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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ZACHARY TUCKNESS,

Plaintiff and Appellant,

v.

**WHOLE FOODS MARKET
CALIFORNIA INC.,**

Defendant and Respondent.

A131448

**(Alameda County
Super. Ct. No. RG09464712)**

Plaintiff and appellant Zachary Tuckness (Tuckness) appeals from the judgment entered following the trial court's grant of a motion for summary judgment filed by defendant and respondent Whole Foods Market California Inc. (Whole Foods). Tuckness, a former employee at the Whole Foods Santa Rosa store, contends the trial court erred in concluding there are no triable issues of material fact relating to his various causes of action based on, among other things, alleged workplace harassment, retaliation, and discrimination. We affirm the judgment.

BACKGROUND¹

In summer 2007, Tuckness, who is gay, was hired as a team member in the Specialty Department at the Whole Foods Santa Rosa store. During most of his employment, Tuckness reported to Patrick Ryan, the department's team leader, and Jimmy Hensley, the department's assistant team leader; Lynn Silva was the store team leader.

November and December 2007 Incidents

Around November 16, 2007, Tuckness provided Silva with a letter detailing several workplace complaints. He complained that Ryan requested a doctor's note before Tuckness could return to work after being sick.² He also complained that, on the way to a recent team dinner, Ryan said, "We should have snuck out Scott [Carrillo] and brought him with us. I'd hate to br[ea]k up the three musketeers." In his deposition, Tuckness said he believed the comment was due to workplace complaints he, Carrillo, and another team member had made, and that it was a "passive aggressive comment connecting us together as some sort of . . . fighting team." Carrillo was a gay employee who worked in

¹ "Our account of the facts is taken from the record before the trial court when it granted defendant's motion for summary judgment. [Citation.] We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained. [Citations.]" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.)

² Tuckness admitted in his deposition that he was permitted to return to work without a doctor's note.

another department; he also was Tuckness's roommate. Finally, Tuckness complained in the November 16 letter that Ryan was not adhering to Ryan's schedule, "leav[ing] the department in shambles for us to clean up." On the same day, Tuckness also called the company's employee hotline and complained about the doctor's note issue and the "three musketeers" comment.

Following receipt of the November 2007 complaint letter, Whole Foods initiated an investigation. Julianne Ugo, director of team member services, oversaw the investigation and reviewed the reports from Tuckness's hotline calls. Tuckness's declaration averred that Ugo came to the Santa Rosa store to meet with him two days after he complained, on November 18. Over the next several weeks, Ugo met with additional employees at the Santa Rosa store, one-by-one, to investigate the issues raised by Tuckness.

According to Tuckness's declaration, on November 23, 2007, he observed that glitter from holiday decorations had fallen onto the store's olive bar and saw assistant team leader Hensley stir the glitter into the olives and laugh. The next day, he told Silva of the problem with the placement of the decorating, but the decorations were still up near the olive bar when he worked his next shift on December 2. Tuckness phoned a health inspector to report the issue. Immediately after Tuckness spoke with the health inspector at the store, Ryan approached Tuckness and stated that a prior request Tuckness had made for time off in December would be denied. However, Tuckness admitted in his deposition that he was ultimately given the requested time off.

On December 3, 2007, Tuckness again called the Whole Foods employee hotline. The report of the call indicates that Tuckness stated he is gay, as is his roommate Carrillo. Tuckness reported that on an unknown date an unnamed employee "overheard Hensley telling specialty team buyer, Jodi Christian, that she had a crush on Tuckness. Hensley told Christian that she could 'turn' Tuckness. Hensley made the comment in front of

other managers”³ Tuckness also reported that, on an unknown date, Hensley told Tuckness that he was not allowed to talk to Carrillo while at work. Tuckness asserted that other employees were not prohibited from talking at work. Tuckness also repeated his complaint about the three musketeers comment and complained about Ugo’s investigation.

On or around December 7, 2007, Tuckness sent a detailed letter to the Whole Foods Northern Pacific Regional Offices. He complained about Ugo’s investigation, Silva’s management, the olive bar incident, Ryan’s comments and conduct relating to Tuckness’s leave request, and Ryan’s failure to provide wine samples to department employees. Tuckness asserted that, with respect to his leave request, Ryan was retaliating against him for making complaints. Tuckness also referenced efforts to separate him from Carrillo, and requested an investigation into the “sexual harassment statement” he gave to the hotline.

