

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Schouker v. Swarm Industries, Inc. dba Polyswarm

Schouker · No. 24-cv-07373-JSC · Decided April 3, 2025

OPINION

Schouker v. Swarm Industries, Inc. dba Polyswarm

PER CURIAM.

1 2 3

4 UNITED STATES DISTRICT COURT

5 NORTHERN DISTRICT OF CALIFORNIA

6 7 PATRICIA SCHOUKER, Case No. 24-cv-07373-JSC 8 Plaintiff,

ORDER DENYING IN PART AND

9 v. GRANTING IN PART DEFENDANT’S

MOTION TO DISMISS

10 SWARM INDUSTRIES, INC., et al., Re: Dkt. No. 39 Defendants. 11 12 13 Patricia Schouker
alleges 12 causes of action against her former employer, Swarm 14 Industries, Inc.
("PolySwarm"), and PolySwarm’s CEO, Steven Bassi, Jr. Counts One through 15 Seven allege
gender and disability discrimination, harassment, retaliation, and failure to prevent 16
discrimination and harassment in violation of Title VII of the Civil Rights Act and California’s 17
Fair Employment and Housing Act ("FEHA"). Counts Eight, Nine, Ten, and Twelve allege 18
intentional and negligent infliction of emotional distress, breach of contract, and a California 19
Labor Code retaliation violation, respectively. Count Eleven seeks a declaratory judgment. 20
Defendants move to dismiss all counts. Having considered the complaint and the parties’ briefs,
21 and having had the benefit of oral argument on March 27, 2025, the Court GRANTS in part
and 22 DENIES in part Defendants’ motion to dismiss. Plaintiff plausibly alleges gender
discrimination 23 and harassment, as well as whistleblower retaliation in response to her protected
activity (Counts 24 One, Two, Four, Six, and Twelve). However, she fails to plausibly plead
disability discrimination 25 and harassment, FEHA retaliation, tort liability, and breach of contract
(Counts Three, Five, 26 Seven, Eight, Nine, and Ten). And as pled, Plaintiff is not entitled to
declaratory relief because 27 she seeks to remedy a past wrong (Count Eleven).

1 FIRST AMENDED COMPLAINT ALLEGATIONS

2 PolySwarm, a company with approximately 30-40 employees, "is a crowdsourcing threat 3
detection marketplace where security experts compete to detect and analyze threats." (Dkt. No. 15
4 ¶ 3.) PolySwarm hired Plaintiff in July 2021 as its Director of Business Development and 5
Strategy. (Id. ¶ 36.) In this role, Plaintiff managed the sales cycle including pre- and post-sales 6

engagement with customers. (Id. ¶ 36.) One year later, in July 2022, Plaintiff was promoted to 7 Vice President of Alliance and Strategic Partnership. (Id. ¶ 41.) Plaintiff's responsibilities 8 expanded to include more market strategy. (Id.) "With her promotion," which was "memorialized 9 in an email," Plaintiff "was eligible to earn a commission split of ten percent (10%) for direct 10 deals and five percent (5%) for partner deals." (Id. ¶¶ 42-43.) 11 During her tenure at PolySwarm, Plaintiff's direct supervisor was Steve Laskowski, 12 PolySwarm's Chief Strategy Officer.¹ (Id. ¶¶ 19, 38.) After her promotion, Plaintiff also began to 13 work closely with PolySwarm's CEO, Mr. Bassi. (Id. ¶ 41.) Plaintiff "was the only full-time 14 female employee at PolySwarm directly reporting to Laskowski" and "the only woman in upper 15 management." (Id. ¶ 39.) Additionally, Plaintiff "was one of only two female full-time 16 employees" for most of her tenure at PolySwarm. (Id. ¶ 4.) 17 In late 2022, Mr. Laskowski and Mr. Bassi began "repeatedly pressur[ing]" Plaintiff "to 18 promote and sell products based on features that did not exist." (Id. ¶ 45.) Plaintiff "regularly 19 raised concerns regarding these unethical sales practices." (Id. ¶ 48.) She also raised concerns 20 about Mr. Bassi "falsely affirming" to the Department of Homeland Security ("DHS") "that 21 PolySwarm had no connections to prohibited foreign entities." (Id. ¶¶ 63-66.) Both Mr. 22 Laskowski and Mr. Bassi dismissed her concerns and made derogatory comments. (Id. ¶ 50.) 23 In addition, during Plaintiff's tenure at PolySwarm, Mr. "Laskowski persistently subjected 24 [her] to demeaning, gender-based harassment and discrimination," and "undercut [her] authority 25 by shifting decision-making power to male colleagues . . . effectively stripping her of the 26 autonomy expected in her senior role." (Id. ¶¶ 53, 59.) He assigned her "demeaning tasks far 27 1 below her position and expertise," "made sexist and inappropriate comments," and "regularly 2 berated her in front of the Sales Team and Customer Success Team, using profanity and harsh 3 language . . . not used with her male colleagues." (Id. ¶¶ 54, 56, 60.) In January 2024 Mr. 4 Laskowski "unilaterally and significantly reduced [Plaintiff's] commission structure, slashing her 5 commissions from 5-10% to 0.7%." (Id. ¶ 72.) 6 Plaintiff "raised multiple concerns regarding gender and disability discrimination to 7 Bassi," who "willingly took on the human resources role" for the majority of Plaintiff's tenure at 8 PolySwarm. (Id. ¶¶ 81-82.) Mr. Bassi neither "investigate[d] her complaints" nor sought to 9 remedy the "unhealthy and toxic work environment" by acting "to reprimand Laskowski or 10 prevent his discrimination and retaliation from continuing." (Id. ¶83.) Instead, Mr. Bassi 11 "dismissed her complaints" and "did not take any action to protect [Plaintiff] or address [her] 12 concerns." (Id. ¶ 82, 87.) 13 Plaintiff also alleges she suffered from health-related issues including high blood pressure, 14 panic attacks, and chest pains. (Id. ¶ 76.) "Despite her transparency about these serious health 15 concerns, Defendants refused to provide any meaningful accommodations or relief." (Id.) 16 In August 2024, PolySwarm fired Plaintiff. (Id. ¶ 12.) PolySwarm "falsely claim[ed] that 17 [Plaintiff] was fired because she had violated confidentiality policies by forwarding certain emails 18 to her personal email address." (Id.) "However, contemporaneous evidence shows that this 19 justification was just a pretext designed to conceal the retaliatory motive behind her dismissal." 20

