SEE DISSENTING OPINION

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DON ANDERSEN et al.,

Plaintiffs and Appellants,

v.

A080279

SAFEWAY, INC.

(Alameda County Superior Court No. 755272-4)

Defendant and Respondent.

_____/

Appellants Don Andersen, J. Michael DeLaney, and Patrick Eisan appeal from summary adjudication in favor of respondent Safeway, Inc. The trial court found appellants were not constructively discharged and therefore could not sue for age discrimination in either violation of the California Fair Employment and Housing Act (Govt. Code, §§ 12900 et seq.) (hereinafter "FEHA")[1] or violation of public policy. The trial court also found that absent a constructive discharge, appellants' claims for intentional infliction of emotional distress were preempted by worker's compensation statutes. Appellants argue that as a matter of law their claims do not require a showing of constructive discharge, and alternatively, that a material question of fact exists as to whether they were constructively discharged. We shall reverse the summary judgment and remand for a trial on the merits.

1 All statutory references are to the Government Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

In August of 1994, Safeway had six stores located in Humboldt and Del Norte Counties and referred to by Safeway as the "North Coast." Four of the store managers, including appellants Andersen, DeLaney, and Eisan were over the age of 40. All three had lived in the North Coast region for many years.[2] On or about August 8, 1994, after settlement of a labor dispute with Safeway non-managerial employees, all four managers over age 40 were told by Safeway district manager Rojon Hasker they would have to either transfer outside of the North Coast region or accept a severance package. Initially, appellants Andersen and DeLaney were told to decide by the following day and to be prepared to start work at their new locations the following Monday.[3] The two younger managers were not required to relocate. All four were replaced by managers under 40, only one of whom had ever been a store manager previously. Two of those replacements have themselves since been replaced, also by managers under 40. Safeway administrators testified they wanted to get "fresh blood" and "new faces," and after the four managers were replaced ran an ad with the pictures of the new, younger managers entitled "Looking Better Than Ever."

Despite Safeway having allegedly promised Andersen that he would never have to relocate, he was offered the choice between the store manager position at Safeway's Carmel Valley store or the severance package. He was told if he decided to relocate he must start the following Monday. DeLaney was offered the store manager position at Safeway's Vallejo store, and was also told he was expected to begin work at the new location the following Monday. There was actually no vacancy in the store manager

---

2 Andersen had lived in the region for his entire life, and had worked for Safeway for 16 years. DeLaney had lived in the region for 35 years and had spent 26-1/2 years working for Safeway. Eisen had worked for Safeway for 29 years and had spent all but 2-1/2 years of that time in the North Coast.

3 The next day Hasker informed Andersen and DeLaney they had until the end of the week to decide. The record does not disclose whether Eisen was given a similar deadline.

position at the Vallejo store at that time. Hasker told DeLaney he was doing a good job, but that store managers had become too close to clerks during the labor negotiations and couldn't make the changes that Safeway needed to be made. When DeLaney asked Hasker what the changes were that needed to be made, she would not answer. Eisan was offered a position at a non-specified store, but was told by his district manager: "Pat, you're the senior manager. I'm sure we'll be able to accommodate you. Right now there's going to be a store available in Vallejo -- Vallejo, Monterey area." She also told him that she believed a store in San Jose was coming up. Andersen and DeLaney both asked whether they could step down to a clerk position as an alternative, Safeway agreed, and DeLaney remains employed at a North Coast store as head clerk. DeLaney had a history of melanoma cancer and feared being without health insurance. Andersen left Safeway, as did Eisan.

DeLaney's reasons for not leaving the North Coast included a son with severe learning disabilities who had just begun college and could not be easily relocated. However, DeLaney had expressed a willingness to be transferred to Seattle or Northern California when it looked like labor negotiations might result in his store closing. Andersen's reasons for not accepting the transfer included his family's long history in the North Coast area and his frail mother and mother-in-law, both of whom lived in Eureka and required assistance. He did, however, write a letter acknowledging the store he was offered in Carmel was "top notch," but also explaining his reasons for not accepting the position. Lastly, Eisan refused because he had lived in the Eureka area almost all his life and he could not financially afford to relocate. He had turned down promotions in the past to stay in the area. Safeway knew of these facts and knew appellants were unlikely to accept transfers.

