CASE NO. 15-55556

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBIN ANDERSON,

Plaintiff/Appellant,

vs.

CRST INTERNATIONAL, INC.,
CRST VAN EXPEDITED, INC.

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA
Case No. 5:14-cv-00368-DSF-MAN
The Honorable Dale S. Fischer, District Judge

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CORPORATE DISCLOSURE STATEMENT

Defendants-Appellees CRST Expedited, Inc. f/k/a CRST Van Expedited, Inc. ("CRST"), and CRST International, Inc. ("CRST International"), are privately-held corporations that are wholly owned by Admiralty Holdings, Inc., which is, in turn, wholly owned by Hillcrest Holdings, Inc. No publicly-held corporation owns 10% or more of either CRST International's or CRST's stock.

/s/ Christopher J. Eckhart
Christopher J. Eckhart

Attorney for
Defendants/Appellees

JURISDICTIONAL STATEMENT

CRST and CRST International agree with Plaintiff-Appellant Robin Anderson's ("Anderson") Statement of Jurisdiction.

STATEMENT OF THE ISSUES

The issues in this appeal are as follows:

A. Did the District Court reasonably exercise its discretion when it deemed certain facts undisputed because Anderson failed to comply with the District Court's local rules and standing order?

B. Did the District Court correctly conclude Anderson's sexual harassment claims failed because the isolated incidents at issue were not sufficiently severe or pervasive to be actionable and CRST took effective remedial measures once Anderson complained?

C. Did the District Court correctly conclude Anderson's retaliation claim failed because CRST had a legitimate, non-discriminatory reason for terminating Anderson's employment?

D. Did the District Court correctly conclude Anderson's state law claims under the California Fair Employment and Housing Act ("FEHA") failed as a matter of law?

STATEMENT OF THE CASE

I. Background Facts

In the District Court's Order Granting Summary Judgment ("Order"), the District Court ruled that certain facts were undisputed because Anderson violated the District Court's local rules and standing order. *See*

infra, § I(A), for further discussion. For citations of these undisputed facts in this brief, CRST will cite both the District Court's Order and the underlying evidence.

A. CRST's Operations.

CRST[1] provides trucking services to the shipping public nationwide. ER13, ER508.[2] CRST, which directs all of its transportation operations from its headquarters in Cedar Rapids, Iowa, employs over three thousand drivers. ER13-ER14, ER508. Anderson and Defendant/Appellee, Eric Vegtel ("Vegtel"), were two of these drivers in December 2012, and January 2013. ER516, ER536.

B. CRST hires Anderson and trains her on CRST's anti-harassment policies.

CRST hired Anderson as an over-the-road commercial truck driver on December 14, 2012. ER572-575, ER633-634. Anderson hauled loads for CRST for just three weeks until January 6, 2013. ER510, ER569. During her orientation, CRST trained Anderson on CRST's Anti-Harassment Policy,

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[1] The parties and the District Court assumed that CRST International and CRST are the same company and are both considered Anderson's employer. Defendants will continue that assumption for purposes of appeal only.

[2] All citations are made to document page numbers of the Excerpts of Record as "ER" and Supplemental Excerpts of Record as "SER."

which she concedes is compliant with Title VII *Appellant's Brief* at 10; ER539-ER554, ER627-ER632. Thus, Anderson knew she was required to report sexual harassment to CRST immediately. ER544-ER545, ER547-ER548, ER551-ER554. After orientation, Anderson was introduced to Vegtel and the two drivers voluntarily decided to work as a team. ER555-ER559, ER651.

C. Vegtel allegedly makes inappropriate comments on the truck, but never directs any sexual comments at Anderson.

Anderson states Vegtel would sometimes "rambl[e]" and tell "stories" on the truck. ER577, ER578-ER580, ER589, ER593-ER594. Specifically, Anderson claims Vegtel was "rambling" about getting in trouble at a prior job because he made comments about women with large breasts. ER15; ER577, ER578-ER580, ER589. Anderson asserts she told Vegtel she was not interested in hearing the story, and he never talked about it again. ER15; ER589.

Anderson asserts Vegtel told her a "story" how he had previously done "lighting" in the "porn world." ER588. Anderson claims Vegtel woke up one morning and told her a "story" about how he "hurt down there" like he had taken Viagra. ER592-ER593. Vegtel told these stories at some

point between December 17, 2012, and December 31, 2012, ER591-ER592, and ceased talking about these subjects when Anderson asked him to stop. ER15, ER589, ER593, ER595. Anderson did not report any of Vegtel's alleged comments until January 7, 2013, after she stopped driving for CRST. ER154, ER213, ER595-ER596, ER617.

Anderson alleges Vegtel drove with his pants unzipped. ER575-579. Anderson asserts she asked Vegtel to zip and button his pants, and he looked down and said, "I'm too big." ER582, ER586-ER587. Anderson did not immediately think this conduct was sexual in nature and changed her mind when, after her employment with CRST ended, she saw a picture of Vegtel on Facebook. ER583-ER584; ER586. Anderson also testified she did not see his penis. ER582-ER583. Anderson never reported this alleged conversation to CRST. ER595, ER617.

Leading up to the alleged hotel incident, Vegtel did not make any passes at Anderson, did not ask her to have sex, and did not make any comments about her or her body. ER410-ER413, ER600, ER609, ER654-ER655.

D. Anderson alleges Vegtel is nude in the hotel room.

Anderson and Vegtel shared a hotel room a total of three nights while they waited for their truck to be repaired in Pennsylvania. ER608, ER610-ER613, ER654-ER655. The first night was uneventful, ER609, and during the next day they never left the hotel room. ER609. Again, Vegtel did not make any passes at Anderson, did not ask her to have sex, and did not make any comments about her or her body. ER609.

On the second night, Anderson claims she woke up and saw a nude Vegtel beginning to get up from his bed. ER597-ER599. Anderson did not testify Vegtel "approached her." ER597-ER599, ER603, ER622. Rather, Anderson testified Vegtel saw her, immediately get back in bed, rolled over, and then sat up on the other side of his bed with his head in his hands. ER597-ER599, ER603, ER622. He then stood up, put his clothes on, and laid back down. ER605-ER607.[3] Here again, Vegtel did not ask her to have sex. ER 410.

Anderson subsequently asked Vegtel "Why did you do that to me?" ER607. Vegtel, who always wears Depends, said he woke up the morning

[3] In her deposition, Anderson characterized Vegtel's conduct as "attempted rape." ER597, ER624. Anderson abandons this characterization on appeal.

of January 2 between 5 and 6 a.m. and noticed he had urinated on himself. ER607, ER661-ER666. So he stood up and went to the bathroom to change his Depends and put on new clothes. ER661-ER666. Vegtel testified Anderson asked him, "What happened?" or "Are you ok?" immediately after he returned from the restroom, and that he responded he "had an accident." ER666.

