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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

TERI MANUEL et al.,
Plaintiffs and Appellants,
v.
DEPARTMENT OF CORRECTIONS AND
REHABILITATION et al.,
Defendants and Respondents.

C062875
(Super. Ct. No.
07AS03273)

JAY SCHIEVELBEIN,
Plaintiff and Appellant,
v.
DEPARTMENT OF CORRECTIONS AND
REHABILITATION et al.,
Defendants and Respondents.

(Super. Ct. No.
34200800003646CUWTGDS)

Teri Manuel and Jay Schievelbein are former employees of
the California Department of Corrections and Rehabilitation

(CDCR). They sued CDCR and prison Warden Matthew Kramer, alleging that Kramer sexually harassed Manuel and that Kramer and CDCR retaliated against Manuel and Schievelbein for complaining about the harassment. The trial court granted the summary judgment motions filed by CDCR and Kramer.

Manuel and Schievelbein contend on appeal that the trial court erred in (1) sustaining the evidentiary objections asserted by CDCR and Kramer; (2) finding no triable issue of material fact regarding whether Kramer subjected Manuel to hostile environment sexual harassment; (3) finding no triable issue of material fact regarding whether CDCR retaliated against Manuel and Schievelbein because they engaged in protected activity; (4) ruling that Manuel did not plead a quid pro quo sexual harassment cause of action and that there was no triable issue of material fact regarding whether Kramer subjected Manuel to quid pro quo sexual harassment; and (5) awarding attorney's fees to CDCR pursuant to Government Code section 12965.

We conclude that (1) except as to exhibit 17 proffered by Manuel and Schievelbein, the trial court did not err in sustaining the evidentiary objections asserted by CDCR and Kramer; (2) based on the totality of the circumstances, no reasonable juror could find conduct that was sufficiently severe or pervasive to alter the conditions of Manuel's employment and create a hostile or abusive work environment; (3) Manuel and Schievelbein failed to establish a causal connection between their protected activity and adverse employment actions; (4) Manuel stated a claim for quid pro quo sexual harassment, but

she failed to establish a triable issue of material fact regarding a causal connection between her resistance to Kramer's conduct and tangible employment actions; and (5) the trial court did not abuse its discretion in finding that the causes of action asserted by Manuel and Schievelbein lacked a factual basis and in granting CDCR's request for attorney's fees.

We will affirm the judgment.

BACKGROUND

In relevant part, Manuel's first amended complaint asserts claims against CDCR and Kramer, including causes of action for sexual harassment and retaliation under the Fair Employment and Housing Act (FEHA), and a cause of action for intentional infliction of emotional distress. Schievelbein's complaint asserts claims against CDCR, including a cause of action for retaliation under the FEHA, and a cause of action for intentional infliction of emotional distress.

The following facts are drawn from the record and the parties' statements of undisputed material facts, except where evidentiary objections were sustained by the trial court.

Manuel began working for CDCR in 1979. Between June 2005 and September 6, 2006, Manuel was a facility captain at Folsom State Prison (the Prison).

Schievelbein began working for CDCR in 1981. He was an associate warden at the Prison and Manuel's direct supervisor. Schievelbein reported to the Prison's chief deputy warden Mark Shepherd, with whom Manuel had a consensual romantic

relationship. Manuel did not publicize her romantic relationship with Shepherd.

Kramer was assigned to the Prison in June 2005 to fill the position of warden. Following a vetting process, in which the Office of the Inspector General (OIG) investigated Kramer's fitness for the position of warden, the Governor confirmed Kramer as warden of the Prison in May 2006.

Manuel's hostile environment sexual harassment claim is based on the following events which occurred over a six- or seven-month period beginning in June or July 2005 and ending in November or December 2005.

Almost immediately upon his arrival at the Prison, Kramer asked Manuel whether she was married or single, when she got a divorce, whether she was dating anyone, who she was dating, how many children she had, and what her children did.

