



2 of 2 DOCUMENTS

**ROSARIO HENDERSON, Plaintiff and Appellant, v. TACO BELL OF AMERICA,  
INC. et al., Defendants and Respondents.**

**B207547**

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,  
DIVISION SEVEN**

*2009 Cal. App. Unpub. LEXIS 5513*

**July 8, 2009, Filed**

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**PRIOR HISTORY:** [\*1]

APPEAL from a judgment of the Superior Court of Los Angeles County. Super. Ct. No. BC369599. Gregory W. Alarcon, Judge.

**DISPOSITION:** Affirmed in part, reversed in part and remanded.

**COUNSEL:** Sullivan, Workman & Dee, Robert Hampton Rogers and Theodore S. Khachaturian for Plaintiff and Appellant.

Step toe & Johnson and Katessa C. Davis for Defendants and Respondents.

**JUDGES:** ZELON, J.; PERLUSS, P. J., WOODS, J. concurred.

**OPINION BY:** ZELON

**OPINION**

Appellant Rosario Henderson ("Henderson") filed this action against her former employer for discrimination in violation of the California Fair Employment and Housing Act (FEHA), wrongful termination in violation of public policy, and denial of meal and rest periods in violation of *Labor Code section 226.7*. In her complaint, Henderson alleged that Respondents Taco Bell Corporation and Taco Bell of America, Inc. (collectively "Taco Bell") terminated her employment on the basis of her race and age and in retaliation for her internal complaint about a potential health and safety violation. The trial court granted Taco Bell's motion for summary judgment and entered judgment against Henderson. Henderson now appeals the trial court's grant of summary judgment and its denial of her request to continue the [\*2] summary judgment hearing. For the reasons set forth below, we hold that summary adjudication is proper on the discrimination and wrongful discharge claims, but reverse the judgment because there is a triable issue of material

fact on the Labor Code claim. We also affirm the trial court's order denying Henderson's request for a continuance.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### **I. Henderson's Employment With Taco Bell**

Henderson, a Filipino American, was employed by Taco Bell over a 15-year period. Taco Bell operates a chain of quick service, Mexican style restaurants, each of which is staffed by a Restaurant General Manager, one or more Assistant Managers, and one or more Shift Leads. The management team supervises line employees known as "crew members" in such areas as food preparation, customer service, and adherence to Taco Bell's standards of conduct. Above the restaurant level, Restaurant General Managers report to an Area Coach, who is responsible for overseeing a number of restaurants in an assigned geographic area.

On March 5, 1991, Henderson was hired by Taco Bell as a Shift Manager. Early in her employment with the company, Henderson was provided with training on Taco Bell's [\*3] various policies and protocols, including its cash policy. At all relevant times, the cash policy required employees to be accountable for their assigned cash drawers by, among other things, counting and recording the amount in their drawer at the start and end of their shift and ensuring that no other employees used their drawer during their shift. Excessive cash shortages or overages could result in disciplinary action, including discharge. In September 1994 and January 1995, Henderson received written warnings for violations of the cash policy by her then manager, Michael Kilgore. In April 1997, Henderson received another written warning for a cash policy violation by her then manager, Rajji Gaines.

In February 1998, at the age of 51, Henderson was promoted to an Assistant Manager position. As an Assistant Manager, Henderson was the second highest ranking employee in her assigned restaurant and assumed increased responsibilities. Her duties as an Assistant Manager included maintaining fast and accurate customer service, ensuring that the products sold were consistent with company standards and health and safety codes, and providing leadership, coaching and training to crew members. [\*4] In her 2002 and 2003 annual performance reviews, Henderson was rated overall as meeting expectations. Henderson's 2003 review noted, however, that she needed to work on improving her management skills.

In 2003, Henderson was assigned to Taco Bell's Buena Park restaurant, which was managed by Laura Santos ("Santos"). Soon after Henderson started working there, Santos solicited Henderson to join a pyramid scheme and later asked her for a personal loan. Henderson refused and reported Santos' pyramid scheme to the Area Coach, Kathy Zamani ("Zamani"). Zamani spoke with Santos, who denied any wrongdoing. According to Henderson, Santos then began disciplining her for violations of company policy that Henderson did not commit. Between December 2003 and April 2004, Henderson received four written warnings from Santos for various policy violations. One such warning, issued in February 2004, was for a violation of the cash policy.

In 2004, Henderson was transferred to Taco Bell's Long Beach restaurant, which was managed by Michael Nassar ("Nassar"). In her 2004 annual performance review from Nassar, Henderson was rated overall as meeting expectations, but as being below expectations in her leadership [\*5] skills. The 2004 review provided, in part, that Henderson needed to learn to communicate effectively with both customers and crew members, and to be patient and enthusiastic in responding to their concerns.

In September 2005, while working in the Long Beach restaurant, Henderson was involved in an altercation with a Senior Assistant Manager named Leo, a 54-year-old Filipino American. Henderson had told a crew member that she believed Leo improperly removed cash from her drawer. When Leo learned of the accusation, he approached Henderson at the restaurant, yelled at her in anger, and flipped her hat. A customer who witnessed the confrontation complained to Taco Bell. Henderson also complained to the Area Coach, Zamani, that Leo had attacked her. After investigating the incident, Zamani issued a final written warning to Leo for his conduct toward Henderson, and orally counseled Henderson not to gossip about other team members. Shortly thereafter, Henderson was transferred to a different store.