For the third night, Vegtel went to a different hotel because he wanted to go swimming, and the first hotel did not have a pool. ER611, ER612, ER667. Anderson chose to go with Vegtel to that hotel and again shared a room with him. ER611. Anderson did not say anything to Vegtel about the alleged incident from the night before, and she did not call her supervisor, Joseph Stearns ("Stearns"), or anyone else at CRST. ER612. She did not request to be put in separate rooms, and she concedes Stearns, who was located in Cedar Rapids, was not aware of the alleged hotel incident on January 2, 2013. ER515, ER612. The third night was uneventful. ER612-ER613.

The next day, January 3, 2013, Anderson did not report any of Vegtel's alleged misconduct. ER517, ER612. To the contrary, she requested

another load from Stearns, who then dispatched Anderson and Vegtel on a new load. ER517, ER519-520.

E. Anderson complains to CRST after the alleged harassment ceased.

More than 48 hours after the hotel incident, Anderson finally sent a Qualcomm message to Stearns, stating "JOE AFTER THIS DELIVERY WE NEED TO GO TO THE FONTANA YARD. ROBIN." ER517, ER521. After Stearns requested an explanation of what was wrong, Anderson stated, "SEVERAL ISSUES.1 I WOKE UP IN THE HOTEL TO HIM SITTING NAKED ON THE SIDE OF THE BED. ROBIN." ER517, ER526.

Stearns immediately gave Anderson the information for the HR Department and dispatched them on a return load to Fontana, California. ER17, ER517. Anderson did not ask to be separated from Vegtel at any point during their return trip to California. ER28, ER517. She did not report any further alleged incidents during the return load. ER517.

Anderson and Vegtel returned to Fontana, California on January 6, 2013. ER517, ER614-ER615. At 10:23 a.m., Anderson informed the fleet manager on duty (Stearns was off at the time) that she had removed her belongings from the truck. ER620-ER621, ER641, ER668-ER669. Anderson

submitted a written statement to CRST on January 7, 2013. ER213, ER216-ER220.

F. CRST immediately opens an investigation, prohibits Vegtel from driving with Anderson or any other female, and attempts to pair Anderson with other drivers.

CRST opened an investigation in response to Anderson's written complaint. ER510. Although CRST did not have to separate Anderson and Vegtel because she had already removed herself from the truck, ER620-ER621, ER641, ER668-ER669, CRST immediately prohibited Vegtel from driving with Anderson or any other female co-driver. ER18; ER510, ER652. Vegtel has never driven with a female co-driver or trainee since Anderson filed her written complaint of harassment. ER510, ER652. There have also been no other complaints of harassment made against Vegtel. ER510, ER652.

Stearns attempted to contact Anderson to team her with another driver, including female drivers. For example, on January 7, 2013, Strearns emailed Anderson the contact information for several possible co-drivers. ER28; ER517, ER537. CRST subsequently informed Anderson that it had

taken "appropriate action" in response to her complaint.[4] ER513, ER532, ER715.

G. Anderson never responded to Stearns and, after several weeks of no communication, Stearns terminated Anderson's employment.

Anderson never returned Stearns' calls or contacted Stearns to be assigned loads. ER517. On or around March 5, 2013, Stearns informed his supervisor that Anderson should be removed as a current employee in CRST's system because Stearns had not heard from Anderson or been able to make contact with her for several weeks. ER517.

Stearns did not terminate Anderson's employment because she is female or because she complained about sexual harassment to ER517. There is no evidence Stearns intentionally discriminated against Anderson. In fact, the undisputed evidence demonstrates Stearns actively tried to get Anderson back to work after she submitted her complaint. ER28; ER517, ER537, ER618.

[4] Anderson claims she never received the January 21, 2013 letter from Sarah Kircher, but her counsel produced a faxed copy of that letter from February, 2013, in discovery. ER513, ER532, ER715.

II. Procedural History

Anderson filed the Complaint on February 26, 2014, claiming she was sexually harassed by Vegtel and wrongfully terminated from her job in retaliation for submitting a complaint with CRST. She asserted claims for sexual harassment under Title VII and the FEHA, gender discrimination under the FEHA only, retaliation under Title VII and the FEHA, and failure to prevent harassment under the FEHA only. ER791-ER94. CRST denied any wrongdoing and asserted several affirmative defenses. SER1-SER13.

On April 1, 2015, the District Court granted CRST's and Vegtel's Motions for Summary Judgment. ER13. The District Court concluded the FEHA claims failed because all of the alleged conduct occurred outside of California, and the FEHA did not apply extraterritorially. ER21. Therefore, Anderson's state-law claims of gender discrimination, retaliation, and failure to prevent harassment claims were dismissed. ER21. The District Court further held the alleged conduct at issue was not sufficiently severe to be actionable under Title VII or the FEHA, and that, even if it were, CRST sufficiently responded to the complaint under Title VII and the FEHA. Finally, the District Court rejected Anderson's retaliation claim because CRST had a legitimate, non-discriminatory reason for terminating

Anderson's employment. ER26-ER28. Finally, even if the FEHA extended extraterritorially, the District Court determined Anderson's FEHA sexual harassment, discrimination, retaliation, and "failure to prevent" claims failed. ER22. This appeal followed.

SUMMARY OF THE ARGUMENT

This is a sexual harassment, discrimination, and retaliation case brought by former truck driver, Anderson, against her former employer, CRST, and co-driver, Vegtel. Anderson asserts Vegtel's conduct over the course of just 16 days is sufficient to hold CRST liable under Title VII and the FEHA. Anderson also claims CRST violated Title VII and the FEHA by terminating her employment because of her gender and because she filed a written complaint of sexual harassment with CRST. Finally, Anderson claims CRST violated the FEHA by failing to prevent the alleged harassment and discrimination. CRST respectfully submits the District Court's judgment in its favor on all of Anderson's claims should be affirmed.

The District Court's decision to find certain facts undisputed for purposes of summary judgment should not be disturbed. *See Argument*, *infra*, § I. This Court has repeatedly noted district courts are not required to

scour the record for evidence creating a genuine issue of material fact. To that it, this Court has previously affirmed a district court's enforcement of local rules that require the nonmovant to specifically identify the specific portions of the record that create genuine issues of material fact. The District Court has such a local rule and standing order, and Anderson failed to comply. Because the District Court did not abuse its discretion in finding certain facts undisputed, these facts should be considered undisputed on appeal.