Safeway had just gained large wage concessions from the union in the North Coast area and Hasker told appellants that tension over this was the reason for their transfers. (Appellants, as managers, were not members of the union and had played no role in the

labor negotiations.) Later that week, appellants learned Safeway spokesperson Debra Lambert had told the media the transfers were not related to the labor concessions. In her deposition, Lambert said her statement to the media was a lie at the direction of upper management. In other areas where there have been labor concessions, the managers were not subsequently transferred. Safeway had never before required North Coast managers to transfer involuntarily and appellants knew this.

At the time they refused the transfers, appellants had concluded the real reason for the transfers of the four managers over 40 was age discrimination. Under the circumstances, they feared that if they accepted the transfers and moved from the area, uprooting their families, Safeway might well discharge them in any event because of their age. Andersen related these concerns to Safeway's Regional Operations Manager Steve Frisby in a telephone call on August 13, 1994. Frisby responded "that this was one of those 'tough business decisions.'"

Safeway has since claimed it wanted to replace appellants with "strong" managers; but appellants all had ratings of "good" on official evaluation forms, a rating equal to that of the younger managers who were retained. In depositions, their performance was characterized as "very good" or "excellent." John Cartales, Safeway's Northern California division manager in 1994, testified Safeway did not compel managers to transfer *into* the North Coast area because it would not be "good for the business to have someone there [who was] very unhappy."

On August 7, 1995, appellants filed a complaint alleging ten causes of action, including age discrimination in violation of FEHA, age discrimination in violation of public policy, and intentional infliction of emotional distress. Safeway moved for summary judgment or adjudication on January 9, 1997. On February 7, 1997, summary adjudication was granted for all claims other than negligent infliction of emotional distress and Andersen's claim of intentional and negligent misrepresentation by promissory fraud. Appellants dismissed their negligent infliction of emotional distress

claim with prejudice on March 7, 1997. After a jury trial, judgment was entered for Andersen on his promissory fraud claim on July 24, 1997. That case is currently on appeal.

Appellants' motion for reconsideration as to their age discrimination and public policy claims was denied April 15, 1997. DeLaney and Eisan also filed a motion for a new trial as to these two causes of action; this motion was denied on May 2, 1997. Final judgment as to all remaining issues was entered August 1, 1997. Notice of appeal was filed September 30, 1997.

DISCUSSION

Appellants contend summary adjudication on their FEHA,[4] public policy, and intentional infliction of emotional distress claims was improperly granted. Appellants contend their claims do not require a showing of constructive discharge and that their intentional infliction of emotional distress claim is not preempted. In the alternative, appellants argue a material question of fact existed on the issue of constructive discharge, because a reasonable person in their situation would have resigned rather than accept a transfer.

Summary Adjudication

"A motion for summary adjudication shall be granted only if it completely disposes of a cause of action . . . ." (Code Civ. Proc., § 437c (f)(1).) To succeed on a motion for summary adjudication, "the defendant must negate a necessary element of the plaintiff's case and demonstrate that under no hypothesis is there a material factual issue requiring a trial. (*Molko* v. *Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107 . . . .)" (*Jane D.* v. *Ordinary Mutual* (1995) 32 Cal.App.4th 643, 649.)

---

4 Appellants allege in their brief both a discriminatory discharge under FEHA section 12941, and harassment under section 12940(h)(1). The harassment issue was not raised in appellants' original claim, their brief submitted in response to respondent's motion for summary judgment, or in the proceedings on summary judgment, and thus cannot be raised on appeal. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (1997) § 8:229.)