In his declaration opposing summary judgment, Tuckness detailed additional incidents involving comments relating to his sexual orientation. In November 2007, another employee told Tuckness that Hensley and Ryan “were going around telling everybody in the store that I was ‘sexually confused’ because I couldn’t tell if I was straight or gay, and I had all these issues, and that I was basically taking it out on them and making their lives miserable because my life was miserable because of my sexual confusion”⁴ Also, on one occasion a female coworker referred to Tuckness as “girlfriend,” and on another occasion another female coworker asked Tuckness how long

³ The trial court concluded that the statement that Hensley allegedly made relating to Tuckness’s sexual orientation was inadmissible hearsay. On appeal, Tuckness contends that the statement, as reported to him, is admissible as relevant to his “subjective perception of the workplace as hostile or abusive.” He does not, however, contend the statement is admissible as evidence that Hensley actually made the alleged comment.

⁴ Like the statement by Hensley alleged in the December 3, 2007 hotline call, the trial court concluded that these alleged statements by Hensley and Ryan were inadmissible hearsay. (See, *ante*, fn. 3.)

he and Carrillo had “been together.”⁵ Tuckness’s declaration does not indicate whether any of these comments were reported to Whole Foods, and his briefs on appeal do not include record citations to that effect. Tuckness does not allege any other comments relating to his sexual orientation.

2008 Incidents

At the start of 2008, after a Specialty Department employee who previously worked mornings transferred to another store, Tuckness was scheduled to work the early morning shift. On that shift he was required to cut and prepare cheese. In his deposition, Tuckness stated that management told him that the purpose of cutting and preparing cheese prior to the store’s opening was “to bring the revenue up in our department” by allowing “other employees who come in later in the day to have more . . . time to deal with customers on the floor.” Tuckness admitted that another employee had previously been scheduled to work that shift. The change in shift did not change Tuckness’s wage category, and he received a raise in January 2008.

On or about January 7, 2008, Tuckness submitted a written complaint to Ugo. He complained that Ryan had just made a weekly work schedule in which Tuckness was not scheduled to work with a coworker name Jodi (presumably a friend of Tuckness) and he “had to open almost every day at 5 a.m.”⁶ Tuckness’s declaration does not indicate that Tuckness made any complaints about the assignment after the January 7 letter, and neither do his briefs on appeal provide any record citations to that effect.

In January 2008, at the request of Whole Foods, a third party company, LP Innovations, conducted an investigation into Tuckness’s complaints. The investigator met with Tuckness and each of the members of the Specialty Department. On January 26, the investigator took a written statement from Tuckness, in which Tuckness

⁵ Tuckness stated at his deposition that he dated Carrillo before working at Whole Foods, but not while he worked at the store.

⁶ Tuckness also complained that a “job dialog” had been postponed and that Silva had criticized him for failing to “cover” the shifts he missed in December due to his request for time off.

complained about retaliation against Carrillo, asserted that Ugo's investigation was "unjust and unprofessional," and stated that he was "upset that Whole Foods doesn't take Sexual Harassment to be serious, especially towards Homosexuals." Tuckness's written statement does not contain any complaints about his work schedule.

As a result of her own and the third party investigation, Ugo determined that Tuckness's claims "either lacked merit or did not amount to violations of company policy." Nonetheless, Ugo "determined that there were issues regarding the strength of leadership in the Specialty team," and she "was involved in the decision to move" Ryan and Hensley "out of their leadership positions." Also, by May 2008, Silva had transitioned to a regional bakery role, and Martha Harmon was hired as the new store team leader.

Tuckness averred in his declaration that, on April 17, 2008, Ugo advised him that she had received a report from the third party investigator. Tuckness asked her what the result would be, but Ugo "refused to communicate any specific determination regarding the subject of [his] complaints" and told him "Whole Foods was going to 'address the issues they want.' "

Between April and May 2008, Whole Foods documented "corrective counselings" for Tuckness for problems with tardiness and absences. In April and May, Tuckness was written up for having an excessive number of "mispunches" in the preceding months. On May 21, 2008, Harmon signed a "corrective counseling notice" and met with Tuckness to discuss his tardiness and absences. Tuckness averred in his declaration that Harmon asked him whether he was " 'happy at the store' " and stated that she was there to " 'help' " him " 'move on' " if he " 'didn't want to be' " there. He stated in his deposition that she also said she was "here to help those who are happy here flourish." Later that same day, Tuckness resigned.