On September 24, 2005, at the age of 59, Henderson began working as an Assistant Manager at Taco Bell's Downey restaurant. The Restaurant General Manager for the Downey restaurant was Rossana Pina [\*6] ("Pina"), a 45-year-old Hispanic woman. Pina in turn reported to the Area Coach, Zamani. The Downey restaurant was located in a racially diverse community of Los Angeles and the majority of its workforce was Hispanic. Henderson was the only employee of Filipino descent at the Downey restaurant and the only one over the age of 50.

In October 2005, Henderson disciplined a young Hispanic employee named Raphael for improperly filtering cooking oil. At Pina's instruction, Raphael had filtered the oil using an unsanitary sink strainer rather than a sanitary paper strainer as required by Taco Bell's health and safety standards. Henderson challenged Pina about her cooking oil instruction, advising Pina that they needed to do things "by the book." In December 2005, Henderson also complained to Zamani that Pina had improperly instructed the crew member on how to handle cooking oil. Zamani discussed the matter with Pina, who assured Zamani that no health and safety violation had occurred. Zamani did not conduct any further investigation into Henderson's complaint, but rather relied on Pina to ensure that the employees in her restaurant were properly instructed on health and safety practices.

According to Henderson, after she complained about Pina's improper cooking oil instruction, Pina's attitude toward Henderson changed. Pina treated Henderson coldly, repeatedly found fault with her, and often told her that they had to do things "by the book." Pina also began disciplining Henderson for various policy violations. On January 16, 2006, Henderson received a written warning from Pina for a cash policy violation when a crew member used Henderson's assigned drawer. A few days later, on January 19, 2006, Pina issued a written warning to Henderson for improperly allowing customer orders to be deleted from the system. On March 3, 2006, Henderson received another written warning from Pina for a cash policy violation when a different crew member used Henderson's drawer and the drawer had a cash shortage. Henderson protested to Pina that she did not knowingly permit the crew members, who were young and Hispanic, to share her drawer and that Pina should discipline those employees for their policy violations. On another occasion, Pina began to write up Henderson for leaving lettuce on the cutting table, but did not discipline the young Hispanic crew member who admitted it was his doing.

When [\*8] Henderson was the manager in charge at the Downey restaurant, she regularly took rest breaks and ensured that the employees under her supervision also took their scheduled breaks. On the other hand, when Pina was in charge, Pina did not allow Henderson to take any rest breaks. Henderson also believed that Pina improperly denied her meal breaks. However, Henderson previously had signed a meal period waiver in November 2003 in which she agreed to work during her meal periods in exchange for payment. On one occasion, when Henderson tried to take a break to eat, Pina told her she could not do so because her break was paid. When Henderson responded that she was hungry, Pina stated that if she could not stand working without a break, she was too weak for her position. On another occasion, Pina complained about the way Henderson walked, commenting that Henderson had been with Taco Bell since 1991 and walked very slow.

On March 25, 2006, Henderson received her 2005 annual performance review from Pina in which she was rated as being below expectations in several categories. The 2005 review provided, in part, that Henderson had difficulty building relationships with her team, was quick to accuse [\*9] others of being wrong when a work-related problem arose, and would refer customer or crew member issues to Pina instead of resolving them directly. Shortly thereafter, on April 7, 2006, Pina and Zamani placed Henderson on a 45-day action plan, which set forth specific action items for Henderson to follow to improve her daily performance. The plan stated, among other things, that Henderson needed to take ownership of her tasks and to perform them at an Assistant Manager level by showing consistent improvement in her speed of service, in following cash procedures, and in coaching and supporting her team.

On April 10, 2006, three days after she was placed on the action plan, Henderson called Taco Bell's internal complaint hotline known as the Network. In her call, Henderson complained that Pina had not ordered Henderson a new uniform hat and had accused Henderson of having a financial problem. Henderson did not, however, indicate that she believed Pina's conduct toward her was because of her race, age, or complaint about Pina's cooking oil instruction. The Network referred the matter to Zamani who met with Henderson. Henderson reported that Pina had refused to order her

a hat, and that [\*10] when Henderson protested that she needed a new hat, Pina took the old hat from Henderson's hand and threw it in the trash. In response, Zamani advised Henderson that it was her responsibility as an Assistant Manager to order her own hat. Henderson also indicated that she believed Pina had accused her of having a financial problem when Pina documented Henderson's performance issues. Zamani reviewed Henderson's most recent performance appraisal and confirmed that it addressed Henderson's cash policy violations, but not any personal financial problems. On April 14, 2006, Pina issued Henderson a written warning for insubordination after Henderson approached Pina and accused her of falsely stating that Henderson had a financial problem.

On May 24, 2006, Henderson complained to Pina that Pina herself was violating Taco Bell's cash policy. As described by Henderson, Pina counted the cash in Henderson's drawer on one occasion without Henderson being present. On another occasion, Henderson observed Pina sharing her cash drawer with two other employees. When Henderson challenged Pina about Pina's cash policy violations, Pina became angry and admonished Henderson to worry about herself and not [\*11] others.

During Henderson's 45-day action plan, Zamani transferred to a new position at Taco Bell. Ramin Nooryzadeh ("Nooryzadeh") replaced Zamani as the Area Coach for the Downey restaurant. As the new Area Coach, Nooryzadeh asked Pina for her input about Henderson's performance. Pina in turn provided Nooryzadeh with Henderson's written action plan and daily feedback forms. According to Henderson, Nooryzadeh told her at some point that she was passing the action plan. However, two weeks before her termination, Nooryzadeh spoke privately with Henderson and suggested that he believed she was responsible for recent cash shortages.