The first incident of alleged harassment by Kramer occurred at an executive staff meeting in July or August 2005. When Manuel arrived at the meeting, Kramer patted an empty chair next to him and told Manuel to sit next to him. Kramer sat very close to Manuel, with his arm touching Manuel's arm. He whispered "chitchat" type things in Manuel's ear. Manuel could not recall what Kramer whispered to her but testified that Kramer's statements were not sexual in nature. On three or four occasions, Kramer patted an empty chair next to him, indicating that Manuel should sit next to him at a meeting.

A few months after Kramer began working at the Prison, OIG held confidential interviews with the Prison managers, including

Manuel and Schievelbein, as part of Kramer's vetting process. After Manuel's OIG interview, Kramer stood two inches from Manuel, forcing her to back up against the wall, and asked Manuel what the deputy inspector general asked her during her interview. Kramer did not say anything threatening to Manuel, but Manuel was intimidated by Kramer's size and afraid that if she did not answer Kramer's question her position at the Prison could be in jeopardy. No part of Kramer's body touched Manuel during the incident.

Around fall 2005, following an executive meeting, Manuel asked Kramer for his contact information for work purposes. Kramer replied, "I have a special number for you" and gave Manuel his cell phone and hotel room numbers.

In about October 2005, during a break in a class about promoting a positive prison culture, Kramer came up behind Manuel, placed his arm around her shoulders, and guided her to the parking lot. Kramer kept his arm around Manuel's shoulders for two to three minutes until they reached the parking lot, where they spoke about the class.

Kramer also asked Manuel to join him for drinks three times. On one occasion, when Kramer, Manuel and Shepherd were leaving the Prison, Kramer invited Manuel and possibly Shepherd to have a drink at Kramer's hotel. Two or three weeks before or after this incident, while talking with Manuel on the telephone about prison business, Kramer told Manuel he was having margaritas at his hotel and invited Manuel to stop by and have a margarita. On the third occasion, while discussing business and

talking at length about where Kramer should move in the Sacramento area, Kramer told Manuel she could stop by his hotel any time for drinks. Manuel declined Kramer's drink invitations.

According to Manuel, Kramer's sexual conduct ended in November or December 2005. Manuel and Schievelbein contend that CDCR's retaliation began in December 2005 or January 2006.

Manuel and Schievelbein contend that their employment was terminated in retaliation for their complaints about the sexual harassment. CDCR dismissed Manuel and Schievelbein based on their alleged dishonesty and misconduct in addressing the falsification of documents by other employees. The circumstances arose from a July 30, 2005 riot at the Prison. On that date, Sergeant Keeley Stevens responded to an alarm. Stevens saw inmates converging on the 1100 dorm, several inmates fighting, and a "large group" of inmates striking an inmate named Tucker on his upper torso and head. Stevens used pepper spray on "an unknown number" of inmates and directed Officer Shawn Stewart to secure a group of six inmates whom Stevens had pepper-sprayed. Stewart later identified these inmates using their "bed cards."

A crime/incident report dated July 30, 2005, identifying Stevens as the reporting officer, said Stevens saw "several unidentified inmates" beating Tucker, and Stevens sprayed an "unknown number" of inmates with pepper spray.

In addition, a crime/incident report and supplemental reports prepared by Stewart said that Stevens directed Stewart

to secure a group of inmates but Stevens did not tell Stewart why the inmates had to be secured. The reports did not state that the inmates Stewart identified using "bed cards" were the inmates who assaulted Tucker.

CDC 115 forms or rules violation reports (115s) were subsequently prepared for the July 30, 2005 incident. The 115s, dated August 11, 2005, identified Stevens as the reporting employee and Lieutenant Natasha Norris as the reviewing supervisor. The 115s stated that Stevens saw approximately six inmates -- later identified as inmates Arreguin, Barba, Contreras, Gonzales, Hernandez and Paniagua -- striking Tucker, and Stevens directed Stewart to secure the inmates striking Tucker.