On May 20, 2009, Tuckness filed a complaint with California's Department of Fair Employment & Housing (DFEH). In July 2009, he filed a complaint in Alameda County Superior Court, asserting nine causes of action: harassment in violation of the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) (FEHA);

retaliation in violation of the FEHA; discrimination in violation of the FEHA; failure to investigate or prevent discrimination in violation of the FEHA; wrongful constructive termination in violation of public policy; negligent retention; negligent supervision; intentional infliction of emotional distress (IIED); and workplace violence or intimidation based on a protected characteristic. Tuckness sought punitive damages.

In August 2010, Whole Foods filed a motion for summary judgment or, in the alternative, summary adjudication. In November 2010, the trial court granted the motion, concluding there were no disputed issues of material fact as to any of Tuckness's causes of action or as to the request for punitive damages. The court also sustained most of Whole Foods' objections to the evidence submitted by Tuckness in opposition to the motion. The court entered judgment in favor of Whole Foods, and this appeal followed.

DISCUSSION

On appeal, Tuckness contends the trial court erred in concluding there were no triable issues of material fact as to six of his nine causes of action, including harassment, retaliation, discrimination, failure to investigate or prevent discrimination, wrongful constructive termination, and IIED. He also contends the trial court erred in concluding there were no triable issues of material fact as to his claim for punitive damages. Tuckness does not contend the court erred as to his claims for negligent retention, negligent supervision, and workplace violence or intimidation.

I. *Standard of Review*

Summary judgment is properly granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) As to each claim framed by the complaint, the defendant moving for summary judgment must present facts to negate an essential element or to establish a defense; only then will the burden shift to the plaintiff to demonstrate the existence of a triable issue of material fact. (*Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263, 268.) When the defendant has met its evidentiary burden, the burden of proof shifts to the plaintiff to show, by responsive separate statement and admissible evidence, that a triable issue of material fact exists.

(*Rosenblum v. Safeco Ins. Co.* (2005) 126 Cal.App.4th 847, 856.) In ruling on the summary judgment motion, the trial court must draw all reasonable inferences from the evidence in favor of the opposing party. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).

On appeal, we review the trial court's grant of summary judgment de novo. (*Aguilar, supra*, 25 Cal.4th at p. 860.) In doing so, we view the evidence in the light most favorable to Tuckness, the losing party, resolving any evidentiary doubts or ambiguities in his favor. (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1102.)

II. *The Harassment Claim (First Cause of Action)*

To establish a hostile work environment (harassment) claim under the FEHA, Tuckness was required to show that: (1) he was a member of a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on the protected characteristic; (4) the harassment unreasonably interfered with his work performance by creating an intimidating, hostile, or offensive work environment; and (5) Whole Foods is liable for the harassment. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876 (*Thompson*).

“[T]he timely filing of an administrative complaint is a prerequisite to bringing an action for damages under the FEHA [citation] and, unless an exception applies, no complaint may be filed ‘after the expiration of one year from the date upon which the alleged unlawful practice . . . occurred’ (Gov. Code, § 12960, subd. (d).)” (*Thompson, supra*, 186 Cal.App.4th at p. 879.) Tuckness filed his DFEH complaint on May 20, 2009, so conduct before May 20, 2008, “cannot serve as a basis for liability unless a statutory exception exists or the continuing violation doctrine applies. In the latter case, at least one act ‘that is part of the hostile work environment’ must occur within the limitations period. [Citation.]” (*Ibid.*) That is, the continuing violation theory “allows liability for unlawful employer conduct occurring outside the statute of limitations if it is sufficiently connected to unlawful conduct within the limitations period.” (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802.)

In the present case, Tuckness does not allege any comments relating to his sexual orientation after November 2007,⁷ and he does not dispute that the managers who allegedly created the hostile environment were no longer in management positions when he resigned on May 21, 2008. Tuckness also does not dispute that the only alleged act within the limitations period is Harmon’s May 21, 2008 conversation, during which she asked him if he was happy at the store and offered to help him move on if he was not.

