SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SHERIDAN v TOUCHSTONE TELEVISION PRODUCTIONS, LLC

CASE No. BC435248

Ruling on Defendant's Motion for Summary Judgment on Remaining Cause of Action for Retaliation in Violation of Labor Code Section 6310

Touchstone moves for summary judgment on Sheridan's sole remaining cause of action for violation of Labor Code § 6310 on the following grounds: (1) Sheridan cannot prove that she made a complaint of unsafe working conditions; (2) Sheridan cannot prove that her complaint put Touchstone on notice that she was complaining of unsafe working conditions; (3) Sheridan cannot prove that her complaint of unsafe working conditions was bona fide; (4) Sheridan cannot prove that Touchstone failed to exercise its contractual option to use her services on the sixth production season of *Desperate Housewives* because of her complaint, Touchstone has stated a legitimate non-retaliatory reason for its decision, and Sheridan cannot prove that Touchstone's reason was pretextual; and (5) even if Sheridan can raise a triable issue of fact as to liability, Touchstone's legitimate non-retaliatory reason, standing alone, would have induced Touchstone not to exercise its contractual option to use Sheridan's service for the sixth production season of *Desperate Housewives*, and this "same-decision" showing precludes a recovery of monetary damages. If the motion for summary judgment is denied, Touchstone alternatively moves for summary adjudication as to Sheridan's claim for punitive damages.

PRELIMINARY ISSUES

The Court grants Touchstone's Request for Judicial Notice. The Plaintiff submitted multiple trial exhibits under the title of a Request for Judicial Notice, and although the Court could perhaps take judicial notice that they were trial exhibits, there was no authentication that they were, and regardless, the Court cannot take judicial notice of the truth of the matters contained therein. The Court rules on the objections of Plaintiff and of Defendant as set forth in separate orders.

The Court also notes certain errors, mis-transcriptions and/or missing words in the reporter's final transcript of the December 2, 2016 hearing. For example, the statement on page 58 at lines 24-25 is not the Court's statement after the single word "Right" but instead appears to be Mr. Crochetiere's statement.

LABOR CODE SECTION 6310

Labor Code Section 6310, subdivision (b), permits an action for damages if the employee is discharged, threatened with discharge, or discriminated against by his or her employer because of the employee's complaints about unsafe work conditions. Here, it is alleged that Touchstone retaliated against Sheridan by not renewing her employment contract. To prevail on the claim, plaintiff must prove that she actually complained about unsafe working conditions, and, but for her complaints, Touchstone would have renewed the employment contract.

Did Sheridan Make a Reasonable and Bona Fide Complaint to Touchstone About Unsafe Working Conditions that Actually Put Touchstone on Notice of Unsafe Working Conditions?

In moving for summary judgment, Touchstone contends that Sheridan did not make any complaints about actual unsafe working conditions and that Sheridan's comments were insufficient to put Touchstone on notice of any allegedly unsafe working conditions. Sheridan contends her contract was not renewed beyond season 5 in direct retaliation for these alleged complaints in violation of Section 6310(b). In determining the legal sufficiency of Sheridan's purported complaints, the court must look to the actual substance of Sheridan's statements regarding Cherry's alleged hit.

It is undisputed that the issue of Cherry's alleged hit was raised by Sheridan only three times within a few days after the incident. First, when the alleged hit actually occurred, Sheridan exclaimed, "You just hit me in the head, that's not okay. That is not okay." Touchstone's SSUF No. 6 (Sheridan Depo. Vol. I 123:3-11; 125:7-12; 159:16-18; Vol. II 426:13-17). After this statement, Sheridan then left the stage to go to her trailer. *Id.* After the incident occurred, Sheridan apparently did not make any further complaints that day. It is further undisputed that Sheridan did not suffer any physical or emotional injuries as a result of the incident. *See* Touchstone's SSUF Nos. 10-15, 22. Later that day, Cherry also provided an apology to Sheridan (*see* Touchstone's SSUF No. 19). She believed it to be a sincere apology and they shared a hug. *Id.* Sheridan then went about the rest of her day as usual. *See* Touchstone's SSUF No. 21.

Second, the day following the incident, Sheridan spoke on the telephone with Executive Producer George Perkins. *See* Touchstone's SSUF No. 24 (Sheridan Depo. Vol. I 92:12-14; 94:7-19; 95:9-96:16). During her deposition, Sheridan recounted the conversation as follows:

> I called George. I asked him if he had heard what had happened yet. He said that he had. He said that he was sorry that that had happened. He asked if I was okay. I said that I was okay. He asked if there was something that he could do to help; if there was anything he'd like me to say to Marc Cherry. I said that Marc needs to know that he can't behave like that. And it would be nice if Marc would send some flowers. And George agreed that that would be nice.