(Id.) 21

DISCUSSION

22 A. Rule 8(a)(2) Dismissal 23 Defendants initially move to dismiss under Rule 8 arguing the entire complaint is an 24 improper shotgun pleading. Rule 8 requires “a short and plain statement of the claim showing that 25 the pleader is entitled to relief.” A Rule 8 dismissal is appropriate when a complaint consists of 26 such overly broad and confusing allegations that a defendant cannot adequately respond. 27 *Sollberger v. Wachovia Sec., LLC*, No. SACV 09-0766 AG (ANx), 2010 WL 2674456 at *4 (C.D. 1 Cal. June 30, 2010) (“Shotgun pleadings are pleadings that overwhelm defendants with an unclear 2 mass of allegations and make it difficult or impossible for defendants to make informed responses 3 to the plaintiff’s allegations.”). 4 Defendants’ contention the complaint “render[s] it nearly impossible for the Defendants to 5 sufficiently determine the basis for each count” is unpersuasive. (Dkt. No. 39 at 4.) Though the 6 complaint incorporates “Facts Common to All Causes of Action” into each of the 12 counts, the 7 complaint provides proper notice as to which factual allegations correspond to which counts.² 8 That is, the common facts are organized by headings specifying their relevance to the various 9 counts. For example, Counts Three and Five—alleging discrimination and harassment based on 10 disability—correspond with the complaint subheading “Defendants Cause, and Then Entirely Fail 11 to Accommodate, Ms. Schouker’s Medical Condition.” (Dkt. No. 15 at 18-20.) As Defendants 12 acknowledge, “incorporation by reference is not per se improper,” so long as adequate notice of 13 the factual premise of a claim is provided. (Dkt. No. 39 at 14). See also *Apothio, LLC v. Kern 14 Cnty.*, 599 F. Supp. 3d 983, 1001 (E.D. Cal. 2022) (“Although aspects of Plaintiff’s complaint are 15 in the form of a shotgun pleading, the complaint is sufficiently framed as to give notice to County 16 Defendants about the nature of the claims asserted against them.”). 17 Moreover, Defendants’ motion demonstrates they could determine which facts are 18 incorporated into each count. For example, in addressing Count Four alleging harassment based 19 on gender, Defendants write, “For her gender-based claim, to the extent Schouker is relying on 20 allegations under the header “Defendants’ Many Months of Gender Harassment Towards Ms. 21 Schouker . . .” and proceed to address those allegations. (Dkt. No. 39 at 23.) Because the 22 complaint does not “deprive[] Defendants from knowing the factual bases of each of the causes of 23 actions,” *George v. Grossmont Cuyamaca Cmty. Coll. Dist. Bd. of Governors*, No. 22-CV-0424- 24 BAS-DDL, 2022 WL 17330467 at *15 (S.D. Cal. Nov. 29, 2022), the Court DENIES Defendants’ 25 request to dismiss the entire complaint pursuant to Rule 8. See *In re Meta Pixel Tax Filing Cases*, 26 724 F. Supp. 3d 987, 1005 (N.D. Cal. 2024) (denying Rule 8 dismissal when complaint was 27 1 decipherable despite incorporation by reference). 2 B. Rule 12(b)(6) Dismissal 3 Defendants further argue all counts should be dismissed under Rule 12(b)(6) for failing to 4 state a claim upon which relief can be granted. “Dismissal under Rule 12(b)(6) is proper when the 5 complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support 6 a cognizable legal theory.” *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). 7 1. Gender

