understand that Speck held that position. In the question immediately preceding the testimony Speck relies upon, Elsen was asked, "But you understood the position of national sales manager had existed throughout the time up until you accepted that position?" Elsen responded, "Correct. It was filled by Nick Andrade." He then was asked, "And so far as you were aware, that position was never eliminated from Pacific?" He answered, "Correct."

Clearly, Elsen's testimony that the National Sales Manager position was never eliminated is without foundation because it is based upon a premise -- that Speck never held that position -- that is contrary to the undisputed facts. Speck himself contends he was promoted to National Sales Manager in February 2005. There is no dispute that Andrade assumed many of Speck's former responsibilities after Speck was terminated, and there is no evidence that anyone was hired to fill Speck's vacated position after his termination until August 2006. Given its faulty foundation, Elsen's testimony does not raise a triable issue as to whether the position was in fact eliminated as part of the reduction in force.

c. *Other asserted facts related to pretext or discrimination*

Speck contends there are other facts that raise triable issues about whether Pacific's reasons for terminating him were pretextual or discriminatory: (1) the timing of the termination; (2) the lack of documentation regarding how the decision to terminate him was made; (3) Ippolito was unable to articulate to Andrade the basis for his decision; (4) Pacific sought a release of Speck's claims when it terminated him; (5) Pacific hired younger workers before terminating him, and his duties were assumed by younger workers; and (6) Speck was more qualified for the position than the person who later took over the position. We are not persuaded.

Speck argues that the timing of his termination -- two weeks after announcing his promotion at the national sales meeting and reassuring him that his job was safe -- shows that Pacific's stated reason for terminating him is implausible.[13] We fail to see the connection. Even assuming that the decision to terminate Speck was made sometime in May 2005, before the national sales meeting, the fact that Ippolito did not tell Speck about his termination until the reduction in force was made public does not raise an inference that the reduction in force was a pretext to fire Speck for improper motives.

Similarly, the absence of documentation raises no inference of pretext. Although his argument on this point is somewhat vague, it appears that Speck contends that the trier of fact could infer nefarious motives on the part of Pacific because it did not produce any documentation of the decision process, even though

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[13] He also notes that a termination closely following complaints of harassment or discrimination can be evidence of a retaliatory motive. He presented no evidence, however, to establish when he complained to Andrade about the "old guy" comments, or even if the person who made the decision to terminate him had any knowledge of those complaints.

Coopman testified that she saw a printout of possible candidates for termination at the June 2005 meeting in which the final decisions were made regarding who would be terminated. But there is no evidence that that printout, or any other documentation, was retained following that meeting; Coopman testified that she last saw the printout at the meeting and did not know what happened to it. To infer that Pacific destroyed the printout or other documentation to conceal its improper motives for terminating Speck would be pure speculation, which is insufficient to raise a triable issue of fact. (See *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807 ["[A]n issue of fact can only be created by a conflict of evidence. It is not created by speculation or conjecture"].)

Equally speculative is the inference urged by Speck arising from Ippolito's failure to respond when Andrade asked him why Speck had been terminated. Speck seems to argue that the trier of fact may infer from Ippolito's silence that Speck was terminated for improper reasons. He supports his argument with a citation to CACI No. 214 (Admissions by Silence), which is based upon the doctrine of adoptive admissions. As the Supreme Court explained in *Estate of Neilson* (1962) 57 Cal.2d 733, the doctrine applies "[w]hen a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue" and the party reacts to that statement with silence, evasion, or equivocation. (*Id.* at p. 746.) In such circumstances, the party's reaction "may be considered as a tacit admission of the statements made in his presence." (*Ibid.*) The court made clear, however, that if the statements are not accusatory, the party's failure to respond is not an admission. (*Id.* at p. 747.) Because there is no evidence in this case that Andrade's question was accusatory -- he simply asked Ippolito why Speck had been terminated -- there can be no inference from Ippolito's silence that the reasons for Speck's termination were improper.

Speck's next assertion -- that Pacific's attempt to have him sign a release of any legal claims at the time it terminated him is evidence of its discriminatory animus -- was rejected by the trial court on the ground that the proposed release was inadmissible under Evidence Code section 1152. Speck does not challenge the court's evidentiary ruling on appeal, except to say that the court "accepted defendant's novel argument" that the release was inadmissible. Therefore, he has forfeited this issue.[14] (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015.)

The remaining facts that Speck contends raise triable issues are for the most part irrelevant. That Pacific hired two younger employees, Garner and Walters, in the months before Speck was terminated does not raise a triable issue as to its motive for the termination. As discussed above, the addition of one or two employees several months before the reduction in force does not tend to refute Pacific's contention that the termination was part of a legitimate reduction in force. The fact that those new employees were younger than Speck does not make it any less likely that there was a legitimate reduction in force. Similarly, the fact that some of Speck's duties were assumed by one or more employees who were younger than Speck is irrelevant in light of the undisputed evidence that most of his duties were assumed by Andrade, who was older than Speck. Finally, the fact that Speck was more qualified than Elsen, who was promoted to the reinstated

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[14] We note that, although the Ninth Circuit has held that a general release offered to a terminated employee who has not made a claim against the employer may be evidence of the employer's improper motive for terminating the employee (*Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F.2d 1338, 1342), other courts have disagreed with that holding. (See, e.g., *Courtney v. Biosound, Inc.* (7th Cir. 1994) 42 F.3d 414, 420 ["this court has said that no inference of guilt can be drawn from a company's sensitivity to its potential liability under the age discrimination law when discharging a protected older worker, unless 'the innocuous evidence of age awareness' is made significant by other evidence that would give rise to such an inference"].)