But on October 3, 2005, Stevens reported to Captain M. Williams that Stevens did not prepare or sign the 115s relating to the attack on Tucker. Stevens reported that on August 13, 2005, Norris told Stevens, "By the way, you wrote six 115's on that incident at the camp" and when Stevens asked if he needed to review and sign the 115s, Norris replied, "No. That is already done." Stevens also reported that when Lieutenant Rick Vickrey and Officer Russell Brizendine questioned Stevens about the identification of an inmate in the 115s, Stevens responded that he could not answer their questions. Norris subsequently admitted authoring the 115s and signing Stevens's name on them.

Captain Williams requested an office of internal affairs (IA) investigation based on Stevens's allegations against Norris. Williams's request for investigation alleged that

Norris had "falsified" the 115s and forged Stevens's signature. Lieutenant Tommy Glensor prepared a CDCR Form 989 (989 Form) on October 11, 2005, requesting an IA investigation into Stevens's allegations. Kramer signed the 989 Form that Glensor prepared.

Norris admitted to Manuel and Schievelbein that she signed Stevens's name on the 115s. Norris told Manuel and Schievelbein that Stevens authorized her to sign his name. Manuel conceded that Norris engaged in misconduct by signing Stevens's name. Nevertheless, Manuel and Schievelbein agreed that nothing more than a "counseling chrono" was warranted for Norris's misconduct.

On October 25, 2005, Manuel signed an employee counseling record (Counseling Record) directed to Norris based on the 115s incident. The Counseling Record stated that Stevens agreed with the content of the 115s and authorized Norris to sign his name. The Counseling Record stated that further investigation was unnecessary given Norris's performance ratings and lack of disciplinary record. The Counseling Record also stated that it was not an adverse action against Norris.

Nonetheless, Glensor prepared a 989 Form requesting direct action against Norris. The 989 Form was dated November 29, 2005, and was signed by Shepherd. IA approved the request for direct action against Norris in a memorandum dated January 13, 2006.

On August 31, 2006, Kramer asked IA to interview Norris and Stevens about the 115s incident and "review for proper penalty" because Norris and Stevens had given conflicting statements

about what happened. Vincent Schumacker conducted the requested IA investigation. According to Schumacker, Manuel and Schievelbein became the subject of investigation in the course of his inquiry into misconduct by Norris.

IA interviewed Manuel, Schievelbein and Shepherd about the 115s incident on September 6, 2006. By that point, Manuel was aware that she was also under investigation for dishonesty and misconduct regarding the aftermath of the 115s incident. Manuel did not complain about harassment or retaliation by Kramer during her investigatory interview.

Norris was fired in October 2006 for falsifying and signing Stevens's name on the 115s and falsely stating during her investigative interview that Stevens had agreed with the content of the 115s and permitted her to sign his name.

Manuel first complained to CDCR on or about October 24, 2006, reporting sexual harassment, dishonesty, retaliation, and inappropriate and unethical management decisions by Kramer. At the time, Norris had already been dismissed from CDCR. On November 1, 2006, Schievelbein also submitted a complaint against Kramer to Kramer's superiors (director of adult institutions John Dovey, deputy director of adult institutions Scott Kernan, and associate director Anthony Kane). This was the first complaint Schievelbein made concerning Kramer's conduct toward Manuel.

On January 26, 2007, Manuel filed a complaint with the California Department of Fair Employment and Housing, alleging sexual harassment and retaliation.

CDCR issued a notice of adverse action dated March 15, 2007, terminating Manuel's employment effective May 1, 2007, based on Manuel's conduct in connection with the 115s incident. Vickrey and Brizendine were also fired based on conduct relating to the incident. Associate director Anthony Kane signed the notice announcing Manuel's discharge.

A notice of adverse action dated March 15, 2007, was also issued to Schievelbein, terminating his employment with CDCR effective May 1, 2007, based on the 115s incident. The effective date of the dismissal was later amended to May 28, 2007.

In addition to her termination, Manuel contends that she was also previously demoted in retaliation for her protected conduct. On December 6, 2005, management services technician Lauren Wagner informed Manuel that Manuel had been selected to take a random drug test. Wagner asked Manuel if she could take the test that day. According to Wagner, Manuel asked to delay the test to the following day because Manuel was busy. Wagner agreed "that would not be a problem."