Discrimination under Title VII and FEHA (Counts One and Two) 8 Counts One and Two allege gender discrimination in violation of Title VII and FEHA. A 9 gender discrimination claim requires the same prima facie showing under Title VII and FEHA. 10 *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1218 (9th Cir. 1998). Plaintiffs may establish a 11 prima facie case based on circumstantial evidence by showing: 12 (1) they are members of a protected class; 13 (2) they were qualified for their positions and performing their jobs 14 satisfactorily; 15 (3) they experienced adverse employment actions; and 16 (4) similarly situated individuals outside their protected class were 17 treated more favorably, or other circumstances surrounding the 18 adverse employment action give rise to an inference of 19 discrimination. 20 *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1156 (9th Cir. 2010). 21 Defendants do not dispute the first two elements, nor could they. Plaintiff is a member of a 22 protected class. See 42 U.S.C.A. § 2000e-2(a) (prohibiting employers from discriminating 23 “against any individual . . . because of such individual’s . . . sex”). And Plaintiff plausibly alleges 24 she was qualified for her position and performing her job satisfactorily. (Dkt. No. 15 ¶¶ 33-35, 40, 25 44 (alleging Plaintiff “was selected as one of the ‘top 40 most influential individuals in the energy 26 sector’” and “consistently received positive performance evaluations and commendations for her 27 work”).) 1 Supreme Court’s broad definition. See *Muldrow v. City of St. Louis*, 601 U.S. 346, 355 (2024) 2 (plaintiffs “must show some harm respecting an identifiable term or condition of employment,” 3 but need not show “the harm incurred was ‘significant.’ Or serious, or substantial, or any other 4 similar adjective suggesting the disadvantage to the employee must exceed a heightened bar”). 5 “[A]ssigning more, or more burdensome, work responsibilities,” *Davis v. Team Elec. Co.*, 520 6 F.3d 1080, 1089 (9th Cir. 2008), and “termination, demotion, . . . adverse job assignments, official 7 discipline, and significant changes in compensation or benefits” are examples of adverse job 8 assignments. *Ayala v. Frito Lay, Inc.*, 263 F. Supp. 3d 891, 905 (E.D. Cal. 2017). Here, Plaintiff 9 alleges the following adverse employment actions: termination (Dkt. No. 15 ¶¶ 97-98); 10 diminishment and reassignment of professional responsibilities (*id.* ¶ 59); a commission cut (*id.* ¶ 11 72); and adverse job assignments such as picking up coffee and watching Mr. Laskowski’s dogs 12 (*id.* ¶ 60). 13 In addition, “workplace harassment, if sufficiently severe or pervasive, may in and of itself 14 constitute an adverse employment action.” *Kelley v. The Conco Companies*, 196 Cal. App. 4th 15 191, 212 (2011) (cleaned up). Plaintiff plausibly alleges the derogatory comments (*id.* ¶ 50), 16 hostile and dismissive attitudes (*id.*), and inappropriate and sexist comments (*id.* ¶¶ 54-60) were 17 sufficiently pervasive so as to “materially affect the . . . conditions of [Plaintiff’s] employment.” 18 See *Chuang*, 225 F.3d at 1126. So, Plaintiff plausibly alleges the harassing conduct also 19 constituted an adverse employment action. See *Martinez v. Costco Wholesale Corp.*, 481 F. Supp. 20 3d 1076, 1092 (S.D. Cal. 2020) (quoting *Yanowitz v. L’Oreal USA, Inc.*, 36 Cal. 4th 1028, 1036 21 (2005)) (“[A] court can consider the ‘totality of the circumstances to determine whether an 22 employee has been subject to treatment that materially affects the terms and conditions of 23 employment.’”). 24 Finally, as to the fourth element,

Plaintiff’s allegations that similarly situated male 25 employees were treated more favorably “give rise to an inference of discrimination.” (Id. ¶¶ 56, 26 59, 61.) See *Hawn*, 615 F.3d at 1156. For example, Plaintiff alleges Mr. Laskowski’s “language 27 and outbursts were directed at her specifically and were not used with her male colleagues” (id. ¶ 1 sales practices (id. ¶¶ 49-50), her male colleagues were not undermined as Plaintiff was in their 2 role and authority (id. ¶ 59), and her male colleagues did not face the same level of resistance 3 about taking time off (id. ¶ 79). From these allegations, it is reasonable to infer Plaintiff 4 experienced the adverse employment actions described above because of her gender. 5 Defendants’ arguments to the contrary are not persuasive. First, Defendants contend Mr. 6 Laskowski was not a decisionmaker and “[a] gender discrimination claim based on comments by 7 co-workers does not survive a motion to dismiss where the comments were made by a non- 8 decisionmaker.” (Dkt. No. 39 at 17.) But Plaintiff alleges Mr. Laskowski reassigned her job 9 responsibilities to male colleagues, gave her adverse job assignments like caring for his dogs, and 10 “unilaterally” reduced Plaintiff’s commission payments—all decisions about the terms and 11 conditions of her employment. (Dkt. No. 15 ¶¶ 59, 60, 72.) So, drawing all inferences in 12 Plaintiff’s favor, Mr. Laskowski was a decisionmaker. Further, the comments Mr. Laskowski 13 made to Plaintiff—for example, “Why are you so salty?” and “She’s not qualified to do this” (Dkt.

14 No. 15 ¶ 56)—support an inference Mr. Laskowski’s adverse employment actions were because of

15 Plaintiff’s gender. 16 Defendants further assert the complaint “lacks any allegations showing or supporting the 17 inference that Bassi treated Schouker in any way differently because of her gender.” (Dkt. No. 39 18 at 17.) This assertion overlooks the complaint’s allegations. For example, Plaintiff alleges “Bassi 19 consistently dismissed her input, belittling her concerns both public and privately” and 20 “undermined her credibility . . . making derogatory comments” that perpetuated a “hostile and 21 dismissive attitude” which “was particularly directed at Ms. Schouker, while her male counterparts 22 who expressed the same concerns did not experience the same level of dismissal or professional 23 undermining.” (Dkt. No. 15 ¶ 50.) These allegations support an inference the adverse 24 employment actions Mr. Bassi implemented were because of Plaintiff’s gender. 25 So, the Court DENIES Defendants’ motion to dismiss Counts One and Two. 26 2. FEHA Discrimination, Harassment, and Hostile Work Environment Based on Disability (Counts Three and Five) 27 1 and Count Five alleges harassment and hostile work environment based on disability in violation 2 of Cal. Gov. Code. § 12940(j). Plaintiffs may establish a prima facie case for disability 3 discrimination by showing: 4 (1) They suffered from a disability; 5 (2) they could perform the essential duties of the job with or without 6 reasonable accommodation; and 7 (3) they experienced adverse employment actions because of their 8 disability. 9 *Kaur v. Foster Poultry Farms LLC*, 83 Cal. App. 5th 320, 344 (2022). Defendants move to 10 dismiss on the ground Plaintiff has not alleged the first element—a qualifying disability. The 11 Court agrees. 12 FEHA defines a disability as a physical or mental impairment that limits a major life 13 activity,