The District Court's judgment on Anderson's sexual harassment claim should be affirmed. *See id,* § II. First, Vegtel's alleged conduct was not objectively severe or pervasive under Title VII because a reasonable woman in Anderson's position would not think harassment had become a permanent feature of Anderson's continued employment with CRST. *Id.*, § I(A). This Court's precedents also establish the conduct at issue—a few offhand comments and the single hotel incident—is not actionable, and Anderson's and the EEOC's attempt to impose out-of-circuit precedent on this Court should be rejected. Second, in response to Anderson's complaints, CRST took effective remedial measures that were reasonably calculated to end the harassment by making it impossible for Anderson

and Vegtel to work in the same truck again and immediately attempting to pair Anderson with a new driver, including female drivers. *Id.*, § I(B). Finally, although not a basis of the District Court's judgment, this Court can still affirm the judgment because Anderson failed to demonstrate the alleged conduct was both subjectively severe and pervasive and "because of sex." *Id.*, § I(C).

The District Court's judgment on Anderson's claims for gender discrimination and retaliation should also be affirmed. *See id.*, § III. First, the undisputed evidence demonstrates CRST did not fail to assign Anderson additional work. Anderson's supervisor affirmatively attempted to pair Anderson with a new driver. Anderson cannot manufacture an issue of fact by asserting objections and argument she failed to make in the District Court. Second, CRST had a legitimate, non-discriminatory reason for terminated Anderson's employment, namely, her failure to report to work. Anderson lacks any evidence from which a reasonable juror could conclude Strearns terminated Anderson's employment because she submitted a written complaint of sexual harassment.

Finally, the District Court's judgment on Anderson's FEHA claim should be affirmed. *See id.*, § IV. Anderson's FEHA claims fail because the

FEHA does not apply does not apply to conduct occurring outside of California, and all of the alleged misconduct in this case occurred outside the state of California. Moreover, even if California law did extend extraterritorially, the claims fail on the merits, and this Court can affirm based on any ground finding support in the record.

ARGUMENT

I. The District Court did not abuse its discretion when it found certain facts to be undisputed because Anderson violated the District Court's local rules and standing order.

The District Court found certain facts "undisputed" because Plaintiff violated the local rules and the Court's standing order. Specifically, the District Court's local rules and standing order required Anderson to identify specific evidence in response to CRST's Statement of Undisputed Facts to demonstrate there were genuine issues of material fact that precluded summary judgment. The District Court found Plaintiff violated these rules because Plaintiff's responses "rais[ed] tangential arguments or cit[ed] irrelevant portions of the record." ER13. According to the District Court, "[t]hese characterizations and corresponding arguments, which appear to constitute little more than an attempt to avoid admitting undisputed facts, are insufficient to create a genuine dispute of fact and

violate the [District Court's] Initial Standing Order […]." ER13. The Court deemed the facts undisputed and, therefore, declined to rule on CRST's related evidentiary objections. ER13.

The District Court's decision to enforce its local rules and standing order and find certain facts to be undisputed is subject to an abuse of discretion standard of review. *See Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002) (explaining that the "district court has considerable latitude in managing the parties' motion practice and enforcing local rules"); *Hollingsworth v. K-Mart*, 182 F.3d 925 (9th Cir. 1999) (determining district court did not err in granting defendant's summary judgment motion where plaintiff did not follow local court rule requiring her to submit a separate concise statement of disputed and undisputed material facts).

The District Court did not abuse its discretion when it considered certain facts undisputed because it had a clear local rule and standing order dictating how Anderson was required to dispute facts for purposes of summary judgment, and Anderson did not comply. *See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988) ("We hold that when a local rule such as United States

District Court—Central District of California Rule 7.14.3 has been promulgated, it serves as adequate notice to nonmoving parties that if a genuine issue exists for trial, they must identify that issue and support it with evidentiary materials, without the assistance of the district court judge.); *Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 842 n.2 (9th Cir. 1994) (citations omitted) (rejecting summary judgment arguments where party failed to comply with local rules).

Therefore, this Court should consider the same facts undisputed for purposes of appeal, including:

- Vegtel ceased talking about "porn industry" and getting in trouble at a prior job because he made comments about women with large breasts when Anderson asked him to stop. ER15, ER172, ER173.

- Stearns responded to Anderson's January 4, 2013 Qualcomm message regarding the hotel incident by giving her the contact information for the HR Department and found a return load to get Anderson back to Fontana, CA. ER17, ER183.

- Anderson did not ask to be separated from Vegtel prior to returning to California on January 6, 2013. ER17, ER184.

- CRST prevented Vegtel from driving with a female co-driver and he has not driven with a female co-driver since Anderson filed her January 7, 2013 complaint. ER18, ER186.

- Vegtel's alleged misconduct occurred outside of California. ER21, ER190.

- After Anderson submitted her January 7 complaint, Stearns attempted to contact her and pair her with other drivers, including female drivers. ER26-27, ER187.

II. The District Court correctly granted summary judgment on Anderson's sexual harassment claim because Vegtel's alleged conduct was not sufficiently severe or pervasive and CRST took effective remedial measures in response to Anderson's complaint.[5]

Title VII is not a "general civility code." A violation is not established merely by evidence showing "sporadic use of abusive language, gender-related jokes, and occasional teasing." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). A violation is established only when the unwelcome sexual conduct is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993). Critically, "[t]he working environment must both subjectively and objectively be perceived as abusive" based on the "totality of the circumstances." *Brooks*, 229 F.3d at 923. Moreover, for harassment by co-employees (rather than supervisors), employers are not liable for co-employee harassment unless they knew or should have known about the harassment and failed to take reasonable

[5] The Court need only assess Anderson's claim under Title VII because "Title VII and FEHA operate under the same guiding principles." *Brooks v. City of San Mateo,* 229 F.3d 917, 924 (9th Cir. 2000).

steps to prevent or correct it. *Swenson v. Potter*, 271 F.3d 1184, 1191-92 (9th Cir. 2001). For the reasons discussed below, the District Court's judgment should be affirmed.

A. The District Court correctly concluded Vegtel's conduct was not objectively severe or pervasive under Title VII.

The District Court's conclusion that Vegtel's alleged conduct was not objectively severe or pervasive should be affirmed chiefly because it was unreasonable for Anderson to think Vegtel's harassment had become a permanent feature of her employment. Moreover, Vegtel's conduct was less severe than similar conduct this Court has concluded would not support a Title VII claim.