With Pina's input, Nooryzadeh decided to terminate Henderson's employment. On May 26, 2006, Nooryzadeh met with Henderson at the Downey restaurant and informed her that she was being discharged for cash policy violations. At the time of her termination, Henderson was 59 years old. According to Henderson, her job duties as an Assistant Manager were assumed by a manager trainee named Barbara, who was Caucasian and under the age of 50.

## **II. Henderson's Civil Action Against Taco Bell**

On October 23, 2006, Henderson filed an administrative complaint with the Department [\*12] of Fair Employment and Housing ("DFEH"), alleging discrimination and retaliation by Taco Bell. In her DFEH complaint, Henderson contended that Nooryzadeh and Pina terminated her employment because of Henderson's race and age and in retaliation for her objection to Pina's improper cooking oil instruction. At Henderson's request, the DFEH issued an immediate right-to-sue notice. On April 16, 2007, Henderson filed a civil action against Taco Bell, asserting claims for race and age discrimination, wrongful termination in violation of public policy, and denial of meal and rest periods.

Following the filing of Henderson's civil complaint, the parties conducted discovery. In September and October 2007, Henderson served her second and third sets of special interrogatories and document requests on Taco Bell. On November 15, 2007, Taco Bell timely served its responses, but objected to producing comparative evidence about other employees based on privacy, relevance, and the burdensome nature of the requests. Over the next month, the parties met and conferred, but failed to reach a resolution. On December 13, 2007, as the parties continued to confer about discovery, Taco Bell filed a motion for [\*13] summary judgment, or in the alternative, summary adjudication. Henderson's opposition was due by February 15, 2008.

On January 4, 2008, Henderson moved to compel further responses to her discovery requests. In her motion, Henderson specifically sought (1) the name, race, ethnicity and age of each employee at the last three Taco Bell restaurants where Henderson worked, (2) documents describing any health and safety violations and cash policy violations by employees at those three restaurants, and (3) information pertaining to Pina's employment with Taco Bell. Henderson's motion to compel was set for hearing on February 6, 2008. On that day, Henderson also filed an ex parte application to continue the summary judgment hearing. Henderson argued that a continuance was necessary because Taco Bell had refused to produce the comparative evidence that Henderson had requested in discovery to prove that Taco Bell treated similarly situated employees more favorably. Henderson asserted that even if Taco Bell was ordered

to produce such evidence at the February 6, 2008 hearing on her motion to compel, Henderson would not have sufficient time to obtain and review the evidence for her summary judgment [\*14] opposition.

On February 6, 2008, the trial court heard Henderson's motion to compel further discovery responses and her ex parte application to continue the summary judgment hearing. During oral argument, Henderson's attorney agreed to forego the requests for employee names and to narrow the requests for employee policy violations to those at the Downey restaurant. After taking the matter under submission, the court granted in part, and denied in part, Henderson's motion to compel. Specifically, the court granted Henderson's requests for discovery regarding health and safety violations and cash policy violations by other employees at the Long Beach and Downey restaurants, but only on the condition that their names be redacted. The remainder of Henderson's discovery motion was denied, including her requests for the race, ethnicity and age of those employees. The court also denied without prejudice Henderson's ex parte application to continue the summary judgment hearing. Taco Bell was ordered to comply with the court's discovery ruling within 10 days.

On Friday, February 15, 2008, Henderson filed her opposition to the summary judgment motion. In her opposition, Henderson renewed her request [\*15] to continue the summary judgment hearing on the grounds that Taco Bell still had not produced the discovery ordered by the court in its ruling on the motion to compel. Because the due date for Taco Bell's supplemental responses fell on a Saturday and the following Monday was a court holiday, Taco Bell did not serve its responses until Tuesday, February 19, 2008. In its responses, Taco Bell stated that there were no documents regarding health and safety violations, that it was working to secure documents regarding cash policy violations, and that it would further supplement its responses once it retrieved, reviewed and redacted the relevant documents. As of the summary judgment hearing date, Taco Bell had not further supplemented its responses to Henderson's discovery requests.

On February 29, 2008, the trial court heard and took under submission Taco Bell's summary judgment motion. The court ruled on March 3, 2008. In its written order, the court reconsidered its prior discovery ruling partially granting Henderson's motion to compel, and decided to deny the motion in full. The court explained that the discovery at issue, which concerned the personnel records of other employees, would [\*16] require the race and age of the employees to be relevant and would unduly burden Taco Bell by forcing it to review each personnel file to determine if others were treated more favorably than Henderson. The court also denied Henderson's request to continue the summary judgment hearing on the grounds that she failed to comply with the formal requirements of *Code of Civil Procedure section 437c*. Finally, the court granted summary judgment in favor of Taco Bell. On April 24, 2008, Henderson filed a timely appeal, challenging both the order granting Taco Bell's summary judgment motion and the order denying Henderson's request to continue the summary judgment hearing.

## DISCUSSION

### I. Motion For Summary Judgment

#### A. Standard Of Review

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action . . ." (*Code Civ. Proc.*, § 437c, subd. (p)(2); [\*17] *Aguilar v. Atlantic Richfield Co.*, supra, at p. 850.) The party opposing summary judgment "may not rely upon the mere allegations or denials of its pleadings," but rather "shall set forth the specific facts showing that a triable issue of material fact exists . . ." (*Code Civ. Proc.*, § 437c, subd. (p)(2).) A triable issue of material fact exists where "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." (*Aguilar v. Atlantic Richfield Co.*, supra, at p. 850.)