without requiring the limitation to be substantial. Cal. Gov. Code § 12926.1(c); *Jensen v. 14 Wells Fargo Bank*, 85 Cal. App. 4th 245, 258 (2000). While this standard is broad, Plaintiff fails 15 to plead facts that support a plausible inference she was disabled within the meaning of FEHA 16 including what major life activities her disability impacted. The complaint’s references to “health- 17 related issues,” “serious health concerns,” “health challenges,” and “stress and health issues” are 18 too vague to support FEHA liability. (Dkt. No. 15 ¶¶ 76, 77, 80.) 19 Plaintiff also alleges she suffered from “high blood pressure, panic attacks, and chest 20 pains.” (Dkt. No. 15 ¶ 76.) As Plaintiff observes, panic attacks “have been recognized as physical 21 disabilities under FEHA.” *Herrera v. Nationwide Mut. Ins. Co.*, No. LA-CV-15-09023 JAK 22 (JEMX), 2017 WL 11628157 at *6 (C.D. Cal. June 9, 2017) (citing *Roby v. McKesson Corp.*, 47 23 Cal. 4th 686, 694 (2009)). But in *Roby*, the plaintiff detailed how such panic attacks “restricted 24 her ability to perform her job.” 47 Cal. 4th at 694 (“During a panic attack, [the plaintiff] suffered 25 heart palpitations, shortness of breath, dizziness, trembling, and excessive sweating.”). Here, 26 Plaintiff’s allegations do not support a plausible inference her panic attacks or other health-related 27 issues limited a major life activity. 1 alleges “[d]espite her health challenges, Ms. Schouker’s work performance remained exceptional, 2 with none of her responsibilities slipping.” (Dkt. No. 15 ¶ 80.) Plaintiff also assured her team 3 “that her responsibilities would not be affected” by her traveling to receive medical treatment. 4 (Dkt. No. 15 ¶ 78.) The only plausible inference from these allegations is that Plaintiff’s health 5 issues did not limit her ability to perform her job. And while Plaintiff alleges she “informed the 6 team that she would need to take paid time off (PTO) to recover from medical treatment” (id. ¶ 79), she does not allege the medical treatment was for a FEHA-qualifying disability. So, she does 8 not plausibly allege a disability discrimination claim. 9 And because Plaintiff does not plausibly allege she had a FEHA-qualifying disability 10 FEHA, her claim for hostile work environment based on disability cannot survive. *Cornell v. 11 Berkeley Tennis Club*, 18 Cal. App. 5th 908, 926-27 (2017). So, the Court GRANTS Defendants’ 12 motion to dismiss Counts Three and Five. 13 3. FEHA Harassment and Hostile Work Environment Based on Gender (Count Four) 14 Count Four alleges harassment and hostile work environment based on gender in violation 15 of Cal. Gov. Code § 12940(j). Plaintiff brings Count Four against both PolySwarm and Mr. Bassi 16 in his individual capacity. Plaintiffs may establish a prima facie case of harassment by showing: 17

(1) They are members of a protected class;

18

(2) they were subjected to unwelcome harassment;

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(3) the harassment was based on their protected status;

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(4) the harassment unreasonably interfered with their work

21 performance by creating an intimidating, hostile, or offensive work 22 environment; and 23

(5) defendants are liable for the harassment.