1. A reasonable woman would not think Vegtel's harassment had become a "permanent feature" of Anderson's employment.

"[O]nly the employer can change the terms and conditions of employment." *Brooks*, 229 F.3d at 924. Consequently, the purpose of analyzing the *objective* severity and pervasiveness of the alleged conduct is to determine whether "a reasonable victim would think that sexual harassment had become *a permanent feature of the employment relationship*." *Id.*; *see also Westendorf v. West Coast Contractors of Nevada, Inc.*, 712 F.3d 417

(9th Cir. 2013) (noting that, to determine whether the plaintiff has made out a *prima facie* case, "[w]e weigh both severity and pervasiveness to evaluate whether a reasonable victim would think that sexual harassment had become a permanent feature of the employment relationship.") (internal quotations and citations omitted). If a reasonable employee in the plaintiff's shoes could not conclude harassment had become a permanent feature of the employee's employment, the harassment could not have affected the terms and conditions of the employment and liability under Title VII would not attach. *Brooks*, 229 F.3d at 924.

Anderson's job was to work with a co-driver to haul loads for CRST's customers all over the country. Her work environment was the inside of the truck. Anderson cannot establish she reasonably feared Vegtel's harassment would be a "permanent feature" of her continued employment because (1) she and Vegtel were no longer assigned to the same truck, (2) Vegtel was prohibited from driving with other females, and (3) it is undisputed Stearns actively tried to pair Anderson with *other* drivers, including female drivers. ER17, ER18, ER28, ER510, ER517, ER527-ER529, ER620-ER621, ER641, ER652, ER668-ER669. Consequently, "[n]o reasonable woman in [the plaintiff's] position would believe that [the harasser's]

misconduct had permanently altered the terms or conditions of her employment." *Brooks*, 229 F.3d at 924 (noting harasser had been removed from the plaintiff's workplace). More broadly, there is no evidence that it was objectively reasonable for Anderson to think it would be impossible to avoid harassment from any one of CRST's stable of 3,000 drivers, male or female.

Like in *Brooks*, Vegtel's conduct "had no precursors"—Vegtel had never been reported for harassment before—"and it was never repeated." *Id.* at 927. Therefore, "in no sense can it be said that [CRST] imposed upon [Anderson] the onerous terms of employment for which Title VII offers a remedy." *Id.* (citations omitted).

2. Vegtel's alleged conduct was not sufficiently severe or pervasive to be actionable under Ninth Circuit Precedent.

Courts analyzing whether particular conduct is actionable under Title VII look "at the frequency of discriminatory conduct, severity of the conduct, whether the conduct is physically threatening or mere offensive words, and whether the conduct unreasonably interferes with the employee's job performance." *Id.* at 923. "[I]solated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms

and conditions of employment.'" *Faragher*, 524 U.S. at 788 (internal citations and quotations omitted); *Brooks*, 229 F.3d at 923.

The unembellished evidence establishes only that Vegtel told one story about "hurting down their," ER592-ER593, one story about being "too big" to zip up his pants, ER582, ER586-ER587, one story about having a "lighting" job in the "porn world," ER588, and one story about getting in trouble at a prior job for looking at women with large breasts. ER577, ER578-ER580, ER589. In addition, Anderson asserts she saw Vegtel unclothed, that he did not take any steps toward her, that he immediately rolled over, and that, after a few short moments, he put on his clothes.[6] ER597-ER599, ER603, ER605-ER607, ER622. Finally, Vegtel never touched Anderson, commented about her body, or asked her for sex. ER410-ER413, ER421, ER600, ER609, ER654-ER655.[7]

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[6] Anderson's claim that Vegtel "approached" her is flatly contradicted by Anderson's deposition testimony. ER597-ER599, ER603, ER622, ER605-ER607. *F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1159 (9th Cir. 2010) (internal citation omitted) (recognizing the "district court need not find a genuine issue of fact if it is based on 'uncorroborated and self-serving testimony.'")

[7] The EEOC recounts other allegations, but these allegations are irrelevant because Anderson does not contend they contributed to a hostile work environment.

Based on this undisputed evidence, the District Court correctly determined the isolated incidents that allegedly took place over the course of just 16 days were not sufficiently severe or pervasive. As indicated above, workplace harassment is not actionable merely because the words used have sexual content or connotations. *Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75, 80 (1998). Vegtel's stories and ramblings were nothing more than offhand comments and impertinent utterances. Similarly, there is no evidence these comments and the hotel incident even "interfere[d] with the [Anderson]'s job performance." *Brooks*, 229 F.3d at 923. Anderson did not assert that the conduct did interfere with her work in her declaration she submitted to the District Court, and she even requested more work after the hotel incident but before she reported any of Vegtel's alleged misconduct to CRST.

This Court previously concluded that conduct more severe than what Anderson alleges occurred in this case did not give rise to liability. In *Brooks*, the Ninth Circuit determined the conduct at issue was insufficient even though the male co-worker "placed his hand on [female plaintiff's] stomach and commented on its softness and sexiness"; "later position himself behind [plaintiff's] chair, boxing her in . . . [and] forced his hand

underneath her sweater and bra to fondle her bare breast"; and stated "you don't have to worry about cheating [on your husband], I'll do everything." and was ultimately convicted of sexual assault for the offense. 229 F.3d at 921-27. *See also Milano v. Aguilerra*, No. 09–cv–2469–L(BLM), 2013 WL 878687, at *1 (S.D. Cal. Mar. 8, 2013) aff'd, 599 F. App'x 767 (9th Cir. 2015) (determining the alleged conduct was not severe or pervasive where plaintiff's male co-worker reached for her breast while she was in the women's locker room, touched her skin located just above the breast, stated "let me take a picture of you," picked up her shirt "to try to get the garter part of my pants down more," and then took a picture of her pregnant stomach).

3. Anderson's and the EEOC's attempts to distinguish *Brooks* are misguided.

The EEOC argues *Brooks* bears only on employer liability, not the conduct's severity or pervasiveness. *EEOC's Brief* at 26-28. But severity and pervasiveness of the alleged conduct was *precisely* what the Court addressed in *Brooks.* 229 F.3d at 923-927 (determining conduct was not sufficiently severe to create actionable sexual harassment claim, including by distinguishing the severity of the conduct at issue in *Ellison*). Moreover,

the EEOC fails to address the Court's core reasoning that, for harassment by co-workers, the conduct must be of such a nature that plaintiff could reasonably believe the conduct permanently changed the terms and conditions of the plaintiff's employment. *See supra*, § II(A)(1). No matter how many incidents occur, misconduct is not actionable unless the plaintiff reasonably believes harassment has become a permanent feature of employment. *Brooks*, 229 F.3d at 924. Thus, if the EEOC is correct that *Brooks* is a "liability" cases, the District Court's judgment should still be affirmed.

Anderson maintains the Court should ignore *Brooks* because it is a "single incident" case. *Appellant's Brief* at 26. The fact *Brooks* only involved one incident does not make it irrelevant. As the District Court correctly recognized, *Brooks* is important in how it stands in contrast to this Court's other cases that demonstrate when an employer will be liable for co-worker harassment—namely, cases involving a series of events that the employer knows about but failed to remedy, or cases involving a sustained campaign of harassing and an inadequate employer response.

