Order After Hearing

Re:	***Wade v. Starbucks Corp. et al.*** Superior Court Case No. 18CECG02779
Hearing Date:	June 11, 2019 (Dept. 503)
Motion:	Defendants' Motions for Summary Judgment or, in the Alternative, for Summary Adjudication

Ruling:

Both motions for summary judgment are granted. (Code Civ. Proc. § 437c(c).) Defendants are directed to submit to this court, within seven (7) days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Explanation:

In this action, plaintiff Maddie Wade ("plaintiff") alleges that she was discriminated against, harassed, and constructively discharged after revealing to her manager, defendant Dustin Guthrie ("Guthrie"), that she was diagnosed with gender dysphoria and would be transitioning from male to female. The complaint alleges four causes of action: (1) wrongful constructive termination against plaintiff's employer, defendant Starbucks Corporation ("Starbucks"); (2) discrimination on the basis of sex, gender, gender identity, and/or gender expression against Starbucks; (3) harassment on the basis of sex, gender, gender identity, and/or gender expression against Starbucks and Guthrie; and (4) intentional infliction of emotional distress against Starbucks and Guthrie. Plaintiff seeks punitive damages.

Defendants both move for summary judgment or, alternatively, summary adjudication of each cause of action against them, as well as the punitive damages claim. As the relevant facts are essentially the same in each motion, the court treats the two motions as one.

First Cause of Action – Wrongful Constructive Termination (Against Starbucks)

"In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251, emphasis added.) However, "an employee may not be unreasonably sensitive to his [or her] working environment . . . as every job has its frustrations, challenges, and disappointments." (*Id.* at p. 1247.) "[A]n employee cannot simply 'quit and sue,' claiming he or she was constructively discharged. The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to

earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Id.* at p. 1246.)

According to plaintiff, she initially had a very good relationship with Guthrie, whom she worked for at the Milburn Starbucks location. On October 1, 2017, plaintiff informed Guthrie of her gender dysphoria diagnosis and desire to transition to female, and that she desired to be called Maddie (as opposed to Matt) and referred to with female pronouns. Plaintiff alleges that, during this time period, her relationship with Guthrie deteriorated as he had little contact with plaintiff, reduced her hours (but did not reduce the hours of other employees), and leered at and intimidated plaintiff.[1] For the next six to eight weeks, plaintiff began the transition process. Guthrie had a hard time referring to plaintiff with female pronouns, never called her Maddie, and instead continued to refer to her as "Matt," "brother" and "man." Plaintiff continued to wear her "Matt" nametag and to sign "Matt" on papers and other Starbucks documents.

In early February 2018, plaintiff asked for and received a transfer to another Starbucks location managed by Joy Garner ("Garner"). Plaintiff's last day at Guthrie's Starbucks store was March 11, 2018; it is also the date that plaintiff commenced an eight-week leave of absence for facial feminization surgery. Plaintiff returned from leave and started work at Garner's store on May 7, 2018. One week later, plaintiff reminded her location manager that she wanted to meet with District Manager Tatiana Stockton to discuss her grievances regarding her treatment by Guthrie at the Milburn location. On May 23, 2018, the district manager called to schedule a time to speak with plaintiff. Plaintiff replied by text with available dates. Not having heard back about the date for the meeting, plaintiff resigned from her employment with Starbucks on June 5, 2018. When asked why she resigned, plaintiff said: (1) she was not able to meet with Tatiana Stockton; (2) Garner ignored company policy on several issues (none relating to plaintiff's alleged mistreatment regarding her gender identity); (3) plaintiff had accumulated stress that resulted from her recovery from facial feminization surgery; and (4) Garner brushed off concerns brought to her attention by employees (again, none relating to plaintiff's alleged mistreatment). Plaintiff did not resign due to any mistreatment by coworkers at her the new store. Rather, plaintiff disagreed with how Garner ran her store and felt she could not work in such an environment.

As stated in *Turner v. Anheuser-Busch, Inc., supra*, constructive discharge occurs when working conditions were so intolerable or aggravated "at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra*, 7 Cal.4th at 1251.) Certainly the history of what plaintiff experienced over time has an impact and is relevant. But, in this case, Guthrie is the only person plaintiff alleges to have mistreated her in any way. Starbucks honored plaintiff's request to be removed from Guthrie in granting her request to transfer to Garner's store. Plaintiff left Guthrie and his store March 11, 2018. Plaintiff was then on leave for eight weeks, and returned to work at a new location, free of Guthrie. Plaintiff resigned three weeks later after experiencing difficulties with the way the Barstow location was managed. Accordingly, about 11 weeks went by between plaintiff's successful removal of herself from the one

[1] This conduct was directed at all employees, not just plaintiff.

person who purportedly discriminated against her and her decision to end her employment with Starbucks. Plaintiff fails raise a triable issue as to whether her working conditions were so intolerable "at the time of [her] resignation that [she] would be compelled to resign." (*Turner, supra*, 7 Cal.4th at p. 1251.)