Tuckness’s harassment claim is time-barred because the May 21, 2008 conversation is, as a matter of law, not an act that can form part of Tuckness’s harassment claim. On this point, Tuckness confuses discrimination and harassment claims under the FEHA. As explained by the California Supreme Court, “ ‘the Legislature’s differential treatment of harassment and discrimination is based on the fundamental distinction between harassment as a type of conduct not necessary to a supervisor’s job performance, and business or personnel management decisions—which might later be considered discriminatory—as inherently necessary to performance of a supervisor’s job.’ [Citation.]” (*Reno v. Baird* (1998) 18 Cal.4th 640, 645 (*Reno*), quoting *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 62-63 (*Janken*)). “ ‘[H]arassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives.’ ” (*Reno*, at pp. 645-646, quoting *Janken*, at p. 63.) The court continued, “ ‘the exercise of personnel management authority properly delegated by an employer to a supervisory employee might result in discrimination, but not in harassment. [Citations.] Making a personnel decision is conduct of a type fundamentally different from the type of conduct that constitutes harassment. Harassment claims are based on a type of conduct that is avoidable and unnecessary to job performance. No supervisory

⁷ Moreover, the statements underlying his allegations regarding comments made by the Whole Foods managers in November and December 2007 were excluded as hearsay and Tuckness does not argue the statements are admissible as evidence that the comments were actually made.

employee needs to use slurs or derogatory drawings, to physically interfere with freedom of movement, to engage in unwanted sexual advances, etc., in order to carry out the legitimate objectives of personnel management. Every supervisory employee can insulate himself or herself from claims of harassment by refraining from such conduct. An individual supervisory employee cannot, however, refrain from engaging in the type of conduct which could later give rise to a discrimination claim. Making personnel decisions is an inherent and unavoidable part of the supervisory function. Without making personnel decisions, a supervisory employee simply cannot perform his or her job duties.’ ” (*Reno*, at p. 646, quoting *Janken*, at p. 64.)

Harmon averred in her declaration supporting the motion for summary judgment that she met with Tuckness on May 21, 2008, to discuss his excessive tardiness and absences. Her decision to meet with him on that issue and gauge his level of satisfaction at Whole Foods was plainly an “ ‘exercise of personnel management authority’ ” that may not form the basis of his harassment claim. (*Reno, supra*, 18 Cal.4th at p. 646.) Without any citation to evidence in the record, Tuckness argues that, in the totality of the evidence, the meeting was linked to the allegedly harassing conduct of Tuckness’s former managers.⁸ However, even assuming that Tuckness was subjected to harassment on the basis of his sexual orientation by Hensley and Ryan at the end of 2007, Tuckness has failed to present *any* evidence of acts in 2008 that can form the basis for his harassment claim. His assignment to the early shift, any delay in regard to his job evaluation, the investigation of his complaints and any failure to report the results to him, and the decisions to write him up for tardiness, absences, and mispunches, were all “ ‘exercise[s]

⁸ At oral argument, Tuckness suggested that, although the May 21, 2008 meeting admittedly was an exercise of Harmon’s management authority, it can form a basis for his harassment claim under *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686. There, the California Supreme Court held that “official employment actions done in furtherance of a supervisor’s managerial role can also have a secondary effect of communicating a hostile message . . . when the actions establish a widespread pattern of bias.” (*Id.* at p. 709.) However, absent any evidence connecting Harmon to the alleged harassing conduct of the previous managers, the May 21 meeting cannot provide a basis for Tuckness’s harassment claim.

of personnel management authority.’ ” (*Id.* at p. 646.) Accordingly, absent any actionable harassment in 2008, the trial court correctly concluded that the harassment claims were time-barred as a matter of law.⁹

II. *The Retaliation and Discrimination Claims (Second and Third Causes of Action)*

“[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a ‘protected activity,’ (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s action. [Citations.]” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*)). To establish a prima facie case of discrimination, Tuckness “must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. [Citations.]” (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 355, fn. omitted.)

To be actionable under the FEHA, an alleged adverse employment action must “materially affect[] the terms, conditions, or privileges of employment”; it must constitute “adverse treatment that is reasonably likely to impair a reasonable employee’s job performance or prospects for advancement or promotion.” (*Yanowitz, supra*, 36 Cal.4th at pp. 1054-1055; see also *McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 386 [“an employee seeking recovery on a theory of unlawful discrimination or retaliation must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment”]; see also *id.* at pp. 386-387.) Once an employee establishes a prima facie case of wrongful retaliation or discrimination, the employer is required to offer a legitimate, nonretaliatory, and nondiscriminatory reason for the

⁹ Whole Foods did not contend below and does not contend on appeal that any of Tuckness’s other FEHA claims are time-barred.

adverse employment action. “If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation [or discrimination] ‘ ‘ ‘drops out of the picture,’ ’ ’ and the burden shifts back to the employee to prove intentional retaliation [or discrimination]. [Citation.]” (*Yanowitz*, at p. 1042 [retaliation claim]; see also *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1003 (*Hersant*) [discrimination claim].)