During her July 31, 2006 IA investigative interview, however, Manuel gave an account that differed substantially from the account Wagner provided. Manuel denied asking Wagner to postpone the drug test to December 7. Manuel claimed she told Wagner she was busy the morning of December 6 but would take the test in the afternoon. Manuel claimed she reported to Wagner's office in the afternoon of December 6 and asked if she could

drive her own car to the testing site, but Wagner said no.¹ According to Manuel, Wagner stated that because it was late in the day Manuel could take the test on December 7. Manuel testified at her deposition in 2008 that Wagner told Manuel she could not take the drug test on December 6 because no state cars were available.

Manuel did not take her drug test on December 7 because no state cars were available that day. Manuel took her drug test on December 9. Manuel admitted that taking her random drug test three days after she received notice of the need for testing violated CDCR's policies.

On May 5, 2006, IA received an anonymous call claiming that Manuel had avoided taking a drug test for four days. Acting special-agent-in-charge Vincent Schumacker requested an IA investigation into Manuel's delayed drug test on May 18, 2006. Around July 2006, Manuel learned that she was under investigation for her failure to timely take her drug test. Associate warden Linda Rianda represented Manuel during the investigative interview concerning the delayed drug test.

IA special agent Darrell Cain issued a report dated September 14, 2006, concerning his investigation into Manuel's delayed drug test. Cain's report described the differing

¹ According to employee relations officer Lieutenant Michael Popovich, in 2005 the employee relations office mistakenly believed that employees who were required to submit to random drug testing had to use a state car to drive to the testing site. Wagner did not allow employees to take their own cars to the testing site.

accounts from Wagner and Manuel. Cain referred the matter back to Kramer without making any conclusions about whether Manuel had engaged in misconduct.

A notice of adverse action dated December 1, 2006, was issued demoting Manuel from facility captain to correctional officer I effective January 1, 2007, based on conduct relating to her delayed drug test. Kramer signed the notice. On December 11, 2006, Manuel requested a *Skelly*² hearing to challenge her demotion. The *Skelly* hearing officer, Sylvia Garcia, recommended a 30-day suspension without pay. Garcia found wrongdoing by Manuel but felt that the employee relations office's mistake played a part in Manuel's delayed drug test. Nonetheless, Kramer upheld Manuel's demotion.

Manuel and Schievelbein also identify other alleged incidents of retaliation. In January 2006, Kramer asked Manuel to transfer from the Prison to CDCR's downtown headquarters to work on a special project with Kramer and ex-warden Ivalee Henry. After Manuel stated she did not want the downtown assignment, Kramer told Manuel to get to work on time and to stop going over her supervisor's head. Although Kramer had the authority to transfer Manuel downtown regardless of her wishes, Kramer did not force Manuel to take the downtown assignment.

² A *Skelly* hearing is an opportunity for the employee to respond to the charges in the notice of adverse action. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*); *Benefield v. Department of Corrections & Rehabilitation* (2009) 171 Cal.App.4th 469, 472, fn. 6.)

Another alleged incident of retaliation occurred during an executive staff meeting in January or February 2006. Kramer did not object when associate warden Karim Noujaim falsely accused Manuel of giving orders during a riot when Noujaim was the administrator of the day.

In addition, Kramer initiated a "hide the convict" exercise to see how long it took the Prison's minimum security staff to notice that two inmates were missing. Kramer criticized the minimum security staff's performance during the exercise but Manuel believed her staff reacted very quickly in response to the missing inmates.