Moreover, an employee's "resignation must be employer-caused[;]" thus, the employer "must know about [the intolerable working conditions] and fail to remedy the situation in order to force the employee to resign." (*Id.* at pp. 1249-1250.) To the extent that the working conditions under Guthrie were intolerable, Starbucks remedied the situation by granting plaintiff's request to transfer. Eleven weeks passed between the last time plaintiff worked under Guthrie and her abrupt resignation.

Additionally, the evidence shows that the conditions at Guthrie's store were not so intolerable. There was testimony of some "leering" and intimidating behavior by Guthrie, but this was directed at all employees, not just plaintiff. Plaintiff's main problem with Guthrie was his failure to use the proper pronouns based on plaintiff's gender identity. While plaintiff did ask Guthrie and other employers to call her Maddie and refrain from using male pronouns, plaintiff herself describes an equivocal request. She testified, "I left it open-ended because I don't want to make anybody feel like I'm trying to force them to call me something. So I asked that, respectfully, I be called Maddie, if that's okay. If not, no big deal. If you would just refrain from calling me Matt and male pronouns." (Wade Depo. at p. 41:4-9.) As plaintiff describes the request, the court cannot conclude that this was a request that, if not honored, would result in an intolerable or hostile work environment.

Plaintiff contends that proper gender classification is a vital component of the transition process and that courts have concluded that continual verbal misgendering constitutes harassment and discrimination based on gender and gender expression, citing *Doe v. Boyertown Area Sch. Dist.* (3rd Cir. 2018) 893 F.3d 179, 184. However, this decision should *not* be cited as authority, as rehearing was granted and the opinion vacated on July 26, 2018. (*Doe v. Boyertown Area School District* (3d Cir. 2018) 897 F.3d 515.) Other cases cited by plaintiff are clearly distinguishable from the present facts. (See *Grimm v. Gloucester Cty. Sch. Bd.* (E.D. Va. 2018) 302 F.Supp.3d 730 [denying motion to dismiss in a Title IX sex discrimination case where the transgender plaintiff was denied access to restrooms corresponding with his gender identity]; *Prescott v. Rady Children's Hospital-San Diego* (S.D. Cal. 2017) 265 F.Supp.3d 1090 [denying a motion to dismiss in a gender discrimination case brought under the Affordable Care Act because transgender discrimination falls under federal law's prohibition against discrimination on the basis of sex]; *McKibben v. McMahon* (C.D. Cal. 2019) 2019 WL 1109683 [plaintiff relies on a provision in a class action settlement]; *Diamond v. Owens* (M.D. Ga. 2015) 131 F.Supp.3d 1346 [denying motions to dismiss claims filed against multiple defendants for violation of a transgender plaintiff's constitutional right when defendant prisons failed to provide plaintiff with medical treatment or protect her from sexual assault].)

Finally, plaintiff's communications during her transitioning period, during which she was allegedly harassed by Guthrie, indicate that the atmosphere was not intolerable. On January 25, 2018, co-worker Zaire Dean texted Guthrie in a group text, "Dustin your [sic] awesome! Nobody's perfect but all you can do is try. No other team I

rather be on! Thank you Dustin for all your hard work and being there for us all." Plaintiff replied, "agreed, I finally got a chance to sit down and read this. Thanks Dustin you are awesome. I'm happy to be a part of this team as well. I have never seen a store on par with what we have here." (Starbucks' Appendix of Declarations and Exhibits, at Ex. B.) Plaintiff's own words show that Guthrie's workplace conduct was not intolerable.

Accordingly, the motion is granted as to the first cause of action.

Second Cause of Action – Discrimination (Against Starbucks)

Plaintiff's second cause of action is for discrimination on the basis of sex, gender, gender identity, and/or gender expression in violation of Government Code section 12940, subdivision (a). Plaintiff must establish that (1) she belongs to the relevant protected classes or was perceived as belonging to them; (2) she was performing her job satisfactorily; (3) she suffered an adverse employment action such as termination, demotion, or denial of an available job; and (4) there is a causal connection between the adverse action and her protected classifications. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 354-356.)