Sheridan Depo. Vol. I 95:9-19. Sheridan does not dispute the content of her conversation with Perkins as recounted in her deposition. However, Sheridan does declare that she also told Perkins that she wanted to ensure that Cherry's mistreatment of her stopped. *See* Sheridan Decl., ¶¶ 41-42.

Third, sometime later, Sheridan's lawyer Neil Meyer called Touchstone's Executive Vice President, Howard Davine, and stated words to the effect that "[Cherry] hit her. He hit her hard. You should

know about this." *See* Touchstone's SSUF No. 26 (Meyer Depo. 52:15-53:5; 53:10-13; Sheridan Depo. Vol. I 75:23- 76:8). Meyer himself thought that "if it happened to [Sheridan], it might happen to someone else," but did not directly say that to Davine. Meyer Depo. 52:-53. Indeed, there is no evidence that he conveyed his thought to Howard Davine or anyone else at ABC. Meyer did not request that Touchstone take any action because Cherry had already apologized and Sheridan "just wanted to get on with her life." *See* Touchstone's SSUF No. 27 (Meyer Depo. 52:1-10). Indeed, Meyer told Davine that Sheridan did not want any action to be taken. Meyer Depo 52:1-10;

These are the only alleged complaints that Sheridan made regarding her incident with Cherry on September 24, 2008, and are the sole basis for her Section 6310 claim.

Touchstone argues that the above "complaints" were insufficient under Section 6310(b) in that no unsafe working conditions were implicated in Sheridan's comments, and she therefore did not put Touchstone on notice of any workplace safety issues. Absent an adequate complaint about unsafe working conditions, Touchstone contends that no Section 6310 liability can attached. In support of this argument, Touchstone cites to *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431. Sheridan contends, relying on *Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 10, that her alleged complaint is sufficient. However, the Court notes that *Cabesuela* involved a foreseeable risk of future harm, unlike the case here.

Cabesuela held that " 'an employee is protected against discharge or discrimination for complaining in good faith about working conditions or practices which he reasonably believes to be unsafe, whether or not there exists at the time of the complaint an OSHA standard or order which is being violated.' " *Id.* at 109. Here, however, the evidence presented to the court does not establish that Sheridan had a reasonable belief that her working conditions were unsafe or that she even mentioned unsafe working conditions in her alleged complaints. Unlike in *Muller* or *Cabesuela,* Sheridan did not voice a fear about her safety in the workplace, did not request an investigation into the incident and did not request that Touchstone take any action in response to the complaints. *See* Touchstone's SSUF No. 27. Rather, the tenor and purpose of Sheridan's and Meyer's comments was to inform Touchstone about what had happened and to ensure that Cherry's purported mistreatment of Sheridan ceased. There is no indication in the record that Sheridan held a genuine fear for her continued safety or that she communicated a fear for her safety to Touchstone. Indeed, Sheridan's actions afterwards further support the conclusion that she did not have a reasonable belief as to unsafe working conditions. Furthermore, it is undisputed that Sheridan was not actually harmed by Cherry's alleged hit. *See* Touchstone's SSUF Nos. 10-16, 22. Also, after the incident occurred, Sheridan accepted an apology from Cherry and went back to work. *See* Touchstone's SSUF Nos. 19-21.

In the end, Sheridan provides no evidence that she communicated to Touchstone that she feared for her safety on the set or that she requested any specific safety or security measures that she wanted Touchstone to implement. Further, there is no substantial evidence that Sheridan reasonably believed her working conditions were unsafe. Since Sheridan's comments did not express any genuine fear or any reasonable belief that Cherry's conduct created an unsafe working environment, Sheridan failed to put Touchstone on notice of continued safety issues on the Desperate Housewives set, further distinguishing this case from *Cabesuela.*

Sheridan also asserts that other cases have held complaints about threats of workplace violence are sufficient to state a claim for violation of Section 6310. The court does not find Sheridan's reliance on these cases to be persuasive. The other cases relied on by Sheridan all involved a foreseeable risk

of future harm. *Franklin v. Monadnock Co.* (2007) 151 Cal.App.4th 252; *Fusco v. Sonoma County Junior College Dist.* (N.D. Cal., Jan. 29, 2010, No. C-09-0114 MMC) 2010 WL 373795; and *Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936 all dealt with instances where the alleged safety concerns demonstrated that it was "highly foreseeable" that future acts of violence might occur. The facts presented in this case are distinguishable because there is no evidence that it was highly foreseeable that future acts of violence might occur on the *Desperate Housewives* set.