24 *Galvan v. Dameron Hosp. Assn.*, 37 Cal. App. 5th 549, 563 (2019). 25 a. PolySwarm 26 Defendants contend the complaint’s allegations “fail to rise to ‘sufficiently severe or 27 1 . . . work environment . . . when the harassing conduct sufficiently offends, humiliates, distresses, 2 or intrudes upon its victim, so as to disrupt the victim’s emotional tranquility in the workplace, 3 affect the victim’s ability to perform the job as usual, or otherwise interfere with and undermine 4 the victim’s personal sense of wellbeing.” *Ortiz v. Dameron Hosp. Assn.*, 37 Cal. App. 5th 568, 5 582 (2019). Courts have declined to find a hostile work environment if allegations consist only of 6 “harassment that is occasional, isolated, sporadic, or trivial.” *Hughes v. Pair*, 46 Cal. 4th 1035, 7 1043 (2009). “[FEHA] is not a civility code and is not designed to rid the workplace of 8 vulgarity.” *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 295 (2006). 9 Drawing all reasonable inferences in Plaintiff’s favor, the allegations support an inference 10 the harassing conduct unreasonably interfered with Plaintiff’s work performance. Plaintiff alleges 11 the following as examples of the harassing conduct she experienced at PolySwarm: 12 - Mr. Laskowski made patronizing remarks like, “she’s not qualified to do this,” “Why are 13 you so salty?” and “you’re too expensive.” (¶ 56.) 14 - Mr. Laskowski used profanity and harsh language such as “I don’t know why the fuck I 15 have to tell you how to do things” and “You fucking don’t get it.” (Id.) 16 - Mr. Laskowski made “[s]exist and inappropriate comments,” including referring to her as a 17 “pretty face” with prospective clients and asking her to wear a wedding ring to “keep 18 prospects and customers focused.” (Dkt. No. 15 ¶¶ 54-55.) 19 - “At conferences and customer/prospect dinners Laskowski often reduced her role to 20 superficial tasks and, told her to, ‘Go, go, go do what it takes, he likes you,’ suggesting that 21 her ability to secure business depended entirely on her attractiveness to male clients.” (Id. 22 ¶ 55.) 23 - Mr. Laskowski “frequently joined calls uninvited, adding himself to [Plaintiff’s] calendar 24 invites without her consent—behavior he did not impose on any of her male colleagues.” 25 (Id. ¶ 57.) 26 - In some meetings with clients, Mr. Laskowski “cut her off whenever she attempted to 27 speak.” (Id.) 1 alleges the harassing conduct fundamentally changed the nature of the work environment by 2 undermining Plaintiff’s sense of well-being and affecting her ability to perform her job. 3 Moreover, Plaintiff sufficiently alleges such harassment was based on her gender. Several 4 allegations are explicit in this regard. “For example, as part of [a conference], Laskowski directed 5 Ms. Schouker to wear a wedding ring to ‘keep prospects and customers focused,’ reducing her to 6 an object for male clients rather than valuing her professional expertise.” (Dkt. No. 15 ¶ 54.) 7 Plaintiff also alleges her “male counterparts . . . did not experience the same level of dismissal or 8 professional undermining.” (Id. ¶ 56; see also id. ¶¶ 49, 50, 59, 61.) So, the Court DENIES 9 Defendants’ motion to dismiss Count Four against PolySwarm. 10 b. Mr. Bassi in His Personal Capacity 11 Defendants assert Plaintiff lacks a legal basis to sue Mr. Bassi in his personal capacity, 12 whereas Plaintiff argues the claim against Mr. Bassi survives because he is an alter ego of the 13 corporation. In California, “[a] corporate identity may be disregarded—the

‘corporate veil’ 14 pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a 15 corporation liable for the actions of the corporation.” *Cam-Carson, LLC v. Carson Reclamation* 16 Auth., 82 Cal. App. 5th 535, 549 (2022). The alter ego doctrine may be invoked when two 17 conditions are met: “First, there must be such a unity of interest and ownership between the 18 corporation and its equitable owner that the separate personalities of the corporation and the 19 shareholder do not in reality exist. Second, there must be an inequitable result if the acts in 20 question are treated as those of the corporation alone.” *Id.* 21 Plaintiff’s allegations do not create an inference Mr. Bassi had a unity of interest with 22 PolySwarm. (Dkt. No. 15 ¶¶ 20-25.) Though Plaintiff alleges “[u]pon information and belief” 23 that “Polyswarm been [sic] and now are a mere shell that Bassi and Laskowski use as a conduit to 24 conduct personal business,” (*id.* ¶ 21), she does not allege facts to support this conclusion. And 25 the two specific allegations—that Mr. Laskowski paid Plaintiff’s bonus and Ms. Black’s salary out 26 of his personal funds (Dkt. No. 15 ¶¶ 24, 38 n.1)—relate to Mr. Laskowski’s actions, not Mr. 27 Bassi’s. Further, Plaintiff does not allege facts that support a plausible inference she will suffer an 1 Plaintiff’s conclusory allegation that she “would be unable to collect on any judgment entered in 2 her favor” because PolySwarm “is undercapitalized” is insufficient. See *Resh, Inc. v. Conrad*, No. 3 22-CV-01427-EJD, 2024 WL 4177944 at *4 (N.D. Cal. Sept. 11, 2024) (cleaned up) (“[D]ifficulty 4 in enforcing a judgment or collecting a debt does not satisfy the inequitable results standard.”). 5 So, the Court GRANTS Defendants’ motion to dismiss Count Four against Mr. Bassi. 6 4. FEHA Failure to Prevent Discrimination and Harassment (Count Six) 7 Count Six alleges Defendants failed to prevent discrimination and harassment in violation 8 of Cal. Gov. Code § 12940(k). Defendants argue “[s]ince Schouker’s harassment and 9 discrimination claims fail as a matter of law, Schouker cannot state a claim for failure to prevent 10 harassment, either.” (Dkt. No. 39 at 24.) As discussed above, Plaintiff plausibly alleges she was 11 subjected to discrimination and harassment based on gender during her tenure at PolySwarm. 12 Defendants make no other argument as to the sufficiency of Count Six. So, the Court DENIES 13 Defendants’ motion to dismiss Count Six. 14 5. FEHA Retaliation (Count Seven) 15 Count Seven alleges retaliation in violation of California Government Code § 12940(h). 16 To establish a prima facie claim of retaliation under FEHA, plaintiffs must show: 17 (1) They engaged in a protected activity; 18 (2) they were subjected to an adverse employment action; and 19 (3) there is a causal link between the protected activity and the 20 adverse employment action. 21 *Steele v. Youthful Offender Parole Bd.*, 162 Cal. App. 4th 1241, 1252 (2008). The causal link 22 required by element three “may be established by an inference derived from circumstantial 23 evidence.” *Flores v. City of Westminster*, 873 F.3d 739, 749 (9th Cir. 2017). Defendants contend 24 Plaintiff does not plausibly allege a causal connection between Plaintiff’s protected activity and an 25 adverse action. The Court agrees. 26 As an initial matter, the Court disregards Plaintiff’s argument that “PolySwarm’s refusal to 27 accommodate her disability” constitutes protected activity. (Dkt. No. 46 at 25.) Plaintiff does not 1 “[a]s a result of Plaintiff’s protest and opposition to the unlawful