In employment discrimination claims, "[t]he burden-shifting system requires the employee first establish a prima facie case of . . . discrimination. If the employee does so, the employer is required to offer a legitimate non-[discriminatory] reason for the adverse employment action. If it does not, then the employee prevails." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1002.)

Starbucks contests the third and fourth elements. Starbucks contends that the only adverse employment action asserted by plaintiff is her constructive discharge. As addressed above, there was no constructive discharge. Plaintiff's opposition does not directly argue that there was any other adverse employment action.

There is mention, however, of reduction in working hours and elimination of plaintiff from a training program. Neither party addresses whether this constitutes an adverse employment action. Regarding the training program, plaintiff does not present clear evidence on this point. It was apparently a goal of plaintiff's to train for an assistant manager position, and there may have been some discussion about it with Guthrie, but "Guthrie never contacted [plaintiff] again about the Assistant Manager training program." (Wade Dec. at ¶¶ 17, 18.) Without more information about this program, the court cannot find a triable issue as to an adverse employment action. Was it a formal program? Was plaintiff required to apply for it? Did plaintiff apply or even explicitly request to participate in it? It seems that it simply was something that was in contemplation at one point, but that over the course of a few weeks nothing happened with it. Plaintiff does not show that there was any actual employment action in this regard.

The evidence is vague regarding the reduction in hours, as well. Guthrie testified that all employees' hours were reduced due to a slow-down, apparently after the 2017 year-end holidays. The moving papers provide no documentary evidence of plaintiff's hours in comparison to the hours of other employees, but there is also no objection to Guthrie's testimony.

The opposition is supported by a declaration from plaintiff, in which she states that her hours were reduced from about 38 hours per week to as little as 23.5 hours in a week. But she says nothing of whether other employees' hours were reduced, as well. The opposition also references deposition testimony from two co-workers on the issue of hours reduction. Dean Zaire testified that, at some unspecified point, plaintiff's hours were cut, but nobody else's hours were cut. Dean Zaire stated he knew her hours were cut because he saw everybody's schedule. Rachel Schwehr testified that plaintiff's hours were cut (she did not say to what extent), which she knew because she saw everyone's schedule. But Rachel Schwehr said nothing about other employees' hours.

The evidence on whether only plaintiff's hours were cut is vague and unsupported by clear documentary evidence. But, inasmuch as there are no objections, the court concludes that plaintiff has presented evidence that only her hours were cut. However, there still is no clear evidence as to the extent of the reduction in hours or how long it lasted. Moreover, there must be a causal connection between the adverse action and plaintiff's protected classification. (*Guz, supra,* 24 Cal.4th at pp. 354-356.) Plaintiff offers only speculation that her hours were reduced because of her gender identity. Such speculation is insufficient to establish a *prima facie* case of harassment. (See *Salazar v. Upland Police Dept.* (2004) 116 Cal.App.4th 934, 941 ["An assertion . . . based solely on conjecture and speculation is insufficient to avoid summary judgment"].) Plaintiff does present evidence of multiple anti-trans social media posts by Guthrie. (See Plaintiff's Appendix of Exhibits at Ex. D.) However, Guthrie never made any anti-trans or negative comments about plaintiff or her transition, in or out of work. (UMF Nos. 25-26.) Plaintiff was not aware of Guthrie's social media posts until *after* plaintiff's employment with Starbucks ended. (UMF Nos. 39-40.) Guthrie's posts were not connected to his employment in any way. (See Gov. Code § 12940(j)(l); *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403 [there is no liability where alleged incidents of harassment took place outside workplace and not related to employer's interests].) Accordingly, it is entirely speculative that there was any causal connection between the reduction in hours and plaintiff's gender identity.

Thus, the motion is granted as to the second cause of action.

Third Cause of Action – Harassment (Against Starbucks and Guthrie)

The third cause of action, against both Starbucks and Guthrie, is for harassment on the basis of sex, gender, gender identity, and/or gender expression in violation of Government Code section 12940, subdivision (a). Plaintiff must prove that (1) she was subjected to verbal or physical conduct of a harassing nature that was based on her protected class; and (2) the conduct was sufficiently severe or pervasive to create an objectively and subjectively hostile working environment. (*Fisher v. San Pedro Peninsula Hosp.* (1998) 214 Cal.App.3d 590, 608-09.) To meet the "severe or pervasive" standard for harassment, plaintiff must demonstrate that her workplace was "permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 145; *Fisher, supra,* 214 Cal.App.3d at p. 609.)