Where summary judgment has been granted, we review the trial court's ruling de novo. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 860.) We consider all the evidence presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We affirm summary judgment where the moving party demonstrates that no triable issue of material fact exists and that it is entitled to judgment as a matter of law. (*Code Civ. Proc.*, § 437c, *subd.* (c).)

## **B. [\*18] First Cause Of Action - Race & Age Discrimination Under FEHA**

### **1. Governing Legal Principles**

FEHA prohibits an employer from, among other things, discriminating on the basis of race or age in the terms and conditions of employment. (*Gov. Code*, § 12940, *subd.* (a).) Discriminatory intent is an essential element of Henderson's race and age discrimination claims. (*Gov. Code*, § 12940, *subd.* (a); *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 642.) Because direct evidence of discriminatory intent is rare, California has adopted the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Guz v. Bechtel National, Inc.* (*Guz*) (2000) 24 Cal.4th 317, 354.)

"At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. . . . [P] Generally, the plaintiff must provide evidence that (1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position he [or she] sought or was performing competently in the position he [or she] held, (3) he [or she] suffered an adverse employment action, . . . and (4) some circumstance [\*19] suggests discriminatory motive. [Citations.] [P] If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. . . . [P] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. [Citations.] [P] If the employer sustains this burden, the presumption of discrimination disappears. [Citations.] The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. [Citations.] . . . The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff. [Citations.]" (*Guz, supra*, 24 Cal.4th at pp. 354-356.)

When moving for summary judgment on a FEHA claim, an employer can negate the element of discriminatory intent and shift the burden to the plaintiff by showing that the plaintiff cannot state a prima facie case of discrimination or that the employer had a legitimate, nondiscriminatory [\*20] reason for the alleged adverse action. (*Guz, supra*, 24 Cal.4th at pp. 356-357; *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 150; see also *Code Civ. Proc.*, § 437c, *subd.* (p)(2) [defendant meets its burden on summary judgment by showing that "one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action"].) If the employer sets forth a nondiscriminatory reason for its decision, the burden shifts to the plaintiff to produce "'substantial responsive evidence' that the employer's showing was untrue or pretextual. [Citation.]" (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.) "[A]n 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*, at p. 361, *fn.* omitted.)

### **2. Application To Henderson's Discrimination Claim**

Henderson contends that Taco Bell discriminated against her on the basis of her race and age by disciplining her in a series of written warnings starting [\*21] in January 2006 and then terminating her employment five months later in May 2006. <sup>1</sup> The trial court granted summary judgment on the discrimination claim on the grounds that Henderson could not make a prima facie showing that she was replaced by a person outside her protected class, nor could she prove that Taco Bell's proffered reasons for its adverse actions were pretextual. We conclude that, even assuming Henderson can establish a prima facie case of race and age discrimination, Taco Bell set forth legitimate, nondiscriminatory reasons

for its employment decisions and Henderson failed to produce any substantial, responsive evidence of pretext.

1 At her deposition, Henderson testified that Taco Bell also discriminated and retaliated against her between 2003 and 2004 when Santos disciplined Henderson after she complained about Santos' improper pyramid scheme. Taco Bell argues that Henderson cannot base her claims on any alleged discriminatory or retaliatory conduct by Santos because Henderson did not file her DFEH charge until at least two years after Santos' disciplinary actions, did not identify Santos in either her administrative charge or civil complaint, and did not assert a continuing [\*22] violation theory. Henderson concedes on appeal that she is not suing Taco Bell for any discrimination or retaliation by Santos, but is simply trying to show why her history of prior discipline was unwarranted. Because Henderson is not seeking to recover for any pre-2006 acts of alleged discrimination or retaliation, we need not address Taco Bell's administrative exhaustion and statute of limitations arguments.

#### **a. Legitimate, Nondiscriminatory Reasons**

First, Taco Bell articulated legitimate, nondiscriminatory reasons for disciplining and ultimately discharging Henderson. It submitted evidence that Henderson's direct supervisor, Pina, issued her written warnings starting in January 2006 because Pina concluded that Henderson had violated various company policies, including the cash policy. Taco Bell also presented evidence that Pina and the Area Coach, Zamani, placed Henderson on a 45-day action plan based on their determination that Henderson was performing poorly in her position. Pina stated in her sworn declaration that she believed Henderson did not understand the role and responsibilities of an Assistant Manager, did not act as a leader for members of her team, and did not take ownership [\*23] of her tasks by handling customer and crew member issues directly. Zamani similarly stated in her declaration that she observed that Henderson worked more as a crew member taking orders than as a manager leading the team and that she often had conflicts with other employees. Additionally, Taco Bell presented evidence that, with Pina's input, the new Area Coach, Norryzadeh, decided to terminate Henderson's employment after concluding that Henderson did not satisfactorily complete the action plan by showing consistent improvement in her performance.

Based on this evidence, Taco Bell met its burden of establishing legitimate, nondiscriminatory reasons for its discipline and discharge decisions. Therefore, the burden shifted to Henderson to present competent admissible evidence that Taco Bell's proffered reasons were pretextual or that it otherwise acted with a discriminatory intent.

#### **b. Pretext**

The plaintiff in a FEHA discrimination action "may establish pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." [Citations.]" (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68-69.) [\*24] To avoid summary judgment, however, the plaintiff must produce specific and substantial evidence of pretext. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.) The plaintiff "cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer. . . . [Citations.] Rather, the [plaintiff] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [the asserted] non-discriminatory reasons." [Citations.]" (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.)