Under Code of Civil Procedure section 437c, the defendant meets the burden of showing that a cause of action has no merit if it shows "that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (o)(2).)

When reviewing a decision granting summary judgment or adjudication "[a]n appellate court must independently determine the construction and effect of the facts presented to the trial judge as a matter of law. [Citations.]" (*Rosse* v. *DeSoto Cab Co.* (1995) 34 Cal.App.4th 1047, 1050.) "The papers of the moving party are strictly construed and those of the opponent liberally construed, while any doubts as to the propriety of the motion are resolved in favor of the opposing party. [Citation.]" (*Jane D.* v. *Ordinary Mutual, supra*, 32 Cal.App.4th 643, 649.)

Appellants' Claims Require Showing a Constructive Discharge

Appellants argue, particularly in their reply brief, that their claims do not require a showing of constructive discharge. As to Andersen and Eisen, both of whom quit, we disagree.

In *Turner* v. *Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245, the California Supreme Court described the doctrine of constructive discharge:

"Employment relationships are generally terminated by resignation or discharge. (Lab. Code, § 2922.) An employee voluntarily severs the relationship by resignation; the employer does so by actual discharge. (*Ibid.*) [¶] Actual discharge carries significant legal consequences for employers, including possible liability for wrongful discharge. In an attempt to avoid liability, an employer may refrain from actually firing an employee,

preferring instead to engage in conduct causing him or her to quit. The doctrine of constructive discharge addresses such employer-attempted 'end runs' around wrongful discharge and other claims requiring employer-initiated terminations of employment. [¶] . . . [¶] Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation. [Citation.]."

Appellants' first claim is under FEHA section 12941, which states: "It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote any individual over the age of 40 on the ground of age . . . ."

"'[A] court is to construe a statute so as to effectuate the purpose of the law.' [Citation.] However, '[w]hen the statutory language is . . . clear and unambiguous there is no need for construction, and courts should not indulge in it.' [Citation.]" (*Rojo* v. *Kliger* (1990) 52 Cal.3d 65, 73, brackets in original.) The clear language of the statute only makes certain enumerated job actions actionable. We are aware of no case holding a transfer alone, in the absence of a constructive discharge, constitutes an unlawful employment practice under the FEHA. Therefore, appellants must show they were either constructively discharged or, in the case of DeLaney, actually or constructively demoted, to fall within the protection of FEHA.[5]

Appellants argue that a claim of age discrimination based upon public policy, rather than upon the FEHA, does not require a showing of constructive discharge, but instead can be based on a mandatory relocation. Appellants state the theories in their

---

5 Respondent objects that no case has ever recognized "constructive demotion." As he did not quit, DeLaney was not required to show a "constructive" demotion. He showed an actual demotion. (See discussion, pages 16-17, *infra.*)

pleadings include discriminatory forced relocation because of age, in violation of public policy (with no relocation required in order to mitigate damages). In other words, appellants want to be able to quit (and sue) if forced to relocate because of age, whether or not they can show a constructive discharge.

This reasoning finds no support in the cases. In *Stevenson* v. *Superior Court* (1997) 16 Cal.4th 880, the California Supreme Court defined the cause of action for age discrimination in violation of public policy. (*Id.* at p. 897.) The court held an employee who had failed to exhaust her administrative remedies under FEHA could sue for discrimination in violation of public policy. (*Id.* at pp. 884-887.) In so concluding the court emphasized language from past cases that the Legislature's intent behind FEHA was to "'supplement, not supplant or be supplanted by, existing antidiscrimination remedies, in order to give employees the maximum opportunity to vindicate their civil rights against discrimination . . . . [Citation.]'" (*Id.* at p. 891, quoting *Rojo* v. *Kliger*, *supra*, 52 Cal.3d at pp. 74-75.) Such language might be read to allow for appellants' claim even though it does not fit within the statutory language of FEHA and the court did not address the question of whether public policy made a broader range of activities actionable than those listed in FEHA. However, the court's discussion focused on wrongful discharge and, significantly, the court emphasized that its conclusion did not create any *new* legal obligations for employers not already manifested in FEHA. (*Stevenson* v. *Superior Court*, *supra*, 16 Cal.4th at pp. 904-905, 909.)