In the present case, Tuckness appears to contend that his complaint to the health inspector about the glitter in the olive bar was a protected activity, and that Whole Foods retaliated by threatening to deny him time off in December 2007, by assigning him to the early morning shift in January 2008, and by various actions relating to the conduct of the investigation, his performance evaluation, and admonishments regarding tardiness and absences. Similarly, he appears to contend those actions constituted discrimination based on his sexual orientation.

Assuming the complaint to the health inspector or other conduct was protected activity and assuming that Tuckness demonstrated a link between the protected activity and/or his sexual orientation and the actions of Whole Foods, his claim fails because he failed to present evidence sufficient to raise a triable issue of fact as to whether he suffered an adverse employment action within the meaning of the FEHA. That is, with the possible exception of the assignment to the early morning shift (discussed below), none of the identified acts “materially affect[ed] the terms, conditions, or privileges” of Tuckness’s employment at Whole Foods. (*Yanowitz, supra*, 36 Cal.4th at p. 1054.) In particular, it is undisputed that Tuckness was *not* denied the days off he wanted in December 2007, Tuckness cites to no evidence that there were consequences associated with the Spring 2008 write-ups, and Tuckness cites to no evidence showing how the conduct of the investigation (including any failure to report the results) or his performance evaluation materially affected the terms and conditions of his employment. Even considered in combination (see *id.* at pp. 1055-1056), the evidence presented is insufficient to raise a triable issue of fact as to whether Tuckness suffered an adverse employment action.

The only arguably adverse employment action demonstrated by the evidence was Tuckness's January 2008 assignment to the early morning shift. Because "the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide" (*Yanowitz, supra*, 36 Cal.4th at p. 1054, fn. omitted), it is a closer question whether that assignment was an adverse employment action. (But see *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 358 [firefighter assigned to "special duty" rather than "platoon duty" did not suffer adverse employment action, despite the fact that he "preferred the work, schedule, and camaraderie of platoon duty"].)

However, we need not resolve that issue because Whole Foods produced a legitimate reason for the assignment: Silva averred in her declaration that Tuckness was assigned to the shift after another Specialty Department employee who previously worked the shift transferred to another store. Tuckness did not dispute that fact in opposing the motion for summary judgment, and, in his deposition, he admitted that another employee had previously been scheduled to work that shift and stated that management told him that the purpose of cutting and preparing cheese prior to the store's opening was "to bring the revenue up in our department" by allowing "other employees who come in later in the day to have more . . . time to deal with customers on the floor." "[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant, supra*, 57 Cal.App.4th at pp. 1004-1005; accord, *Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 160.) Because Tuckness has failed to present any evidence that the reason proffered by Whole Foods for the change in shift assignment was a pretext for retaliation or discrimination, that assignment cannot form the basis for his FEHA claims.

For the stated reasons, the trial court properly concluded that there were no triable issues of material fact as to the retaliation and discrimination causes of action.

III. *The Failure to Investigate or Prevent Discrimination Claim (Fourth Cause of Action)*

An employer who knows or should have known of unlawful discrimination, and fails to take immediate and appropriate corrective action, may be liable for the resulting damages. (*Thompson, supra*, 186 Cal.App.4th at p. 880; see also *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288-289.) “However, because the [FEHA] does not create a stand-alone tort, the employee has no cause of action for a failure to investigate . . . unless actionable misconduct occurred.” (*Thompson*, at p. 880.) Tuckness appears to concede this point, and presents no authority or argument to the contrary in his briefs on appeal. Accordingly, as no actionable discrimination occurred, the trial court properly granted the motion for summary judgment as to the fourth cause of action. (*Ibid.*)

In any event, the undisputed evidence shows Whole Foods *did* promptly investigate Tuckness’s complaints, both internally and through a third party investigator, and that, as a result of the investigation, it removed Silva as well as the managers who Tuckness alleges discriminated against him. (See *Thompson, supra*, 186 Cal.App.4th at p. 880 [“there is no material dispute as to whether the [police department] investigated [the plaintiff’s] complaint of race discrimination”]; *Northrop Grumman Corp. v. Workers’ Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035-1036 [“Prompt investigation of a discrimination claim is a necessary step by which an employer meets its obligation to ensure a discrimination-free work environment. [Citations.]”].) Moreover, Tuckness has not presented evidence that Whole Foods had reason to know that Ryan and/or Hensley had a propensity to discriminate on the basis of sexual orientation. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 [demurrer sustained where there were no factual allegations that the defendant knew or should have known of likelihood of misconduct].) The trial court properly concluded there was no triable issue of material fact as to Tuckness’s fourth cause of action.