Because Norryzadeh was the final decision-maker in Henderson's discharge, the parties dispute whether Henderson could satisfy her burden on summary judgment by showing that Pina, rather than Norryzadeh, acted with a discriminatory intent. Relying on a theory of imputed liability, often referred to as the "cat's paw" doctrine, Henderson argues that [\*25] she could meet her burden by demonstrating that Pina alone harbored a discriminatory motive because such animus on the part of Pina could be imputed to Norryzadeh for purposes of pretext. We agree. California courts have recognized that a showing that a significant participant in an employment decision exhibited a

discriminatory intent is sufficient to support an inference that the decision itself was discriminatory, even absent evidence that others involved in the decision harbored such animus. (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 551-552; *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 113-114.) As one court has explained, "[t]o establish an entitlement to judgment as a matter of law, it is not enough to show that one actor acted for lawful reasons when that actor may be found to have operated as a mere instrumentality or conduit for others who acted out of discriminatory or retaliatory animus . . . . If a supervisor makes another his tool for carrying out a discriminatory action, the original actor's purpose will be imputed to the tool, or through the tool to their common employer." (*Reeves v. Safeway Stores, Inc.*, *supra*, at p. 113.)

Here, Taco Bell has [\*26] stated that Norryzadeh made the decision to discharge Henderson based on her prior violations of company policy and failure to satisfactorily complete the 45-day action plan. It is undisputed, however, that Pina was the one who concluded that Henderson had committed the various policy violations, and that Pina and Zamani made the original decision to place Henderson on an action plan. Henderson also produced evidence that Norryzadeh did not become the Area Coach until the action plan was already in place, and that Nooryzadeh had minimal interaction with Henderson while she was on the plan. Although Pina testified at her deposition that she did not make any recommendation about the termination, she stated in a prior sworn declaration that she provided input about Henderson's performance to Norryzadeh, and that Norryzadeh, with Pina's input, made the decision to discharge Henderson. Because Pina was directly involved in the discharge decision and influenced Norryzadeh's decision through her input about Henderson's performance, Henderson was entitled to demonstrate pretext through evidence that Pina acted with a discriminatory animus. We thus consider whether Henderson presented any such [\*27] evidence of pretext.

Henderson first claims that she established pretext through evidence that Pina made discriminatory comments about Henderson's race and age. With respect to her race, Henderson contends that Pina called her "Rosa" rather than "Rosario" or "Rose," and that this was offensive to Henderson because "Rosa" is a common Mexican name. Henderson asserts that Pina also acted with a racial bias when she said, "look at your face, you do not even smile." With respect to her age, Henderson argues that Pina made ageist remarks when she told Henderson, "look at the way you walk, you are very slow," and "if you cannot stand working without a break, you are too weak for your position." Yet even construing this evidence in the light most favorable to Henderson, Pina's alleged statements are far too ambiguous to suggest a discriminatory animus. Pina's reference to Henderson as "Rosa" is simply an abbreviated form of Henderson's first name and is not derogatory on its face. Pina's remarks that Henderson walked too slow and was too weak for her position also fail to reflect any discriminatory bias given that Henderson worked in a fast-paced service environment where she was expected to [\*28] perform her duties promptly. (*Horn v. Cushman & Wakefield Western, Inc.*, *supra*, 72 Cal.App.4th at p. 809 ["isolated remark" that is "highly ambiguous as far as discriminatory animus" is "entitled to virtually no weight in considering whether the [adverse action] was pretextual"].)

Henderson contends that she also demonstrated pretext through evidence that Pina selectively enforced company policies by treating younger, Hispanic employees who violated the policies more favorably than Henderson, who was the only employee of Filipino descent at the Downey restaurant. For instance, Henderson asserts that Pina issued her written warnings for sharing her cash drawer and for having shortages in her drawer, but did not discipline the young, Hispanic crew members who used Henderson's drawer without her permission. Likewise, Henderson claims that Pina accused her of leaving lettuce on the counter and began to issue her a warning for such violation, but did not discipline the young, Hispanic crew member who admitted it was his doing. Henderson also argues that while Taco Bell terminated her employment for violating the cash policy, it did not discharge younger, Hispanic employees, including Pina, [\*29] for their cash policy violations.

Henderson's evidence of alleged disparate treatment does not establish pretext. To begin with, Henderson is not comparing herself to "similarly situated" employees. (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 817 ["comparative evidence of pretext . . . [is] evidence that [the plaintiff] was treated differently from others who were similarly situated"].) At the time she was issued the written warnings by Pina, Henderson was an Assistant Manager, while the younger, Hispanic employees whom she alleges were not disciplined were almost all non-managerial crew members. As an Assistant Manager, Henderson was held to a higher standard of conduct and was not only responsible

for her own compliance with company policies, but also for ensuring compliance by employees under her supervision. Moreover, while Henderson maintains that younger, Hispanic crew members were not disciplined by Pina for violating the cash policy, she admitted that she does not actually know whether Pina ever wrote up other employees for their violations. Furthermore, other than her own speculation, Henderson failed to offer any evidence to establish whether employees with [\*30] similar violations were or were not terminated. Taco Bell, on the other hand, produced evidence that, around the time of Henderson's termination, Norryzadeh and Pina discharged another management-level employee, who was non-Hispanic and under the age of 40, for cash policy violations.<sup>2</sup>

2 Henderson also sought to compare herself to Pina, asserting that Pina violated the cash policy by sharing her drawer with crew members, but was not disciplined or discharged. However, Henderson did not submit any evidence to show that she reported Pina's cash policy violations to anyone other than Pina. In the absence of any evidence that Pina's superiors had knowledge of her alleged violations of the cash policy, Henderson cannot prove that Taco Bell treated Pina more favorably than Henderson in how it handled such violations.