conduct of employees of 2 Defendants, Defendants retaliated against Plaintiff by, among other things, diminishing her role in 3 the company, reducing her commissions, and discharging her.” (Dkt. No. 15 ¶ 134 (emphasis 4 added).) So, the Court declines to address Plaintiff’s arguments in her opposition brief about 5 requesting accommodations and taking time off for medical treatment as protected activity. See 6 *Schneider v. California Dep’t of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (“In determining 7 the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a 8 plaintiff’s moving papers, such as a memorandum in opposition to a defendant’s motion to 9 dismiss.”). 10 As to the protected activity of protesting and opposing the unlawful conduct of 11 Defendants’ employees, the complaint is vague about when this occurred. In the section titled 12 “Defendants’ Many Months of Gender Harassment Towards Ms. Schouker,” Plaintiff alleges she 13 raised the issue of Mr. Laskowski’s discriminatory conduct to Bassi and her complaints were 14 ignored. (Dkt. No. 15 ¶¶ 61-62.) But Plaintiff does not say when such conversation(s) occurred. 15 Plaintiff later alleges she “raised multiple concerns regarding gender and disability discrimination 16 to Bassi” including during “Bassi’s multiple trips to Washington D.C.” (Id. ¶¶ 81, 83.) But again, 17 Plaintiff does not provide dates. And Plaintiff’s allegation that she “raised her concerns to Bassi 18 after Laskowski’s demeaning comments at the 2024 RSA Conference” is also unspecific as to 19 when in 2024. (Id. ¶ 84.) That timing is important, as the alleged adverse actions occurred over 20 an eight-month period in 2024. Plaintiff alleges “Defendants retaliated against Plaintiff by, among 21 other things, diminishing her role in the company, reducing her commissions, and discharging 22 her.” (Dkt. No. 15 ¶ 134.) Those alleged adverse actions occurred in June 2024, January 2024, 23 and August 2024, respectively. (Id. ¶¶ 72, 78, 92.) Because the complaint is vague about the 24 timing of her complaints and vague about the connection between such complaints and a series of 25 adverse employment action, the Court cannot determine whether temporal proximity supports an 26 inference of causation. 27 Plaintiff argues “temporal proximity is but one factor to be considered” in deciding 1 Court to other allegations which plausibly support a causation inference. So, the Court GRANTS 2 Defendant’s motion to dismiss Count Seven. 3 6. Intentional Infliction of Emotional Distress (IIED) (Count Eight) 4 Defendants move to dismiss the IIED claim on the ground Plaintiff has not alleged conduct 5 of the extreme and outrageous nature required to support a claim of IIED. A claim for intentional 6 infliction of emotional distress is supported only where conduct by the defendant is extreme and 7 outrageous. *Christensen v. Super. Ct.*, 54 Cal.3d 868, 903 (1991). Conduct is “outrageous” or 8 “extreme” when it “exceed[s] all bounds of that usually tolerated in a civilized society.” 9 *Schneider v. TRW, Inc.*, 67 F.Supp.3d 1091, 1099 (N.D.Cal.2014) (citation omitted). 10 Plaintiff alleges “[t]he conduct complained of above was outside the conduct expected to 11 exist in the workplace.” (Dkt. No. 15 ¶ 136.) But the IIED cause of action fails to identify which 12 specific conduct was extreme and outrageous; instead, it incorporates by reference the allegations 13 of the complaint in their entirety. And unlike other causes of action, there is no IIED subheading 14 in the complaint specifying the relevant

allegations. Relatedly, while all Defendants are named in 15 Count Eight, it is unclear which conduct supports a claim of IIED against which defendant. 16 Moreover, generally employer conduct—including derogatory remarks, humiliation, and 17 inadequate investigations into staff complaints—does not rise to the level of outrageousness 18 required to support a claim for IIED. See, e.g., *Lee v. S. of Mkt. Health Ctr.*, No. 19-CV-06482- 19 LB, 2020 WL 2219032 at *7-8; *Kelley v. The Conco Companies*, 196 Cal. App. 4th 191, 216 20 (2011); *Garamendi v. Golden Eagle Ins. Co.*, 128 Cal. App. 4th 452, 480 (2005). 21 Because Plaintiff fails to plausibly allege extreme and outrageous conduct, the Court 22 GRANTS Defendants’ motion to dismiss Count Eight as to both Defendants. 23 7. Count Nine: Negligent Infliction of Emotional Distress (NIED) (Count Nine) 24 “[N]egligent infliction of emotional distress is a form of the tort of negligence, to which 25 the elements of duty, breach of duty, causation and damages apply.” *Huggins v. Longs Drug Stores Cal., Inc.*, 6 Cal.4th 124, 129 (1993). “The existence of a duty of care owed by a defendant 27 1 & Loan Ass’n, 231 Cal.App.3d 1089, 1095 (1991). Thus, “absent a duty, the defendant’s care, or 2 lack of care, is irrelevant.” *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal.