This understanding of *Stevenson* is consistent with an earlier case, *Jennings* v. *Marralle* (1994) 8 Cal.4th 121, in which the court concluded that because FEHA did not allow employees to sue employers for age discrimination if the employer had five or fewer employees, an employee could not then attempt to sue for age discrimination based on public policy if the employer had fewer than five employees. (*Id.* at p. 130.) As in *Stevenson*, it would appear the court's logic was fueled by a concern that public policy should not be used to extend FEHA claims to situations not covered by FEHA. We

conclude therefore that an employee's claim for age discrimination in violation of public policy must be a claim contemplated in FEHA. Consequently a showing of constructive discharge was required under this public policy theory as well.

We are convinced appellants' intentional infliction of emotional distress claim also requires a showing of wrongful discharge. Appellants' claim was based on "[d]efendant's discharge and/or constructive termination and/or wrongful demotion of plaintiffs." Respondent moved for summary adjudication of the emotional distress claim on the grounds it was preempted by the state's workers compensation scheme and that respondent was immune from tort liability for emotional distress caused by the termination of employment. The trial court concluded the claim was preempted because it determined that appellants did not show they were constructively discharged.

In *Livitsanos* v. *Superior Court* (1992) 2 Cal.4th 744, the court held: "So long as the basic conditions of compensation are otherwise satisfied (Lab. Code, § 3600), *and the employer's conduct neither contravenes public policy* [citation] nor exceeds the risks inherent in the employment relationship [citation], an employee's emotional distress injuries are subsumed under the exclusive remedy provisions of workers' compensation." (*Id.* at p. 754, emphasis added.) Thus, for appellants' transfers to give rise to claims for emotional distress, there must have been a violation of public policy. As discussed *supra*, for there to be a violation of public policy, appellants must have been constructively discharged. If appellants can show a triable issue of fact exists on the issue of wrongful discharge or demotion, then they can show a triable issue of fact also exists on the claim for intentional infliction of emotional distress. Without a constructive discharge, a job transfer would fall within the realm of normal employment activities.

Constructive Discharge

Thus the essential question is whether appellants raised a triable issue of material fact on the issue of constructive discharge. "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., supra,* 7 Cal.4th 1238, 1251.) Prior to stating this rule, the court had explained "[i]n order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. [Citation.] Moreover, a poor performance rating, or a demotion, even when accompanied by reduction in pay, does not trigger a constructive discharge." (*Id.* at p. 1247, brackets in original, fns. omitted.) However, the court noted that "[i]n some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.'" (*Id.* at p. 1247, fn. 3.)[6]

"Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.] Situations may exist, however, where the employee's decision to resign is unreasonable as a matter of law." (*Valdez* v. *City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1056.)

The central question in this appeal is whether under the circumstances the forced transfers could constitute a working condition so intolerable or aggravated that a

---

6 Appellants cite three working conditions that they contend would have compelled a reasonable person in their condition to resign: first, that appellants were at "severe risk of termination" even if they relocated because Safeway lied to them about the transfers by giving contradictory reasons; second, that if appellants accepted the transfers this would constitute acquiescence in Safeway's policy of age discrimination; and third, the requirement that appellants relocate hundreds of miles away.

reasonable employer would realize a reasonable person in the employee's position would be compelled to resign. (*Turner, supra,* at pp. 1245-1248.)[7]

Because this is summary adjudication, we must reverse unless we can say, as a matter of law, that no reasonable employees in appellants' position would have found the working conditions so egregious as to compel resignation. (See, *Casenas* v. *Fujisawa USA, Inc.* (1997) 58 Cal.App.4th 101, 115.)[8]