Guthrie never made any anti-trans comments or negative comments about plaintiff's transition or gender identity. (UMF Nos. 25-26.) The leering and threats to write-up employees were directed at other non-trans employees, and therefore are not linked to plaintiff's gender identity. There is no evidence that the reduction in hours related to plaintiff's gender identity. The cause of action appears primarily based on Guthrie's failure to use pronouns corresponding to plaintiff's gender identity, and Guthrie's apparent discomfort with and distance from plaintiff after she revealed her diagnosis and intent to transition to female.

Courts in cases involving much more severe conduct have held the conduct not to constitute actionable harassment, including *McCoy v. Pacific Maritime Ass'n* (2013) 216 Cal.App.4th 283, 293-294, where the grant of summary judgment in favor of the defendant employer was affirmed where the plaintiff's coworkers yelled at the plaintiff and called her stupid, stated a women had a "J-Lo ass," speculated about another employee's sexual relationship, and made crude gestures toward an employee with her back turned. In *Jones v. Department of Corrections and Rehabilitation* (2007) 152 Cal.App.4th 1367, 1377-78, conduct was not severe or pervasive where a female corrections officer was physically assaulted, sent to work in a tool shed because male officers did not want her around, criticized daily, and faced with openly hostile coworkers who spread rumors about her.

In her deposition, plaintiff would not describe Guthrie's conduct as outrageous, only unprofessional. She did say his conduct was extreme, but only in the sense of using intimidation in situations having nothing to do with plaintiff in particular, or her gender identity. (Wade Depo. at pp. 218:15-222:9.) As referenced above, on January 25, 2018, plaintiff wrote "... Dustin you are awesome. I'm happy to be a part of this team as well. I have never seen a store on par with what we have here." (Starbucks' Appendix of Declarations and Exhibits, at Ex. B.) Plaintiff's own words show that Guthrie's workplace conduct was not severe or pervasive.

Plaintiff's opposition argues that Guthrie failed to follow Starbucks' guidelines supporting transgender employees. The guidelines provide that partners should be addressed by the pronoun that corresponds to the partner's gender identity. "Intentional or persistent refusal to identify the partner by the pronoun of choice may violate Starbucks' *Anti-Harassment Standard*." (Starbucks' Appendix of Declarations and Exhibits, at Ex. D, p. 6, italics in original.) However, Starbucks' internal policies do not set the standard for what constitutes harassment under the Fair Employment and Housing Act. Plaintiff must prove that she was subjected to verbal or physical conduct of a harassing nature that was based on her protected class, and that the conduct was sufficiently severe or pervasive to create an objectively and subjectively hostile working environment. (*Fisher v. San Pedro Peninsula Hosp.* (1998) 214 Cal.App.3d 590, 608-09.) The undisputed material facts show that Guthrie's conduct did not create a subjectively and objectively hostile work environment.

The motions are therefore granted as to the third cause of action.

Fourth Cause of Action – Intentional Infliction of Emotional Distress (Against Starbucks and Guthrie)

The elements of the tort of intentional infliction of emotional distress are: (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.) "[E]xtreme and outrageous conduct" means conduct "by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Ibid.*)

Here, even crediting plaintiff's version of the facts as accurate, there is no evidence of extreme or outrageous conduct. For the reasons discussed above, the conduct alleged simply does not rise to that level. Plaintiff's oppositions do not actually address the intentional infliction of emotional distress cause of action, or otherwise attempt to show that the cause of action is viable.

Nor is there evidence of severe emotional distress. Plaintiff's only claim for emotional distress directly relating to Guthrie's conduct is that it caused her anxiety and that she lost confidence and felt she could no longer work in a customer-facing job. (UMF Nos. 34-35.) Anxiety alone is not sufficiently intense or enduring so as to rise to the level of severe emotional distress. (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397.) Severe emotional distress means highly unpleasant mental suffering or anguish from socially unacceptable conduct, which entails such intense, enduring and nontrivial emotional distress that "no reasonable man in a civilized society should be expected to endure it." (*Id.* at p. 396.)

Plaintiff argues that defendants conflate the standard of recovery of emotional distress damages under the Fair Employment and Housing Act with the general tort elements for emotional distress. But defendants' argument regarding emotional distress is clearly made in the context of the intentional infliction of emotional distress cause of action, not a cause of action under the Fair Employment and Housing Act.

Accordingly, the motions are granted as to the fourth cause of action.

Punitive Damages

In light of the grant of summary judgment as to all causes of action, it is unnecessary to address the punitive damages claim.

Ruling Issued By: KMcL on 7/3/19.
(Judge's initials) (Date)

EXHIBIT A
-11-