Sheridan also argues that *Lujan v. Minagar* (2004) 124 Cal.App.4th 1040, supports her position that she adequately put Touchstone on notice of an unsafe working condition. In that case, the Court of Appeal determined that Section 6310 applies to employers who retaliate against employees they fear might file a complaint because permitting preemptive retaliation would be at odds with statute's apparent intent. *Id.* at 1045. *Lujan* dealt with the timing of the complaint, or more precisely, whether an employer could preemptively cut off an employee's ability to complain about safety violations. Touchstone does not dispute that Sheridan made statements about Cherry's alleged hit. However, what Touchstone argues, and *Lujan* does not address, is whether Cherry's alleged hit would constitute an unsafe work condition and therefore form the basis of a valid Section 6310 complaint. Here, the statements about Cherry's alleged hit did not put Touchstone on notice of an ongoing unsafe work condition. *Lujan* does not support Sheridan's argument against summary judgment.

The same can be said for Sheridan's reliance on *Skillsky v. Lucky Stores, Inc.* (9th Cir. 1990) 893 F.2d 1088. In that case, the plaintiff had previously complained about Cal-OSHA violations involving the noise level of his prior employer's trucks. *Id.* at 1090. These complaints ultimately led to the prior employer being forced to replace ten of its trucks. *Id.* Therefore, the severity and future foreseeable risk of harm from the unsafe work condition associated with the complaint was not in question and it was clear that the complaint put the original employer (and in *Skillsky*'s case, the subsequent employer) on notice that an actual bona fide complaint about workplace safety had been made.

Based on the foregoing, the Court finds that Sheridan has failed to raise a triable issue of fact as to whether her contract was not renewed because of complaining to Touchstone about unsafe working conditions in violation of Labor Code section 6310. Sheridan has not offered evidence that she had a reasonable basis for believing that the *Desperate Housewives* set presented an ongoing unsafe environment or that she ever actually apprised Touchstone that she was complaining about unsafe working conditions.

Was The Set of Desperate Housewives An Unsafe Workplace Because of the Incident With Marc Cherry?

The Court finds that the evidence does not establish that the alleged incident between Sheridan and Cherry is sufficient to render the Desperate Housewives set an unsafe workplace, either subjectively or objectively. Sheridan has failed to present evidence that it was "highly foreseeable" that future acts of violence might occur. Moreover, under California law a safe place of employment has been interpreted to relate to the physical condition of the place of work rather than activities of other employees. *Cole v. State of California* (1970) 11 Cal. App. 3d 671, 675; *Burnette v. Godshall* (N.D. Cal. 1993) 828 F. Supp. 1439, 1446.

The Court of Appeal in *Muller* held, *inter alia*, "There is no evidence in the record that Muller was subjected to unsafe working conditions in the Auto Club office where she worked. " *Id.* at 451–52. The complaints allegedly made in *Muller* specifically voiced a fear about Muller's safety in the workplace, but the *Muller* court found they were not evidence that the workplace was actually unsafe, and so were not sufficient. [1] Like *Muller*, the Court finds that Sheridan has not opposed this motion with evidence that the workplace was actually unsafe.

In opposition, Sheridan contends after the fact that Cherry engaged in a "pattern of violent, abusive, and hostile behavior," as evidenced by yanking her arm, his statement that he wished for Teri Hatcher's death, and rude, derisive, or otherwise agitated demeanor. However, certain of these acts took place in the 2nd season of the show, long before the Cherry incident at issue, which occurred in the 5th season of the show. Moreover, these issues were never raised in Sheridan's or Meyer's actual conversations with Touchstone personnel. Nor would these purported facts even amount to substantial evidence of a pattern of violent, abusive, and hostile behavior that would render a workplace unsafe. *See Day v. Sears Holdings Corp.* (C.D. Cal. 2013) 930 F.Supp.2d 1146, 1192 (Cal-OSHA "does not establish a public policy that all employees of private businesses must act professionally. Consequently, a complaint of unprofessional activity will not support a retaliation claim based on the statute."). Furthermore, it has already been previously determined based on the evidence presented at trial that Sheridan "failed to establish . . . that Cherry had intended to injure her and she suffered injury as a result of Cherry's action." *See Touchstone I, supra*, 208 Cal.App.4th at 680 fn.3. Sheridan's contention that Cherry's actions were serious enough to be considered a workplace safety hazard are unpersuasive.