We recognize, as did *Turner*, that "'In order to properly manage its business, every employer must on occasion review, criticize, demote, *transfer,* and discipline employees.'" (*Turner, supra,* at p. 1255, italics added.) We do not believe a transfer alone would constitute the type of aggravated conduct which is required to constitute a constructive discharge.[9] However, we believe the circumstances surrounding the transfers in the present action, whether viewed as one unusually aggravated incident, or as several incidents combining with the transfer requirement to constitute intolerable and

---

7 *Turner* recognized three "areas of inquiry" in determining whether there had been a constructive discharge:

First, the conditions giving rise to the resignation must be "intolerable." (*Id.* at p. 1247.)

Second, "'a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' [Citations]" (*Turner, supra,* at p. 1248.)

Third, the employer "either created or knowingly permitted working conditions to remain intolerable." (*Id.* at p. 1250.) Requiring employees to notify someone in a position of authority about the situation "permit[s] employers unaware of any wrongdoing to correct a potentially destructive situation" (*ibid.*), and discourages employers from "deliberately ignoring a situation that has become intolerable to a reasonable employee." (*Ibid.*)

8 Here, viewing the facts favorably to the appellants, as we must under the summary adjudication standard, there is evidence to indicate Safeway knew appellants would find the transfer requirement so intolerable that they would resign. The facts as submitted raise a question of fact as to whether respondent used this knowledge to remove older store managers in the North Coast area.

9 We also recognize that "a requirement to move to a new city is likely to be particularly burdensome to a victim of age, rather than race or sex, discrimination, because the victim is almost by definition likely to have lived and worked in the community for a large number of years." (*Spagnuolo* v. *Whirlpool Corp.* (1983) 717 F.2d 114, 118.)

aggravated working conditions, were sufficient to raise a triable issue of fact as to the existence of a constructive discharge.

At the time they were faced with the choice to transfer or sever employment, appellants were aware of the following facts:

All six stores in the North Coast area had been affected by labor negotiations, resulting in significant wage concessions by employees. Of the six stores, four had managers over 40, all with strong evaluations as managers. None had been involved in the labor negotiations which had led to the concessions. Although all six stores were affected by labor unrest, only the four managers over 40 were told they had to accept transfers out of the area or severance. The two managers under 40 were not required to transfer. The reason given was ostensibly to avoid workers harboring residual resentment against managers resulting from the labor concessions and disrupting smooth operations. Contrary to the explanation appellants had been given for the transfers, Safeway spokesperson Debra Lambert had told the media the transfers were not related to the labor concessions. DeLaney had been offered a store that apparently was not then available. Safeway had never before required North Coast managers to transfer involuntarily and appellants knew this. Safeway knew appellants had very strong ties to the region and would be unwilling to accept transfers involving moving their families. Appellants relayed their concerns and suspicions to Safeway's upper management, but were rebuffed. Frisby told Andersen this was "one of those tough business decisions." Hasker told DeLaney he was doing a good job, but that store managers couldn't make the changes that Safeway needed to be made. However, she refused to answer DeLaney's inquiry as to what those necessary changes were. Safeway gave no consideration to rotating the managers to other stores in the North Coast area in a manner which would provide new managers at each store, but would not compel appellants to uproot their families. Furthermore, appellants were initially given *one day* to make up their minds about whether to relocate or sever their decades-long employment with Safeway.

This information could lead a reasonable employee in appellants' positions to conclude that Safeway was requiring them to transfer because they were over 40 and that Safeway did not expect appellants to accept the transfers, but was trying to get rid of them in order to bring in younger managers. Under these circumstances, appellants had good grounds to believe that if they accepted the transfers, Safeway would find some other reason to terminate their employment after they had moved. We believe it is an open question whether a reasonable employee would find the forced transfer, coupled with the surrounding circumstances, to constitute an intolerable working condition and would feel compelled to resign and accept the severance package rather than accept the transfer. In these circumstances, we believe appellants have raised a triable issue of fact as to whether appellants were constructively discharged.