Henderson further sought to demonstrate pretext by showing that Taco Bell was inconsistent in its story about who made the decision to terminate her employment and the basis for the termination. With respect to the decision-maker, Taco Bell initially stated in discovery that Pina alone decided to discharge Henderson, but later indicated that both Norryzadeh and Pina were involved [\*31] in the decision. Yet as Taco Bell explained, Pina was no longer an employee of the company at the time Henderson filed her civil action, and Taco Bell thus responded to Henderson's initial discovery requests based on its information and belief and subject to the right to further supplement. After locating Pina and learning of her role in the termination, Taco Bell amended its discovery responses to provide that both Norryzadeh and Pina participated in the discharge decision with Norryzadeh being the final decision-maker. With respect to the reason for the decision, Henderson stated in her declaration that Norryzadeh told her she was being terminated for cash policy violations, while Taco Bell responded in discovery that Henderson was discharged, in part, because of her failure to satisfactorily complete the 45-day action plan. But given that compliance with the cash policy was a specific condition of the action plan and a basis for Henderson's prior discipline, Henderson failed to show such weaknesses or inconsistencies in Taco Bell's stated reasons as to render them "unworthy of credence."<sup>3</sup> (*Hersant v. Department of Social Services, supra*, 57 Cal.App.4th at p. 1005.)

3 Henderson also [\*32] stated in her declaration that Norryzadeh advised her at some point that she was "passing" the 45-day action plan. However, at her deposition, Henderson testified that, two weeks before her termination, Norryzadeh indicated that he believed Henderson was responsible for recent cash shortages at the Downey restaurant. Therefore, based on Henderson's testimony, Norryzadeh did communicate to Henderson, prior to her termination, that he had ongoing concerns about her compliance with the action plan.

Accordingly, even if Henderson could establish a prima facie showing of race or age discrimination, she did not offer any "specific, substantial evidence" to support that Taco Bell's proffered reasons for its discipline and discharge decisions were pretext for unlawful discrimination. (*Horn v. Cushman & Wakefield Western, Inc., supra*, 72 Cal.App.4th at p. 807.) Because Henderson failed to come forward with "evidence supporting a rational inference that intentional discrimination . . . was the true cause of [Taco Bell's] actions," Taco Bell was entitled to summary adjudication on Henderson's first cause of action for race and age discrimination. (*Guz, supra*, 24 Cal.4th at p. 361.)

## **C. Second Cause [\*33] Of Action - Termination In Violation Of Public Policy**

### **1. Governing Legal Principles**

In her second cause of action for wrongful termination in violation of public policy, Henderson alleged that Taco Bell discharged her in retaliation for her internal health and safety complaint about Pina's improper cooking oil instruction. To establish a prima facie case of retaliation in violation of public policy, a plaintiff must show that (1) he or she engaged in a protected activity, (2) the employer subjected the plaintiff to an adverse employment action, and (3) a causal link existed between the protected activity and the adverse action. (*Loggins v. Kaiser Permanente Internat.*

(2007) 151 Cal.App.4th 1102, 1108; *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453.) Once a prima facie showing of retaliation is made, an employer can satisfy its burden on summary judgment by setting forth a legitimate, non-retaliatory reason for the adverse employment action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042; *Akers v. County of San Diego*, *supra*, at p. 1453.) Summary judgment is appropriate if, upon consideration of all the circumstances, the evidence is insufficient to permit a [\*34] rational inference that the employer's actual motive was retaliatory. (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, at p. 1042.)

## 2. Application To Henderson's Wrongful Termination Claim

The trial court granted summary judgment on the wrongful termination claim on the grounds that Henderson could not state a prima facie case of retaliation by showing a causal connection between her health and safety complaint and her termination. We conclude that, even assuming Henderson can make a prima facie showing of retaliatory discharge, she failed to rebut Taco Bell's proffered reasons for its termination decision with specific and substantial evidence of pretext.

As with the FEHA discrimination claim, Taco Bell satisfied its summary judgment burden on the wrongful discharge claim with evidence that it terminated Henderson's employment because of her violations of company policy and failure to satisfactorily complete the 45-day action plan. Henderson countered with evidence that Pina had knowledge of her complaint about the allegedly improper cooking oil instruction, that Pina began disciplining Henderson approximately one month after her complaint, and that Henderson was discharged based, in part, on [\*35] Pina's input about her performance less than six months later. Based on such evidence, Henderson contends that the proximity in time between her protected complaint and her termination established the requisite causal connection, and thus, raised a triable issue of fact sufficient to defeat summary judgment. We disagree.