The court finds that Plaintiff has not presented material evidence demonstrating that the actual workplace conditions themselves presented an unsafe work environment. Based on the undisputed evidence, the court finds from an objectively reasonable perspective that the working environment was not unsafe and further that Sheridan did not subjectively believe it was unsafe.

Accordingly, the motion for summary judgment must be GRANTED.

Was the Decision to Not Renew Sheridan's Contract Made in Retaliation for Her Alleged Complaints?

In addition to the above arguments in favor of summary judgment, Touchstone also contends that Sheridan cannot establish the requisite causation necessary for her retaliation claim because the decision to kill off her character, Edie Britt, had already been made prior to the September 24, 2008 incident with Cherry.

Based on undisputed facts 78, 79, 80, and 81, and ineffectively disputed facts 64, 82, and 83, it is uncontroverted that Sheridan's character, Edie Britt, had been considered for a scripted death at various times throughout the first five seasons of the show. SSUF 64, 82 and 83. Moreover, Touchstone presents substantial evidence from the major decision makers for the show –through

[1] Although Sheridan also contends that *Muller* is distinguishable on the facts because the alleged threat came from outside the workplace, whereas Cherry was an employee of Touchstone, the court finds that this is a distinction without a difference in this instance and that the cases are comparable.

five witnesses who attended the meeting--that it was agreed on May 22, 2008 that Edie Britt would be killed off on season 5. Sheridan does not effectively dispute this evidence. While the decision could have been revoked based on other circumstances—e.g., another actress becoming pregnant—this does not negate the fact that the decision to kill of Edie Britt and, consequently, the decision to decline to renew Sheridan's contract, was previously considered and decided prior to the September 24, 2008 incident with Cherry. Sheridan's attempts to rebut Touchstone's evidence on this point is not persuasive. The key witnesses upon which Sheridan relies, Baker and Greenstein, were admittedly not involved in the May 22, 2008 meetings. Thus, their recollections about when they finally heard about the decision to kill off Edie Britt do not at all raise a factual dispute regarding the May 22, 2008 decision. Sheridan does not effectively dispute this evidence.

Since the undisputed evidence demonstrates that all of the major decision makers—notably Pedowitz and McPherson—had signed off on the decision to kill Edie Britt as of May 22, 2008, it is clear from the uncontroverted evidence that the decision to kill Edie Britt occurred months before Sheridan had her run in with Cherry. It stands to reason that the September 24, 2008 incident Sheridan had with Cherry had no impact on the employment decision regarding Sheridan. There is no causal link connecting Sheridan's complaints about the single incident with Cherry to the decision to kill of her character. The decision was made in May, 2008, long before the Cherry incident and the decision was never changed. That the decision remained unchanged after the September 24, 2008 incident does not retrospectively color the decision with retaliatory animus. *See, e.g., Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353. And the fact that this decision was not actually carried out until after the incident does not undercut the lack of causation. It does not mean that retaliation played any part, let alone a "substantial" part, in the decision. Therefore, the Court finds that Sheridan has not established a prima facie case of retaliation because she lacks evidence of causation. Summary judgment must be granted on that ground alone.

Alternatively, Touchstone asserts that even if the decision to kill off Edie Britt were partially motivated by retaliatory animus, Sheridan cannot show that this animus was a "substantial motivating factor" for the decision, citing *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203 In *Harris*, the California Supreme Court held that even if an employment action was motivated by discriminatory and non-discriminatory reasons (i.e., "mixed-motives"), the employer was not liable if it could establish that its legitimate reason, standing alone, would have induced it to make the same decision. *Id.* at 213. Specifically, that Court held that in mixed-motives cases, for liability to attach, a plaintiff must prove that discrimination was a "substantial motivating factor" of the employment decision. *Id.* at 241. The Court further held that, even if the plaintiff can make a showing of liability, the plaintiff cannot be awarded damages if the employer can prove it would have made the same decision for lawful reasons. *Id.*

The Court finds that the Defendant has presented substantial undisputed evidence of the creative decision to kill off Sheridan's character, developed over several seasons of the show. Thus, under *Harris v. City of Santa Monica*, Touchstone's legitimate reasons for killing off Sheridan's character would have resulted in the same decision. Sheridan has not presented a triable issue of fact showing

that retaliatory animus was a "substantial motivating factor" of the employment decision. Therefore, *Harris* offers an independent basis for granting this motion.

Accordingly, the motion for summary judgment is GRANTED.

January 12, 2017

HOLLY E. KENDIG

Holly E. Kendig, Judge
Los Angeles Superior Court