In so concluding, we emphasize that, except insofar as appellants' personal circumstances were known to Safeway and would strengthen appellants' belief that the transfers were in reality an attempt to force their resignations because of their age, we have not considered the personal circumstances underlying each appellant's unwillingness to transfer in the first instance. (See *Gibson* v. *Aro Corp.* (1995) 32 Cal.App.4th 1628, 1636 ["the proper focus is on the working conditions themselves" and not on the employee's subjective reaction to those conditions]; cf., *Cherchi* v. *Mobil Oil Corp.* (D.N.J., 1988) 693 F.Supp. 156, 162-163.)

No California case directly addresses whether a transfer requiring the employee to move can constitute an intolerable working condition for purposes of the constructive discharge doctrine. Safeway relies upon *Lee* v. *Bank of America* (1994) 27 Cal.App.4th 197, and *Gibson* v. *Aro Corp., supra*, 32 Cal.App.4th 1628, to argue the forced transfers were not objectively intolerable working conditions.

In *Lee,* the trial court granted summary judgment to the employer where the employee, a bank branch manager in Costa Mesa, was transferred to another local branch office in Laguna Beach and was demoted to assistant branch manager, with

accompanying reduction in pay and responsibilities. The Court of Appeal affirmed, stating: "In the present case there is certainly nothing about being an assistant bank manager in a branch office in Laguna Beach that even remotely suggests the required element of intolerability. Indeed, no reasonable person could seriously suggest that the difference in pay, responsibility, conditions and prestige between being a full-fledged branch manager in Costa Mesa and being an assistant branch manager in Laguna Beach is so great that going from the former to the latter even comes close to being 'intolerable.'" (*Id.* at p. 213.)

In *Gibson,* an employee sued for age discrimination after he was given the option of a severance package or demotion from his position as regional manager for 13 states to a field sales job. He claimed his demotion, reduced pay, reduced responsibilities and embarrassment at working the field sales amounted to intolerable working conditions and constructive discharge. Following a jury verdict in the employee's favor, and affirmance by the Court of Appeal, the Supreme Court vacated and remanded in light of *Turner*. On remand the Court of Appeal reversed "as plaintiff cannot prove a constructive discharge as now delineated in *Turner* in that he failed to notify defendant that he considered his working conditions to be intolerable." (*Id.* at p. 1630.) The appellate court held that, as a matter of law, a demotion with a cut in pay does not create the kind of aggravated or intolerable circumstances that would compel a reasonable employee to quit his job. (*Id.* at p. 1635.) Nevertheless, the *Gibson* court examined the facts surrounding the transfer and demotion, finding the working conditions were not intolerable where "At the time of his resignation, Gibson had been performing the duties of a field sales representative at a salary of $2,700 per month, plus commissions, for four full months. He had the highest salary of all the Aro field sales representative[s] at Aro, and his salary was more than $1,000 more than [his supervisor's]. He was working in a sales territory in his own backyard in which there was ample work and where [his supervisor] treated him as a colleague. He was performing the same duties as other sales representatives (for more

pay) and was not being harassed (or even bothered) by anyone. There is nothing even arguably intolerable about these working conditions. [¶] The field sales representative job was not the job Gibson would have preferred. However, under *Turner*, an employee is not permitted to quit and sue simply because he or she does not like a new job assignment." (*Id.* at p. 1637.) Finally, the court held Aro had no actual knowledge of any intolerable working condition as Gibson's failure to notify Aro that he found working conditions intolerable deprived Aro of the opportunity to remedy the situation and undermined Gibson's claim. (*Id.* at p. 1639.)

Both *Lee* and *Gibson* involve local transfers. Neither required the employee to relocate to another geographic area in a context similar to that present here where the employee could reasonably believe he was being forced to transfer because of his age and when circumstances which would lead a reasonable person in the employee's position to believe the employer was forcing a resignation.