IV. *The Wrongful Constructive Termination Claim (Fifth Cause of Action)*

In order for Tuckness to prevail on a claim for wrongful constructive termination in violation of public policy, he must first establish that he was constructively discharged. “In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee’s resignation that a reasonable employer would realize that a reasonable person in the employee’s position would be compelled to resign.” (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 (*Turner*)). Next, Tuckness must establish that the constructive termination was in violation of a fundamental public policy, for example due to a protected characteristic or in retaliation for protected activity. (*Id.* at pp. 1252, 1256.)

The evidence presented on summary judgment provides no basis for a jury to conclude that Tuckness’s working conditions were intolerable *at the time he resigned*. “[T]he cases are in agreement that the standard by which a constructive discharge is determined is an objective one—the question is ‘whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.’ [Citation.]” (*Turner, supra*, 7 Cal.4th at p. 1248.) Most of the incidents alleged by Tuckness occurred in November and December 2007, including all of the alleged comments referencing his sexual orientation. During 2008, Tuckness complains only about his assignment to the early morning shift and about various other acts relating to the conduct of the investigation, his performance evaluation, and admonishments regarding tardiness and absences (including the conversation with Harmon on May 21). The alleged 2008 acts are of the sort that employees are expected to tolerate: “ ‘In order to properly manage its business, every employer must on occasion review, criticize, demote, transfer, and discipline employees.’ [Citation.]” (*Turner*, at p. 1255.) Indeed, although Tuckness alleges no harsh criticism in 2008, even such discipline is normally of a sort employees are expected to tolerate. (See *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1171 (*Tracor Flight*) [“While

the conduct may not be ‘ordinarily . . . encouraged,’ employers have the right to unfairly and harshly criticize their employees, to embarrass them in front of other employees, and to threaten to terminate or demote the employee. [Citations.]”.)

Tuckness concedes he made no complaints to Whole Foods after January 2008. Although Tuckness objected to the early morning work assignment on January 7, 2008, he did not include any objection to it in his January 26 written statement to the third party investigator. And Tuckness cites to no evidence in the record demonstrating that the work conditions on the early morning shift were objectively intolerable. The fact that he remained in the position until the end of May suggests that the work conditions were not, in fact, intolerable. (*Tracor Flight, supra*, 86 Cal.App.4th at p. 1171.) Finally, it is undisputed that Tuckness was no longer supervised by Hensley, Ryan, or Silva at the time he resigned. We conclude the trial court properly dismissed Tuckness’s fifth cause of action.

V. *The IIED Claim (Eighth Cause of Action)*

Tuckness alleges Whole Foods engaged in “outrageous conduct” that was intended to, and did, cause him “severe emotional distress,” giving rise to a cause of action for IIED. However, as the trial court concluded, because the alleged wrongful conduct “occurred at the worksite, in the normal course of the employer-employee relationship,” the workers’ compensation scheme provides Tuckness’s “exclusive remedy for any injury that may have resulted.” (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 902.) As the Supreme Court explained, “ ‘[t]he kinds of conduct at issue (e.g., discipline or criticism) are a normal part of the employment relationship. Even if such conduct may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers’ compensation exclusivity provisions.’ [Citation.]” (*Ibid.*)

On appeal, Tuckness argues that misconduct that exceeds the normal risk of the employment relationship is excepted from this rule. However, he provides no reasoned argument with citations to the record and supporting authorities demonstrating that this case falls within that exception. The only evidence of managerial comments directed at Tuckness’s sexual orientation was excluded by the trial court on hearsay grounds (see,

ante, fns. 3 & 4); the remaining allegations involve ordinary management decisions that Tuckness contends were undertaken for discriminatory or retaliatory reasons. (See *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160 [“when the misconduct attributed to the employer is actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer’s decisions as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance”].) We conclude that the eighth cause of action for IIED is barred by the workers’ compensation exclusive remedy provisions.

VI. *The Punitive Damages Claim*

Tuckness also contends the trial court erred in concluding there was no triable issue of material fact as to his claim for punitive damages. Because we have concluded his other causes of action were properly dismissed and his punitive damages claim cannot stand alone as a cause of action (*Jackson v. Johnson* (1992) 5 Cal.App.4th 1350, 1355), we need not address this contention.

DISPOSITION

The trial court’s judgment is affirmed. Costs on appeal are awarded to respondent.

SIMONS, J., Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.