Here, CRST had no knowledge of the alleged harassment until *after* all of the alleged harassment had already occurred. This is therefore not a

case where the employer failed to prevent the harassment from occurring.[8] Similarly, Vegtel's conduct was not a sustained campaign of harassment. Unlike in *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1988), where the harasser sent the plaintiff a series of "love letters" that included a "typed, single-spaced, three-page letter" that mentioned "sex," and "enjoy[ing]" and "[e]xperiencing" the plaintiff, here, Vegtel made only a handful of comments, none of which were directed at Plaintiff, and was nude on one occasion in a hotel room, but never attempted to touch Anderson and did not request or even mention having sex with Anderson. Additionally, unlike in *Ellison*, CRST permanently prohibited Vegtel from working with or around Anderson. *Cf. Brooks*, 229 F.3d at 926 (noting the harasser was removed from the plaintiff's work environment), with *Ellison*, 924 F.2d at 874-875 (noting the employer allowed the harasser to return to the plaintiff's location).

The other cases Anderson cites miss the mark because they address conduct far more egregious than here, including sexual touching, conduct

[8] The EEOC has previously sued a motor carrier for gender discrimination for preventing males and females from driving with each other. *E.E.O.C. v. New Prime, Inc.*, 42 F. Supp. 3d 1201 (2014)

that was directed at the plaintiff, and conduct that was more frequent and occurred over a much longer time span.[9]

3. The fact Anderson and Vegtel primarily worked on the road in a truck does not heighten the severity of Vegtel's comments.

Anderson and the EEOC maintain the alleged severity of Vegtel's conduct is heightened as a result of Anderson and Vegtel's working arrangement. *Appellant's Brief* at 23; *EEOC's Brief* at 25. As an initial matter, Anderson waived this argument by not raising it in the District Court. *Alohacare v. Hawaii Dep't Human Servs.*, 572 F.3d 740, 744 (9th Cir. 2009) (explaining court will not recognize argument raised for the first time on appeal, absent exceptional circumstances).[10]

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[9] *Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 953 (9th Cir. 1999) (plaintiff alleged the store manager made several comments containing sexual references directed at the plaintiff); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1461 (9th Cir. 1994) (supervisor habitually referred to plaintiff in a derogatory fashion using sexually explicit and offensive terms); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) (noting that the harasser "repeatedly engaged in vulgarities, made sexual remarks, and requested sexual favors from the complainants" and even threatened to terminate a complainant if she did not submit to his sexual advances); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989) (on two different occasions, co-worker hung noose on plaintiff's work station).

[10] Anderson also relies on *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108 (9th Cir. 1998), but that case does not support the proposition that a confined work environment heightens the severity of conduct. In fact,

Moreover, the EEOC relies on two factors considered by the Eighth Circuit—"physical proximity" and "presence or absence of others" factors—that have not even been adopted by this Court. *See Anderson v. Durham D & M, L.L.C.*, 606 F.3d 513, 519 (8th Cir. 2010) (identifying Eighth Circuit's severe and pervasive factors). And even when Eighth Circuit applied these elements to CRST's drivers, the sexual harassment claims still failed. *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 687 (8th Cir. 2012) (affirming summary judgment for CRST on hostile work environment claims of nine of eleven similarly-situated women even when considering their physical proximity to the harasser and presence or absence of others).[11]

Draper does not address confined working spaces or any facts that serve as an analogue to long-haul truck-driving work.

[11] Where the Eighth Circuit reversed the district court's grant of summary judgment, the allegations were far more egregious than Anderson's. *See, e.g.*, *id.* at 688 (one of class members with surviving claim testified co-driver (1) asked her on "three to five" occasions to drive naked; (2) refused class member's repeated requests to exit at a truck stop so she could go to the bathroom, ordering her to urinate in a parking lot instead; and (3) in a culminating incident, grabbed her face while she was driving and began screaming that "all he wanted was a girlfriend," resulting in a lacerated lip).

B. The District Court correctly concluded CRST's response to Anderson's complaints—which made it impossible for Vegtel to harass Anderson and confirmed to Anderson that harassment would not be a term and condition of Anderson's continued employment—satisfied Title VII.

The standard for an employer's liability for sexual harassment under Title depends on the status of the harasser. *See Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2439 (2013). "If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions." *Id.* "[A]n employer cannot be held liable for misconduct of which it is unaware." *Swenson*, 271 F.3d at 1192. Therefore, employers are not liable for co-worker harassment unless they knew or should have known about the alleged harassment and failed to take reasonable steps to prevent and correct it. *Id.* at 1191-92.[12] "The reasonableness of the remedy depends on its ability to: (1) stop harassment by the person who engaged in harassment; and (2) persuade potential harassers to refrain from unlawful conduct." *Hardage v. CBS Broadcasting, Inc.*, 427 F.3d 1177 (9th Cir. 2005) (internal citations and quotations

[12] The District Court concluded Vegtel was not Anderson's "supervisor" as a matter of law. ER25. Anderson abandoned that argument by failing to address it in her opening brief. *See Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1046 n.7 (9th Cir. 1999) (holding arguments not raised on appeal are waived).

omitted). "Although an 'investigation is a key step,' we 'consider the overall picture' to determine whether the employer's response was appropriate. *Id.* (quoting Swenson, 271 F.3d at 1193).

1. CRST took reasonable steps to prevent and correct Vegtel's alleged harassment.

Considering the "overall picture," the District Court correctly concluded that CRST satisfied its obligations under Title VII.

First, the undisputed evidence demonstrates *all* of Vegtel's alleged misconduct took place before CRST was made aware of it. Anderson admits she was not harassed after January 2, 2013. ER17; ER410-ER413, ER517, ER612, ER614, ER721, ER723. Anderson did not report the hotel incident until January 4, 2013, and the allegations of Vegtel's conduct in the truck until January 7, 2013. ER154, ER213, ER595-ER596, ER614-ER615, ER617, ER635-ER639. Thus, this is not a case where the employer failed to take adequate corrective action to prevent harassment after learning of a co-worker's sexually harassing conduct. *Brooks*, 229 F.3d at 924.

Second, CRST took effective remedial measures once it was finally made aware of Anderson's allegations. When Anderson informed Strearns about the hotel incident and requested a trip back to California, Strearns

immediately dispatched Anderson and Vegtel on a trip to California[13] and gave Anderson the information for CRST's Human Resources Department.[14] ER17, ER517. When Anderson submitted the written complaint to Alvin Hoggard ("Hoggard"), Hoggard immediately forwarded the statement to CRST's HR Department and an investigation was opened. ER510, ER721, ER723.