3 App. 4th 472, 482 (1996). “The existence of a legal duty to use reasonable care in a particular 4 factual situation is a question of law for the court to decide.” *Vasquez v. Residential Invs., Inc.*, 5 118 Cal.App. 4th 269, 278 (2004). 6 As a threshold matter, Plaintiff’s reference to all the factual allegations in the complaint 7 and failure to specify which “conduct” gives rise to this claim is fatal to her NIED claim. See 8 *Muse Brands, LLC v. Gentil*, No. 15-CV-01744-JSC, 2015 WL 4572975 at *11 (N.D. Cal. July 9 29, 2015). Moreover, Plaintiff does not allege facts that support a plausible inference Defendants 10 owed Plaintiff a special duty. Plaintiff’s assertion that “all individuals have a duty to refrain from 11 negligent conduct that causes harm” misstates the law. (Dkt. No. 46 at 27.) Rather, under 12 California law, there is no general duty to avoid negligently causing emotional distress to another. 13 *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 984 (1993). As Plaintiff merely alleges “if 14 said conduct of Defendants, and of their agents and employees was not intentional, it was 15 negligent, and Plaintiff is thereby entitled to general damages for the negligent infliction of 16 emotional distress” (Dkt. No. 15 ¶ 140), she does not state an NIED claim. 17 So, the Court GRANTS Defendants’ motion to dismiss Count Nine as to all Defendants. 18 8. Breach of Contract (Count Ten) 19 Count Ten alleges PolySwarm breached Plaintiff’s employment contract by failing to pay 20 her the required percentages on commission splits. (Dkt. No. 15 ¶¶ 72, 144.) Specifically, 21 Plaintiff alleges on July 21, 2022, “Plaintiff and defendant PolySwarm entered into an agreement. 22 . . . memorialized in an email” amending her commission package. (Id. ¶ 142.) The agreement 23 provided for a “commission split of ten percent (10%) for direct deals and five percent (5%) for 24 partner deals.” (Id. ¶¶ 142, 143.) Then, in January 2024, PolySwarm breached the agreement by 25 “significantly reduc[ing] Ms. Schouker’s commission structure [and] slashing her commissions 26 from 5-10% to 0.7% for partner, direct, and renewal opportunities.” (Id. ¶ 72.) 27 In moving to dismiss, Defendants attach

the July 21, 2022 email setting forth the 1 email under the incorporation by reference doctrine. See *United States v. Ritchie*, 342 F.3d 903, 2 908 (9th Cir. 2003) (“Even if a document is not attached to a complaint, it may be incorporated by 3 reference into a complaint if . . . the document forms the basis of the plaintiff’s claim.”). 4 Plaintiff cannot plausibly state a breach of contract claim based on the email. “It is settled 5 that an employer may unilaterally alter the terms of an employment agreement, provided such 6 alteration does not run afoul of the California Labor Code.” *Davis v. Nordstrom, Inc.*, 755 F.3d 7 1089, 1093 (9th Cir. 2014). Further, “an employer may terminate or modify a contract with no 8 fixed duration period after a reasonable time period, if it provides employees with reasonable 9 notice.” *Id.* And “where an employee continues in his or her employment after being given notice 10 of the changed terms or conditions, he or she has accepted those new terms or conditions.” *Id.* 11 Irrespective of whether the July 21, 2022 email is an enforceable agreement, the email did 12 not guarantee Plaintiff’s commission structure would exist through a specific date or indefinitely. 13 In January 2024, PolySwarm started paying “Ms. Schouker only the reduced 0.7% commission on 14 deals she closed.” (Dkt. No. 15 ¶ 74.) Plaintiff continued working at PolySwarm through August 15 2024. In so doing, Plaintiff “accepted those new terms or conditions.” See *Davis*, 755 F.3d at 16 1093. 17 Plaintiff’s arguments to the contrary ignore settled precedent allowing employers to 18 unilaterally alter terms of an employment agreement. *DiGiacinto v. Ameriko–Omserv Corp.*, 59 19 Cal.App.4th 629, 637 (1997) (an “employee who continues in the employ of the employer after 20 the employer has given notice of changed terms or conditions of employment has accepted the 21 changed terms and condition.”). “[A]s long as the employee continued in employment with 22 notice of the new terms, the employee has no action for breach of contract as a matter of law.” *Id.* 23 So, the Court GRANTS Defendants’ motion to dismiss Count Ten. 24 9. Declaratory Judgment (Count Eleven) 25 In Count Eleven, Plaintiff “seeks a declaratory judgment that she did not violate her duties 26 of confidentiality and loyalty, or any related statutory duty, to PolySwarm.” (Dkt. No. 15 ¶ 149.) 27 “In a case of actual controversy within its jurisdiction,” courts “may declare the rights and other 1 could be sought.” 28 U.S.C. § 2201(a). In determining whether an actual controversy exists, a 2 court considers “whether the facts alleged, under all the circumstances, show that there is a 3 substantial controversy, between parties having adverse legal interests, of sufficient immediacy 4 and reality to warrant the issuance of a declaratory judgment.” *Maryland Cas. Co. v. Pac. Coal & 5 Oil Co.*, 312 U.S. 270, 273 (1941). 6 Plaintiff’s allegations do not satisfy the requirement for sufficient immediacy because it 7 seeks a remedy for past actions. “A declaratory judgment is not a corrective action, and therefore, 8 it should not be used to remedy past wrongs.” *John M. Floyd & Assocs., Inc. v. First Imperial 9 Credit Union*, No. 16-CV-1851 DMS (WVG), 2017 WL 4810223 at *5 (S.D. Cal. Oct. 25, 2017), 10 aff’d, 771 F. App’x 840 (9th Cir. 2019). Plaintiff “seeks a declaratory judgment that she did not 11 violate her duties of confidentiality and loyalty, or any related statutory duty, to PolySwarm.” 12 (Dkt. No. 15 ¶ 149 (emphasis added).) So, as alleged, she does not seek to define legal rights and 13 obligations in anticipation of some future