Federal cases, which are persuasive authority in the area of employment law, are instructive.[10] Federal cases have held that transfers, in combination with other actions by the employer, can constitute constructive discharge.[11] Although finding no constructive discharge under the specific factual circumstances presented (where employees in an entire job classification were transferred to another plant and where there was no indication that younger employees were treated any better than older employees), the

---

10 Federal case law regarding the Age Discrimination in Employment Act (ADEA) is often persuasive in FEHA age discrimination cases. California courts look to the federal law as a guide to analysis of claims under the California act because the statutes are similar. (*Stephens* v. *Coldwell Banker Commercial Group* (1988) 199 Cal.App.3d 1394, 1399.) ADEA prohibits a somewhat broader range of conduct than the FEHA insofar as it provides that it is unlawful for an employer to "[d]ischarge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment' based on age." (29 U.S.C. § 623(a)(1).)

11 In *Cockrell* v. *Boise Cascade Corp.* (10th Cir. 1986) 781 F.2d 173, 175, and *Walker* v. *Mountain States Tel. & Tel. Co.* (D. Colo. 1988) 686 F.Supp. 269, 274, transfers to different jobs were coupled with pay cuts and sizable demotions in terms of the assigned tasks.

court in *Bradford* v. *Norfolk Southern Corp.* (8th Cir. 1995) 54 F.3d 1412 recognized: "There may be situations in which a transfer to another location is so intolerable *when viewed in light of the attendant circumstances* that a finding of constructive discharge is warranted. [Citations]." (*Id.* at p. 1420.)

Further, in *Medwid* v. *Baker* (S.D.N.Y. 1990) 752 F. Supp. 125, the court upheld the decision of the magistrate to refuse summary adjudication for the employer on the issue of constructive discharge, concluding it was an open question whether "a transfer to a distant region after twenty-four years of service with the same agency in the same locale on one month's notice" constituted a constructive discharge. (*Id.* at p. 138.) The court concluded that the issue should be decided at trial. (*Id.* at pp. 138-139.) It appears from the court's analysis that this issue was considered as separate from other allegations of adverse employment actions.

Appellants claim DeLaney was either "wrongfully demoted or constructively wrongfully demoted (and was not offered any actual position in another location, since the Vallejo job was not in fact available)." Safeway argues that because DeLaney decided to remain working at Safeway, he cannot claim he was constructively discharged.

Government Code section 12941, subdivision (a), makes it an unlawful employment practice "to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or *demote*, any individual over the age of 40 on the ground of age . . . ." (Italics added.) A prima facie case of age discrimination arises when the employee shows (1) at the time of the adverse action he or she was 40 years of age or older, (2) an adverse employment action was taken against the employee, (3) at the time of the adverse action the employee was satisfactorily performing his or her job and (4) the employee was replaced in his position by a significantly younger person. (*Hersant* v. *Department of*

Social Services (1997) 57 Cal.App.4th 997, 1003; *Stephens* v. *Coldwell Banker Commercial Group, Inc., supra,* 199 Cal.App.3d 1394, 1400.)[12]

Demotion, even when accompanied by a reduction in pay, does not by itself trigger a constructive discharge, allowing the employee to quit and sue. (*Turner, supra,* 7 Cal.4th 1238, 1247.) DeLaney did not quit. We need not view this as "constructive discharge" or "constructive demotion." DeLaney was actually demoted. He contends this demotion violated FEHA and public policy as it was based on his age. Here, as we have determined above, a jury could find the forced relocation transfers, combined with the attendant circumstances constituted "intolerable" working conditions and that a reasonable employee would have felt compelled to resign, rather than accept the transfer. A jury could also conclude on these facts that in forcing DeLaney to make a Hobson's choice between resigning, accepting a transfer (in circumstances where the transfer constituted an intolerable working condition) and accepting a demotion, Safeway violated FEHA and public policy. That DeLaney accepted demotion, does not render the transfer less intolerable a working condition or his acceptance of demotion to avoid transfer any less coerced.