National Sales Manager position more than a year after Speck was terminated, sheds no light on Pacific's motivation for eliminating the position as part of its reduction in force.

In short, Speck failed to present evidence sufficient to raise a triable issue that Pacific's stated reason for terminating him was pretext or that Pacific had a discriminatory motive. Therefore, the trial court correctly concluded that Speck could not establish the discrimination portion of his FEHA claim. We note, however, that the trial court's stated reason for rejecting the retaliation portion of Speck's FEHA claim -- that Speck "could not have been retaliated against for complaining about something that was not unlawful" (i.e., the "old guy" comments) -- is an incorrect statement of the law. (See, e.g., *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043 ["It is well established that a retaliation claim may be brought by an employee who 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"].) Nevertheless, in light of the absence of any triable issue of pretext, the retaliation portion of Speck's FEHA claim necessarily fails.[15] (*Loggins*, *supra*, 151 Cal.App.4th at p. 1113.) Pacific's failure to directly address in its motion for summary judgment the complaint's single reference to retaliation does not preclude summary adjudication of the entire FEHA claim, since Pacific did produce evidence that it had a legitimate reason for terminating Speck and established there was no evidence that its reason was pretextual.

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[15] We gave both parties an opportunity to file supplemental briefs on this issue in accordance with Code of Civil Procedure section 437c, subdivision (m)(2).

C. *The Wrongful Termination, Breach of Contract, and Section 17200 Claims*

Speck concedes in his opening brief on appeal that his wrongful termination and section 17200 claims are entirely dependent upon the viability of his FEHA claim. He also concedes that the only issue as to his breach of contract claim is whether there are triable issues regarding Pacific's stated grounds for termination. In light of our conclusion that Speck failed to raise any triable issue that his termination was not the result of a legitimate reduction in force, Pacific is entitled to summary adjudication of all three of these claims.

D. *The IIED and NIED Claims*

To the extent that Speck's IIED and NIED claims are based upon his allegations of discrimination or harassment, Pacific is entitled to judgment in light of the absence of triable issues as to Speck's FEHA claim. But Speck's claims are also based upon his allegation that Pacific terminated his employment after assuring him that his job was secure and encouraging him to make arrangements to move cross-country. Nevertheless, Pacific demonstrated that it is entitled to judgment on the entirety of those claims.

In its motion for summary judgment, Pacific argued that, because Speck could not establish he was discriminated against or harassed based upon his age, his NEID claim was barred by the workers' compensation law's exclusive remedy rule. The trial court correctly found the claim was barred. The California Supreme Court has repeatedly held that, where an employee alleges a claim for infliction of emotional distress based upon conduct occurring in the workplace, the claim is preempted by the exclusivity provisions of the workers' compensation law unless the alleged conduct violates an express statute or is a violation of fundamental public policy. (See *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 902; *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 713-714; *Livitsanos*

v. Superior Court (1992) 2 Cal.4th 744, 754; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 25; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160.) There is no question that the conduct at issue -- assuring Speck that his job was secure, then terminating him, knowing that he had made arrangements to move his family -- occurred in the workplace. Therefore, his claim for NIED is barred.

Although the workers' compensation exclusivity rule applies to both IIED and NIED claims, Pacific did not assert that rule with regard to the IIED claim. Instead, Pacific argued that it was entitled to judgment because Speck could not establish outrageous conduct by Pacific.

To establish a claim for IIED, the plaintiff must prove: "'''''(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.''''' (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) "In evaluating whether the defendant's conduct was outrageous, it is 'not . . . enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' [Citation.]" (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496.)

Pacific argued in its moving papers that "[f]iring an employee does not constitute 'outrageous' conduct, even if the firing is without cause." Speck argued in opposition that Pacific's motion must be denied because Pacific's argument did

not specifically address his allegation that Pacific "terminat[ed] plaintiff immediately after assuring him of long term employment." In reply, Pacific noted that it had shown, in connection with the breach of contract claim, that its termination of Speck was with good cause. Therefore, it argued that as a matter of law, Speck could not establish outrageous conduct with regard to that termination. The trial court found that Speck's allegations of false assurances of employment were the basis of his breach of contract claim, that Pacific established the termination was with good cause, and therefore Pacific was entitled to judgment on his IIED claim. The trial court was correct.

"While the outrageousness of a defendant's conduct normally presents an issue of fact to be determined by the trier of fact [citation], the court may determine in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. [Citations.]" (*Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883.) Speck argues that Pacific's conduct was outrageous because it reassured him that his job was safe and encouraged him to move during the four months preceding his termination. But as discussed above, Speck failed to raise a triable issue that his termination was not the result of a legitimate reduction in force, nor did he present evidence that Pacific made those repeated assurances with knowledge they were going to eliminate his job. At most, there is disputed evidence that Ippolito may have known that Speck's job might be eliminated when he told Speck his job was safe on June 2, before the reduction in force was implemented. Although Speck undoubtedly was distressed by his sudden termination, Pacific "cannot be subject to liability for infliction of emotional distress when it has merely pursued its own economic interests" by implementing a company-wide reduction in force. (*Id.* at p. 885.)

DISPOSITION

The judgment is affirmed. Pacific shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.