Even if we assume that there was sufficient temporal proximity between Henderson's complaint and her termination to support a prima facie case, Henderson still failed to satisfy her burden on summary judgment by offering any other evidence of pretext. Although a plaintiff may make a prima facie showing of a causal link "by producing evidence of nothing more than the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision," such evidence "only satisfies the plaintiff's initial burden." (*McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 388.) "[T]emporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, [non-retaliatory] reason for the termination. [\*36] [Citations.]" (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353; see also *Loggins v. Kaiser Permanente Internat.*, *supra*, 151 Cal.App.4th at p. 1112 [temporal proximity "does not, without more, suffice . . . to show a triable issue of fact on whether the employer's articulated reason was untrue and pretextual"]; *McRae v. Department of Corrections and Rehabilitation*, *supra*, at pp. 388-389 [temporal proximity standing alone is insufficient to show pretext]. "Instead, an employee seeking to avoid summary judgment cannot simply rest on the prima facie showing, but must adduce substantial additional evidence from which a trier of fact could infer the articulated reasons for the adverse employment action were untrue or pretextual." (*Loggins v. Kaiser Permanente Internat.*, *supra*, at p. 1113.)

Apart from the alleged temporal proximity, however, Henderson did not produce any substantial evidence of pretext. In opposing summary judgment on her wrongful termination claim, Henderson essentially relied on the same evidence that she set forth to support her discrimination claim. None of Henderson's evidence established that Taco Bell's proffered reasons for terminating her employment were [\*37] untrue or pretextual. Henderson also sought to demonstrate pretext by arguing that because Pina's disciplinary actions against her were unjustified, they must have been retaliatory. But a plaintiff does not demonstrate a triable issue simply by showing that the employer's adverse actions were wrong or unwise. If non-retaliatory, the employer's "true reasons need not necessarily have been wise or correct'. . . [T]he ultimate issue is simply whether the employer acted with a motive to discriminate [or retaliate] illegally." (*Guz*, *supra*, 24 Cal.4th at p. 358 [italics omitted].)

Because Henderson's sole evidence of retaliatory pretext was the purported proximity in time between her

complaint and her termination, the evidence as a whole was insufficient to support a rational inference that Taco Bell's actual motive was retaliatory. Therefore, Taco Bell was entitled to summary adjudication on Henderson's second cause of action for wrongful termination in violation of public policy.

#### **D. Third Cause Of Action - Denial Of Meal And Rest Periods**

Henderson's complaint also alleged a single cause of action for denial of meal and rest periods in violation of *Labor Code section 226.7*.<sup>4</sup> The trial [\*38] court granted summary judgment on the Labor Code claim on the grounds that Henderson waived her right to meal breaks by written agreement and did not complain about the denial of rest breaks until after she was discharged. On appeal, Henderson does not challenge the trial court's ruling with respect to the denial of meal periods, but contends that there is a triable issue with respect to the denial of rest periods. We agree that summary judgment on Henderson's third cause of action was improper because there is a disputed issue of material fact as to whether Henderson was denied rest breaks.<sup>5</sup>

4 *Labor Code section 226.7* states, in pertinent part, that "[n]o employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission," and that "the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." (*Lab. Code § 226.7*.)

5 Although Henderson pleaded her meal and rest period allegations as a single cause of action, they constitute separate and distinct claims under *Code of Civil Procedure section 437c, subdivision (f)(1)* [\*39] because they assert violations of two different primary rights. (*Hindin v. Rust (2001) 118 Cal.App.4th 1247, 1257* ["Whether a complaint in fact asserts one or more causes of action for pleading purposes depends on whether it alleges invasion of one or more primary rights."].) One is the right to a 30-minute unpaid meal period, which may be waived by a written agreement between the parties. (*Cal. Code Regs., tit. 8 § 11050, subd. 11(A)*.) The other is the right to a 10-minute paid rest period, which may not be waived. (*Cal. Code Regs., tit. 8 § 11050, subd. 12(A)*.) Because Henderson does not challenge the trial court's ruling regarding her claim for meal periods, she has forfeited that claim on appeal. (*Reyes v. Kosha (1998) 65 Cal.App.4th 451, 466, fn. 6* [even where review is de novo, "it is limited to issues which have been adequately raised . . . in [appellant's] brief"].)

In moving for summary judgment, Taco Bell argued that it had no affirmative duty to ensure that employees took rest breaks, and that, as an Assistant Manager, Henderson was responsible for deciding whether or not to take her own rest breaks. The California Supreme Court has granted review to consider the scope of [\*40] an employer's duty to ensure that employees take statutorily mandated meal and rest periods. (See *Brinker Restaurant Corp. v. Superior Court (2008) 165 Cal.App.4th 25*, review granted Oct. 22, 2008, S166350; *Brinkley v. Public Storage, Inc. (2008) 167 Cal.App.4th 1278*, review granted Jan. 14, 2009, S168806.) However, contrary to Taco Bell's assertion, Henderson's rest period claim is not predicated on the allegation that Pina failed to ensure that Henderson took rest breaks. Rather, Henderson is alleging that Pina affirmatively prohibited her from taking any such breaks.

At her deposition, Henderson testified that when she was the manager in charge at the Downey restaurant, she would regularly take her rest breaks, but that when Pina was in charge, Henderson was not allowed to take any breaks. Henderson also testified that Pina told Henderson that she was not entitled to a break because her breaks were paid, and that Pina would become angry if she learned from other employees that Henderson had taken a rest break when Pina was not there. According to Henderson, Pina "never gave me a break every time I worked with her, not even 10 minutes." While California law remains unsettled as to [\*41] the scope of an employer's duty to ensure that breaks are taken, it is clear that an employer may not prevent employees from taking statutorily mandated breaks, as Henderson has alleged here. (*Cicairos v. Summit Logistics, Inc. (2005) 133 Cal.App.4th 949, 963* [defendant employer was not entitled to summary judgment on rest period claim because there were triable issues as to whether "the defendant did not permit the plaintiffs to take their rest breaks"].)