Most importantly, CRST immediately prohibited Vegtel from driving with Anderson, and any other female driver. Vegtel and Anderson never worked together again, and Vegtel never drove with another female again. ER18, ER510, ER620-ER621, ER641, ER652, ER668-ER669. Finally, it is

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[13] Anderson complains for the first time that CRST should have separated the two drivers immediately. This argument is also waived for the reasons stated above. In any event, Strearns had no reason to think the pair would need to be separated. Anderson did not request it and, at that time, Anderson's sole complaint at that time was that Vegtel was nude in the hotel room. Anderson did not report that alleged conduct until January 7 after they returned to California.

[14] The EEOC asserts Stearns should have called the HR Department on his own. Notably, the EEOC cites no authority for the proposition that the supervisor must independently contact HR to satisfy HR, particularly where the supervisor gives the contact information directly to the employee and immediately gives the employee the exact remedy the employee requested—here, a trip back to California.

undisputed CRST attempted to pair Anderson with another co-driver so she could continue working. ER517, ER527-ER529.

In short, in response to Anderson's complaint, CRST gave Anderson exactly what she requested (a load back to California) and made it impossible for her to be harassed by Vegtel again. There was nothing preventing Anderson from working with another driver in work environment free of harassment.

The Eighth Circuit previously analyzed and upheld CRST's similar corrective actions in response to sexual harassment complaints. *E.E.O.C.*, 679 F.3d at 693 (holding responses "promptly and effectively remedied any alleged harassment"). This Court has also considered similar remedial measures appropriate. *See, e.g., Star v. West*, 237 F.3d 1036, 1039 (9th Cir. 2001) (determining remedial measures were appropriate where employer, among other things, moved the offender to a different shift).

2. Anderson and the EEOC collectively make three arguments, but all three lack merit.

a. CRST was not required to discipline Vegtel to avoid liability. Relying on *Ellison* and *Fuller*, Anderson and the EEOC claim CRST is liable under Title VII because it did not discipline Vegtel or tell him that his conduct

was unacceptable. This Court has previously rejected the argument that an employer must discipline an employee to avoid liability:

> Even assuming that the investigation was less than perfect, the [employer] nevertheless took prompt action to remedy the situation. The harassment stopped. The only possible consequence of a better investigation could have been to make out a stronger case for disciplining [the alleged harasser]. But the purpose of Title VII is remedial—avoiding and preventing discrimination—rather than punitive.

Swenson, 271 F.3d at 1197.

Moreover, "[a]n employer's refusal to apply the label 'discipline' to any of [its] actions is not determinative of their adequacy as a remedy. What is important is whether the employer's actions, however labeled, are adequate to remedy the situation." *Star*, 237 F.3d at 1039. Here, CRST took immediate steps to shield Anderson from future harassment when it re-routed Anderson and Vegtel to California, prevented Vegtel from driving with Anderson and other females, and immediately tried to pair Anderson with other drivers. Also, the alleged harassment stopped, and Vegtel has not been accused of harassment since. ER17, ER18, ER27, ER510, ER517, ER527-ER529, ER652. Regardless of what label Anderson and EEOC put on CRST's response—"precautionary" or otherwise—CRST adequately remedied the situation. *Id.*

Fuller and *Ellison* do not compel a different result. Neither *Fuller* nor *Ellison*—both decided before *Swenson*—hold that an employer *must* discipline a harasser to avoid liability under Title VII. Rather, the key question is whether the employer's remedy was "reasonably calculated to end the harassment." *Swenson*, 271 F.3d at 1192. The employer in *Fuller* did absolutely nothing in response to the plaintiff's complaints, and the employer in *Ellison* allowed the harasser to return to the same location as the plaintiff after only six months. *Id.* at 874-875. Here, CRST's permanent removal of Vegtel from Anderson's work environment was reasonably calculated to end the harassment.

b. CRST was not required to communicate with Anderson to avoid liability so long as its response was otherwise effective. Citing district court opinions from Iowa[15], the EEOC claims CRST is liable under Title II because it did

[15] The EEOC's citation of these District Court opinions appears to be an effort to try to portray CRST as a company with across-the-board issues of sexual harassment in its driver ranks. This is obviously something the EEOC could not prove it its case against CRST, *see EEOC*, 679 F.3d at 692 (finding EEOC failed to "adduce sufficient evidence to create a fact issue as to whether the harassment was so broad in scope, and so permeated the workplace, that it must have come to the attention of someone authorized to do something about it") (internal quotation omitted), which ultimately led to an award of $4,189,296.10 in attorneys fees against the EEOC. *See* 2013 WL 3984478, at *19-20 (N.D. Iowa Aug. 1, 2013) (awarding attorney's

not inform Anderson that it had imposed a no females restriction on Vegtel. Anderson waived this argument by not presenting it to the District Court or in her opening brief to this Court. Even so, there is no precedent that an employer must communicate all the details of its remedial response to avoid liability under Title VII so long as the employer's response serves the purposes of Title VII—avoiding and preventing discrimination. *Swenson*, 271 F.3d at 1197. Considering the "overall picture," those purposes were served by CRST's response. *Hardage*, 427 F.3d at 1177. Moreover, this argument is a red herring because it is undisputed Anderson immediately left CRST to never return on January 7 and never returned CRST's repeated attempts to pair her with a new driver.

c. The EEOC's argument that Anderson was left worse off fails because it was waived and it also lacks merit. The EEOC argues CRST is liable under Title VII because "it left Anderson worse off than before she complained." *EEOC's Brief* at 34-36. This argument has been waived because Anderson did not make it to the District Court. It is a long-standing rule that "[a]bsent exceptional circumstances, this Court will not consider

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fees to CRST on EEOC's "frivolous" claims), rev'd, 774 F.3d 1169 (8th Cir. 2014), cert granted, 136 S.Ct. 582 (2015).]

arguments raised for the first time on appeal. *Alohacare*, 572 F.3d at 744. Stated differently, a party "abandons an issue when it has a full and fair opportunity to ventilate its views with respect to an issue and instead chooses a position that removes the issue from the case." *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009).

Waiver notwithstanding, the argument lacks merit because it is undisputed CRST attempted to assign Anderson with another co-driver and truck. CRST's response to Anderson's harassment complaint included imposing work modifications on Vegtel, not Anderson. ER18, ER510, ER652. Therefore, unlike in *Ellison*, where the employer moved the plaintiff to a different location, Anderson's "work environment"—the truck—did not change, and she was no longer required to work with Vegtel.[16]

[16] The facts in the other cases the EEOC cites also involve an employer affirmatively transferring the plaintiff to a different shift in response to the plaintiff's complaint. *See Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 811 (7th Cir. 2000) (employer transferred plaintiff to a different shift); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) (agreeing that transferring shift is not effective remedial measure but determining facts were distinguishable from contention); *Steiner*, 25 F.3d at 1464 (employer transferred plaintiff's shift twice); *EEOC*, 2009 WL 1783495, at *6 (employer removed women from truck while out on the road and away from terminal).