---

12 "It is not entirely clear that this last element is a required part of the employee's prima facie case. (Cf. *O'Connor* v. *Consol. Coin Caterers* (1996) 517 U.S. 308, 309-313 . . . and *Heard* v. *Lockheed Missiles & Space Co., supra,* 44 Cal.App.4th at pp. 1747-1753.)" (*Hersant* v. *Department of Social Services, supra,* 57 Cal.App.4th at p. 1003, fn. 3.)

DISPOSITION

We conclude the trial court erred in granting summary judgment on appellants' FEHA, public policy, and intentional infliction of emotional distress claims. The judgment of the trial court is reversed and the matter remanded. Appellants are awarded their costs on appeal.

Kline, P. J.

I CONCUR,

Ruvolo, J.

Andersen et al. v. *Safeway Inc.*, No. A080279
Dissenting opinion of Haerle, J.

I respectfully dissent. In my view, the majority opinion does violence to the explicit holding of our Supreme Court in *Turner* v. *Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238 (*Turner*). In that case, and as the majority acknowledges, the court repeatedly stressed that "constructive discharge" could only be found where there are "aggravated and intolerable" working conditions. (*Id.* at pp. 1247, 1251). Not quoted by the majority is the court's equally important cautionary note that "[t]he 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" (*id.* at p. 1246) nor its approving quotation from another case that "the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.'" (*Id.* at p. 1248, quoting *Rochlis* v. *Walt Disney Co.* (1993) 19 Cal.App.4th 201, 212.)

In *Turner* the court also observed (as the majority here *does* note) that transfers are often a normal part of the employment process. (*Id.* at p. 1255; see also, to the same effect, *Cole* v. *Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160; *Soules* v. *Cadfam, Inc.* (1991) 2 Cal.App.4th 390, 401, disapproved on other grounds in *Turner*, *supra*, 7 Cal.4th at p. 1240.)

Notwithstanding these unmistakable holdings, the majority constructs a "transfer plus" rule that essentially says that a plaintiff may avoid the *Turner* rule and claim constructive discharge any time he or she can allege any remotely related ancillary factor or factors that accompany the mandatory relocation or transfer. Here the "plus" factors the majority relies upon seem to be (see maj. opn. at p. 12): (1) the fact that two other under-40 managers in the area were not

transferred, (2) the "spin" a public-relations type gave the local media as to the reasons for the transfers, (3) the fact that the appellants were given only one day to make up their minds, (4) Safeway had never before required "North Coast managers" to transfer involuntarily, and (5) Safeway knew of the appellants' long and substantial ties to the region and the consequent unlikelihood they would accept involuntary transfers.

To my mind, none of these factors, either singly or in combination, comes close to meeting the "aggravated and intolerable . . . extraordinary and egregious . . . no reasonable alternative but to quit" standard of *Turner*. Indeed, one -- the media smoke-blowing by the public relations functionary -- seems patently trivial. And another, the alleged "fact" that Safeway knew of their long ties to the community and thus that they would be unlikely to agree to a transfer, can of course always be alleged by a plaintiff seeking to use a "transfer plus" rule to evade *Turner's* holding.

Finally, one of the majority's "plus" factors, the lack of any precedent for involuntary transfers in the North Coast region, is highly misleading. In fact, the record is clear that *on a company-wide basis,* relocations and transfers, even if involuntary, were normal within Safeway. Both appellants Andersen and Eisen so stated, the former both in a declaration drafted by his counsel and in his deposition. This was confirmed by company witnesses Frisby and Cartales.

I would affirm the summary judgment.

Haerle, J.

A080279

Philip Brian Horowitz
Lawless & Horowitz
600 Montgomery Street - 33rd Floor
San Francisco, CA 94111

pa

adda