In granting summary judgment on Henderson's third cause of action, the trial court noted that Henderson "did not complain until she was terminated." However, there is no requirement that an employee bring either an internal or

administrative complaint about the denial of meal or rest breaks to state an actionable claim under *Labor Code section 226.7*. Accordingly, while Henderson's alleged failure to complain to anyone above Pina about the denial of rest breaks may be relevant to Henderson's credibility, it does not bar her rest period claim as a matter of law. Because there are triable issues as to whether Henderson was affirmatively prohibited from taking rest breaks by her supervisor, Taco Bell was not entitled to summary adjudication [\*42] on Henderson's claim for the denial of rest periods.

## II. Request To Continue The Summary Judgment Hearing

Henderson also appeals the trial court's denial of her two requests to continue the hearing on Taco Bell's summary judgment motion under *Code of Civil Procedure section 437c, subdivision (h)*. Henderson first sought to continue the summary judgment hearing in an ex parte application filed on February 6, 2008. After her application was denied, Henderson renewed her request for a continuance in her February 15, 2008 opposition to the summary judgment motion. The trial court again denied Henderson's request on the grounds that she failed to satisfy the statutory requirements for a continuance. We conclude that the trial court did not abuse its discretion in denying Henderson's requests.

*Section 437c of the Code of Civil Procedure* directs a trial court to deny a summary judgment motion or to order a continuance of the hearing upon a good faith showing that an extension of time is needed to obtain facts essential to justify opposition to the motion. (*Code Civ. Proc.*, § 437c, subd. (h) ["If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that [\*43] facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit . . . discovery to be had . . .".]) To demonstrate good faith, the party seeking a continuance must submit an affidavit or declaration showing that "(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]" (*Cooksey v. Alexakis (2004) 123 Cal.App.4th 246, 254.*) If the good faith showing is made by a properly submitted affidavit, the summary judgment hearing must be continued to allow time for the necessary discovery. (*Knapp v. Doherty (2004) 123 Cal.App.4th 76, 100-101; Bahl v. Bank of America (2001) 89 Cal.App.4th 389, 398.*) However, in the absence of the showing required by *Code of Civil Procedure section 437c, subdivision (h)*, granting a continuance is within the trial court's discretion. (*Cooksey v. Alexakis, supra, at p. 254.*)

Henderson claims that she was entitled to a continuance to obtain the comparative evidence that the trial court previously ordered Taco Bell [\*44] to produce. In support of her argument, Henderson notes that she timely filed a motion to compel further discovery responses from Taco Bell, that the trial court partially granted the motion to compel and ordered the production of certain evidence about other employees' policy violations, and that Taco Bell failed to produce that evidence by the deadline for Henderson's summary judgment opposition. Henderson asserts that, because such comparative evidence was essential to establishing pretext, the trial court should have continued the summary judgment hearing so that Henderson could have sufficient time to obtain it and incorporate it into her opposition.

Henderson's argument fails, however, because she cannot show that the evidence that the trial court originally ordered Taco Bell to produce was in fact essential to her opposition. In its original February 6, 2008 ruling on Henderson's motion to compel, the trial court only partially granted the motion. The court granted Henderson's requests for evidence of other employees' cash policy and health and safety violations. It denied, however, Henderson's requests for the name, race, ethnicity and age of those employees. While Henderson [\*45] contends that the trial court later erred by reversing the portion of its order that permitted discovery of other employees' violations, she does not challenge the portion of the original order that denied discovery of each employee's name, race and age. Therefore, the issue before this Court is whether evidence of policy violations by unidentified employees was essential to Henderson's summary judgment opposition. We conclude it was not.

Henderson reasons that evidence of other employees' policy violations was relevant to establishing pretext because it could show that Taco Bell selectively enforced its cash policy by treating younger, Hispanic employees who violated the policy more favorably than Henderson. But even assuming that Taco Bell had produced evidence of cash policy

violations by other employees, as originally ordered by the trial court, such evidence would not demonstrate pretext. To prove that Taco Bell treated employees outside her protected class more favorably, Henderson would need to know, at minimum, the race and/or age of those employees. Notably, however, none of the discovery that Taco Bell originally was ordered to produce would have included such identifying [\*46] information. Instead, the discovery would simply show whether third party employees, none of whom would be identified by name, race or age, were disciplined for violating Taco Bell's cash policy and what type of discipline they received. Contrary to Henderson's claim, such evidence, standing alone, is insufficient to establish pretext. Because Henderson cannot show that the narrow category of evidence that the trial court originally ordered Taco Bell to produce was essential to her opposition, the court did not abuse its discretion in denying Henderson's request for a continuance.

#### **DISPOSITION**

The judgment is reversed and the matter is remanded to the trial court with directions to vacate its order granting Taco Bell's motion for summary judgment and to enter a new order (1) granting Taco Bell's motion for summary adjudication as to Henderson's first cause of action for race and age discrimination in violation of FEHA, (2) granting Taco Bell's motion for summary adjudication as to Henderson's second cause of action for wrongful termination in violation of public policy, (3) granting Taco Bell's motion for summary adjudication as to Henderson's claim in her third cause of action for the [\*47] denial of meal periods, and (4) denying summary adjudication as to Henderson's claim in her third cause of action for rest periods. The order denying Henderson's request to continue the summary judgment hearing is affirmed. Henderson shall recover her costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.