C. Although not reached by the District Court, this Court can also affirm the judgment because Anderson failed to establish Vegtel's conduct was subjectively abusive and "because of sex."

This Court may affirm the District Court's dismissal of the FEHA claims on "any ground finding support in the record." *Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 419 (9th Cir. 1998). As such, the Court can affirm for two additional reasons.

1. The District Court's ruling should also be affirmed because Anderson did not establish Vegtel's conduct was subjectively abusive.

Anderson must offer evidence in support of her contention she subjectively perceived her environment as abusive. *See Walpole v. City of Mesa*, 162 F. App'x 715, 716-17 (9th Cir. 2006). Here, despite the training she received at the beginning of her employment just a few weeks earlier, Anderson did not immediately report the hotel incident or any other alleged harassment to Stearns or request to be immediately separated. Instead, Anderson continued to share a hotel room with Vegtel and, in fact, chose to follow him to a second hotel. ER611, ER612. On January 3, 2013, Anderson herself asked her supervisor for more work. ER517, ER519-520. Anderson concedes it was not until January 4, 2013, approximately two

days after the alleged incident, that Anderson told Stearns that Vegtel was nude in the hotel room. ER517, ER521-ER526.

Because Anderson cannot establish she subjectively perceived the environment as abusive, her claim fails. *See Harris*, 510 U.S. at 21–22; *Best v. Cal. Dep't of Corrections*, 21 F. App'x 553, 557 (9th Cir. 2001) (affirming summary judgment where plaintiff failed offer evidence that plaintiff subjectively perceived conduct as abusive).

2. The District Court's ruling should also be affirmed because Anderson cannot establish Vegtel's conduct occurred "because of sex."

"Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at *'discriminat[ion] ... because of ... sex.'*" *Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75, 80 (1998) (emphasis in original). A plaintiff in a sexual harassment suit must therefore show "the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion] ... because of ... sex.'" *Lyle v. Warner Bros. Tel. Prod.*, 38 Cal. 4th 265, 280 (Cal. 2006) (quoting *Oncale*, 523 U.S. at 81).

Here, Anderson cannot—nor does she try to—establish Vegtel's conduct was motivated by her gender. *See Dawson v. Entek Int'l*, 630 F.3d

928, 937-38 (9th Cir. 2011) (holding summary judgment appropriate where plaintiff failed to establish the conduct was because of his gender). Anderson lacks any evidence that Vegtel would not have told the same "stories" and made the same "ramblings" had he been teamed with a man. *Best v. Cal. Dep't of Corrections*, 21 F. App'x 553, 557 (9th Cir. 2001) (affirming lower court's summary judgment in defendant's favor where plaintiff failed to offer evidence that established the "perceived mistreatment" was "based on her sex"). The same is true of the alleged hotel incident. Consequently, Anderson can only speculate about Vegtel's motivation, which is insufficient to satisfy the "because of" element. *See Dawson*, 630 F.3d at 938 (holding summary judgment appropriate where plaintiff failed to establish the conduct was "because of" his gender).

III. The District Court correctly concluded CRST did not retaliate against Anderson because CRST immediately offered Anderson different driving partners and only terminated Anderson's employment after she failed to report to work for nearly two months.

Anderson claims CRST retaliated against her in two ways: (1) by "fail[ing] to provide her with job assignments beginning on January 7, 2013," and (2) terminating her employment on March 5, 2013. The undisputed evidence, however, confirms CRST did not refuse to assign

Anderson loads and only terminated Anderson's employment when she failed to report to work. Because Anderson failed to attempt (much less establish) pretext, the District Court correctly dismissed her retaliation termination claims.

A. Anderson did not suffer an adverse employment action because CRST attempted to pair her with other drivers and assign her work.

With respect to providing Anderson job assignments, the undisputed evidence demonstrates CRST did attempt to provide Anderson additional work and Anderson failed to respond. Therefore, Anderson did not suffer an adverse employment action. *Lyons v. England*, 307 F.3d 1092, 1118 (9th Cir. 2002) (affirming dismissal of retaliation claim where plaintiff failed to establish employer's alleged conduct constituted "adverse employment action").

Specifically, Stearns, who was responsible for assigning Anderson loads, attempted to pair Anderson with other drivers, including female drivers, after Anderson submitted a written complaint of harassment on January 7. ER15, ER515, ER517, ER527-ER529. Specifically, Stearns sent Anderson an email with an attachment containing the names and numbers of other drivers. This fact is undisputed because Anderson failed to

designate any evidence before the District Court that she never received Stearns' email. ER27-ER28. It is also undisputed that Anderson never contacted Strearns, the individual responsible for assigning her loads. ER515, ER517-ER518.

On appeal, Anderson attempts to cast a shadow on this evidence for the very first time. Effectively, Anderson objects to the admissibility of the Stearns email, but evidentiary objections not presented to the District Court are waived. *Alohacare*, 572 F.3d at 744. Moreover, Anderson's arguments make no sense. For example, Anderson suggests the email is not *really* an email because it is a different format than an email Alvin Hoggard sent to Sarah Kircher. But Anderson does not challenge the authenticity of the email Stearns sent Kircher on January 23, which is in the same format as Stearns email to Anderson. ER186-ER188, ER530.[17]

Anderson claims CRST failed to prove that it "has declined to assign co-drivers or to provide work assignments to non-complaining males who have had to leave their driving teams," *Appellant's Brief* at 34, or that CRST submitted no evidence of a consistent policy or practice of requiring

[17] Notably, Anderson falls short of asserting she does not have an email address with "nurserlg" in it, such as "nurserlg@yahoo.com."

drivers to take particular actions to be assigned to a team or to receive loads. *Id.* at 19. True to form, Anderson failed to make this argument below. Besides, it is *Anderson's* burden to prove similarly situated individuals were treated differently, not CRST's. *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1113 (9th Cir. 2000) (recognizing it is plaintiff's burden to establish similarly situated individuals were treated more favorably). And Anderson wholly fails to identify any other drivers who failed to report to work for several weeks and were not terminated.