conduct. See *Seattle Audubon Soc. v. Moseley*, 80 F.3d 14 1401, 1405 (9th Cir. 1996) (“declaratory judgment offers a means by which rights and obligations 15 may be adjudicated in cases ‘brought by any interested party’ involving an actual controversy that 16 has not reached a stage at which either party may seek a coercive remedy.”). Because Plaintiff has 17 not alleged a claim for declaratory relief for a controversy of sufficient immediacy, the Court 18 GRANTS Defendants’ motion to dismiss Count Eleven. 19 11. Retaliation in Violation of California Labor Code (Count Twelve) 20 Plaintiff alleges whistleblower retaliation under Cal. Labor Code § 1102.5(b), which states 21 an employer “shall not retaliate against an employee for disclosing information, or because the 22 employer believes that the employee disclosed or may disclose information, to a government or 23 law enforcement agency, to a person with authority over the employee.” To make a prima facie 24 case for whistleblower retaliation a plaintiff must demonstrate three elements: 25 (1) They engaged in a protected activity; 26 (2) they were subjected to an adverse employment action; and 27 (3) there is a causal link between the protected activity and the 1 *McVeigh v. Recology San Francisco*, 213 Cal. App. 4th 443, 468 (2013). 2 Plaintiff’s allegations plausibly support an inference she experienced retaliation because 3 “she reported to Bassi her reasonable suspicion of PolySwarm’s violations of federal law.” (Dkt.

4 No. 15 ¶ 152.) Specifically, Plaintiff alleges as part of PolySwarm’s contract with DHS, 5 PolySwarm was obligated to comply “with the Federal Acquisition Regulation (FAR) Clause 6 52.204- 23, which explicitly prohibits contracting for hardware, software, and services developed 7 or provided by Kaspersky Lab, a Russian entity, and includes the requirement that Federal 8 government contractors must also report any Kaspersky hardware, software, or services 9 discovered during contract performance.” (Id. ¶ 63.) Because “PolySwarm’s ecosystem included 10 an engine developed by Kaspersky . . . [,] Ms. Schouker flagged the issue immediately to Bassi,” 11 but he failed to take corrective action and instead “submitted the required DHS forms, falsely 12 affirming that PolySwarm had no connections to prohibited foreign entities, including Kaspersky.” 13 (Id. ¶ 64.) In light of these allegations, Defendants’ argument that Plaintiff has not alleged “what 14 suspicions of violations of federal law she reported to Bassi” is unpersuasive. (Dkt. No. 39 at 31.) 15 Moreover, Plaintiff plausibly alleges that in response to this protected activity, Defendants 16 retaliated through a series of adverse employment actions. Specifically, Plaintiff alleges in

17 January 2024—the same month she reported her concerns to Mr. Bassi—Mr. Laskowski 18 “significantly reduced Ms. Schouker’s commission structure.” (Dkt. No. 15 ¶ 72.) In spring 2024, 19 “Laskowski excluded Ms. Schouker from key discussions” about the 2024 DHS contract renewal 20 process. (Dkt. No. 15 ¶ 67.) In July 2024, “Laskowski reassigned the DHS account to” another 21 employee. (Id. ¶ 69.) And finally, in August 2024, PolySwarm fired Plaintiff. (Id. ¶ 90.) 22 Defendants’ citation to *Choi v. Wal-Mart Assocs., Inc.*, No. 8:23-CV-02376-SB-KES, 2024 23 WL 5431492 (C.D. Cal. Nov. 25, 2024) is unavailing. In *Choi*, the district court held “Plaintiff’s 24 serious misconduct on July 3, 2022—his refusal to leave Console’s office for five hours,

leading 25 to his removal by the police—defeats any causal inference that may be drawn from temporal 26 proximity.” Id. *6. Defendants do not identify an analogous intervening event that defeats the 27 inference of temporal proximity in this case.

1 CONCLUSION

2 For the reasons stated above, the Court GRANTS Defendants’ motion to dismiss disability 3 discrimination (Count Three), hostile work environment based on disability (Count Five), 4 retaliation in violation of FEHA (Count Seven), WED (Count Eight), NIED (Count Nine), breach 5 of contract (Count Ten), and declaratory judgment (Count Eleven) with leave to amend. See 6 || Bacon v. Woodward, 104 F.4th 744, 753 (9th Cir. 2024) (“Leave to amend shall be freely given 7 || when justice so requires, and this policy is to be applied with extreme liberality.”). And the Court 8 || DENIES Defendants’ motion to dismiss gender discrimination under Title VII and FEHA (Counts 9 One and Two), hostile work environment based on gender (Count Four), failure to prevent 10 discrimination (Count Six), and whistleblower retaliation (Count Twelve). 11 An amended complaint that attempts to plead the dismissed claims must be filed by April 12 || 18, 2025. If no amended complaint is filed the case shall proceed on the non-dismissed claims. 13 || No new defendants or claims may be added without the Court’s prior permission. 14 This Order disposes of Docket No. 39. 3 15 IT IS SO ORDERED. a 16 || Dated: April 3, 2025 SI

ACQUELINE SCOTT COREY

Z 18 United States District Judge 19 20 21 22 23 24 25 26 27 28