Finally, Anderson asserts CRST assigned Anderson as a co-driver to Vegtel and claims this is evidence that CRST treated her differently. Of course, it is undisputed CRST did not assign the drivers to work together. Anderson testified unequivocally in her deposition that Hoggard did not force her to work with Vegtel. ER544-ER545, ER547-ER548, ER551-ER554, ER555-ER559, ER651. (SUF, ¶ 39). Even the EEOC states Hoggard's introduction of the two drivers were merely a "suggest[ion]." *EEOC's Brief* at 3. Any attempt by Anderson to state the contrary should be disregarded. *F.T.C.*, 604 F.3d at 1159 (internal citation omitted).

B. CRST had a legitimate, non-discriminatory reason for terminating Anderson's employment, and Anderson failed to attempt (much less actually demonstrate) that CRST's proffered reasons was mere pretext for retaliation.

With respect to the termination of Anderson's employment, Anderson argument did not suffer an adverse employment action because she effectively quit her job. At a minimum, CRST had a legitimate, non-discriminatory reason for terminating Anderson's employment.

Specifically, on March 5, 2013, almost two months after Anderson submitted the written complaint, Stearns informed his supervisor that Anderson should be removed as a current employee in CRST's system because Stearns had not heard from Anderson or been able to make contact with her for several weeks. ER517-ER518. Thus, CRST terminated Anderson for failing to report to work. ER517. Stearns did not take any adverse action against Anderson because of her gender or because she complained of sexual harassment. ER518. *Garcia v. Int'l Rehab. Assoc.*, 29 F.3d 631 (9th Cir. 1994) (granting summary judgment to employer after finding the employee's failure to report was a legitimate, non-discriminatory reason for the employment decision).

The burden thus shifted Anderson to prove pretext. *Brooks*, 229 F.3d at 928. If the employer articulates some legitimate, nondiscriminatory reason for a plaintiff's termination, the plaintiff must show that the articulated reason is pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002). To the extent a plaintiff attempts to rely on circumstantial evidence to show pretext, "such evidence must be both specific and substantial." *Id.*

Here, Anderson lacks any evidence that Stearns decided to terminate her employment did so because he harbored illegal animus. As indicated, Stearns attempted to pair Anderson with a new driver *after* she complained. ER517, ER537. Stearns' January 23, 2013 email to Kircher also demonstrates he was actively attempting to get Anderson back to work even after she filed a complaint. ER27, ER517, ER530. Anderson lacks any evidence, much less the "specific and substantial" evidence required to show pretext. *Villiarimo,* 281 F.3d at 1062. Accordingly, Anderson's retaliation and discrimination claims fail as a matter of law. *Kohler v. Inter-*

Tel Tech., 244 F.3d 1167, 1179 (9th Cir. 2001) (relying on Title VII decisional authority and concluding the FEHA claims fail where plaintiff could not establish causal link between protected conduct and alleged employment actions).

IV. The District Court correctly dismissed Anderson's California law claims because California law does not apply extraterritorially and the claims would fail on the merits even if it did.

The District Court correctly granted summary judgment on Anderson's claims under the FEHA. First, the FEHA does not apply to extraterritorial conduct and, therefore, Anderson's claims necessarily fail. California courts have recognized a general presumption against the extraterritorial application of state laws absent express legislative intent. *See Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1207 (2011); *Diamond Multimedia Sys., Inc. v. Superior Court*, 19 Cal. 4th 1036, 1060 n.20 (1999). It is well established that the FEHA was not intended to apply to nonresidents where the tortious conduct took place out of the state's territorial boundaries. *Campbell v. Arco Marine, Inc.*, 42 Cal. App. 4th 1850, 1852 (1996) (holding that the FEHA did not apply to claim for sexual harassment brought by non-resident based on conduct that took place outside of California).

Anderson's invocation of the "governmental interest" test is misguided. That test applies when the District Court must resolve conflicts of law where the laws of multiple jurisdictions are at issue. *See Sullivan*, 51 Cal.4th at 1202 (court considered whether laws of Arizona, California, or Colorado govern plaintiffs' claims). That is not the case here because the applicable authority establishes that California law cannot apply to conduct occurring outside of the state.

Here, it is undisputed that Vegtel's alleged conduct occurred exclusively outside of California. ER21-ER22, ER581, ER590, ER602. Even assuming CRST terminated Anderson's employment by refusing to assign her loads, all dispatch instructions came from Stearns in Cedar Rapids, Iowa. ER21-ER22; ER510, ER515, ER563-564. Any decision to terminate her employment would have been made in Cedar Rapids. As a result, CRST is entitled to summary judgment on all of Anderson's state law claims.

Second, even if Anderson's FEHA claims did not require the extraterritorial application of the FEHA, this Court may affirm the District Court's dismissal of the FEHA claims on "any ground finding support in the record." *Cigna Property & Cas. Ins. Co.,* 159 F.3d at 419. As indicated above, Anderson's claims fail on the merits as a matter of law.

Finally, Anderson's claim that CRST failed to prevent discrimination and harassment falls with the underlying claims. *Dep't of Fair Empl. & Housing v. Lucent Tech., Inc.*, 642 F.3d 728, 748 (9th Cir. 2011) (determining there was no cause of action for failure to take reasonable steps to prevent discrimination and retaliation where plaintiff failed to establish underlying claims).

In short, all of Anderson's claims under the FEHA fail as a matter of law. Therefore, the District Court's judgment on those claims should be affirmed.

CONCLUSION

Anderson and the EEOC attempt to revise Anderson's claims largely by making arguments that Anderson failed to make to the District Court or attempting to impose case law from other circuits or district courts on this Court. But Anderson cannot dispute Vegtel never touched her, commented about her body, or asked her for sex even when, as she claims, they were alone in a hotel room and Vegtel was nude. Moreover, Anderson cannot dispute CRST had no advance notice of Vegtel's alleged harassment and that, once she complained, CRST immediately made it impossible for future harassment to occur. Finally, the undisputed evidence confirms that

CRST immediately took steps to pair Anderson with a new co-driver, and that CRST only terminated Anderson's employment when she failed to report to work for approximately two months. CRST respectfully submits that, based on this evidence, it is not liable to Anderson under Title VII or the FEHA.

For the foregoing reasons, CRST respectfully requests the Court to affirm the District Court's judgment in all respects.

/s/ Christopher J. Eckhart
Christopher J. Eckhart

STATEMENT OF RELATED CASES

Counsel for CRST and CRST International hereby certifies that he is aware of no related cases pending in this Court.

Dated: February 19, 2016

/s/ Christopher J. Eckhart
Christopher J. Eckhart

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type size and type font of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using 14 point Times New Roman font. It also complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,360 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: February 19, 2016

/s/ Christopher J. Eckhart
Christopher J. Eckhart

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2016, a copy of the foregoing Appellee's Response Brief was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Christopher J. Eckhart
Christopher J. Eckhart

4839-2997-8925, v. 15-2997-8925, v. 7