In response to this lawsuit, CDCR and Kramer filed motions for summary judgment. The trial court granted the motions, finding (1) there was insufficient evidence for any reasonable juror to find Kramer's conduct so severe and pervasive as to create a hostile work environment for Manuel, (2) Manuel did not plead a quid pro quo sexual harassment cause of action, (3) Manuel and Schievelbein failed to establish a causal link between their complaints against Kramer and an adverse employment action, (4) the process to discharge Manuel and Schievelbein for "code of silence"³ violations was already under

³ The "code of silence" encourages prison employees to remain silent about improper conduct by fellow employees. (*Madrid v. Gomez* (N.D.Cal. 1995) 889 F.Supp. 1146, 1156.) When it enacted Penal Code section 5058.4, which requires the secretary of CDCR to develop and implement a disciplinary matrix for CDCR employees, the Legislature recognized the existence of a code of silence in correctional facilities. (Stats. 2004, ch. 738, §§ 1 & 2, pp. 5775-5776.) The Legislature found that the code of

way when Manuel and Schievelbein first complained about sexual harassment, (5) there was no evidence that Kane, in discharging Manuel and Schievelbein, had a retaliatory motive or was influenced by Kramer, (6) Kane's decision to discharge Manuel and Schievelbein was supported by ample evidence from the IA investigation, and (7) Kramer may not be sued individually under the FEHA for retaliatory acts.

CDCR then filed a motion for attorney's fees under Government Code section 12965, subdivision (b), seeking an award in excess of \$425,000. The trial court awarded CDCR \$35,040 for the attorney's fees CDCR incurred in connection with its motions for summary judgment. The trial court found that by the time discovery was complete and the defense motions for summary judgment had been served, Manuel and Schievelbein should have realized that their claims lacked merit.

STANDARD OF REVIEW

A defendant moving for summary judgment meets its burden of showing that a cause of action has no merit if it shows that one or more elements of the cause of action cannot be established. (Code Civ. Proc., § 437c, subds. (o), (p)(2).) Once the defendant makes such a showing, the burden shifts to the plaintiff to set forth specific facts showing that a triable issue of material fact exists as to that cause of action. (*Id.* at subd. (p)(2).) The defendant's motion shall be granted if

silence has threatened inmates, the integrity of correctional officers, security within the institutions, and public safety. (*Ibid.*)

the admissible evidence submitted shows that there is no triable issue as to any material fact and that the defendant is entitled to judgment as a matter of law. (*Id.* at subds. (c), (d); *Hayman v. Block* (1986) 176 Cal.App.3d 629, 638.)

Although our review of a summary judgment is de novo, “[d]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant’s responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed.” [Citation.]” (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230.) Additionally, in determining the propriety of summary judgment, we do not consider evidence to which objections have been made and sustained by the trial court, except where reversible evidentiary error has been demonstrated. (Code Civ. Proc., § 437c, subd. (c).)

We review the trial court’s rulings on evidentiary objections for abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

DISCUSSION

I

Manuel and Schievelbein assert that the trial court erred in sustaining evidentiary objections asserted by CDCR and

Kramer. We conclude that except as to appellants' exhibit 17, Manuel and Schievelbein either forfeited their claims of error or failed to establish that the trial court's evidentiary rulings were an abuse of its discretion. We decline to address the arguments raised for the first time in appellants' reply brief. Such arguments are forfeited. (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1074.)

We begin with the challenges to the trial court's order on Kramer's evidentiary objections. Incorporating by reference arguments that were made in Manuel's trial court reply brief, Manuel and Schievelbein contend that the trial court abused its discretion by sustaining Kramer's objection numbers 2 through 17 and 19 on relevancy grounds. But except as to objection numbers 2 and 5, which concern appellants' exhibits 11 and 17 (discussed below), Manuel and Schievelbein forfeited their claim of error by incorporating their arguments by reference without analysis of each alleged erroneous ruling. (*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 290 [incorporating arguments made in the trial court by reference does not comply with California Rules of Court, rule 8.204(a)(1)(B)]; *Whyte v. Rosencrantz* (1899) 123 Cal. 634, 642 [reviewing court may ignore omnibus objection].) In any event, contrary to the assertion in appellants' opening brief, Kramer's objection numbers 2 through 17 and 19 were not based on lack of relevance.

Regarding Kramer's evidentiary objections to exhibits 11 and 17, we conclude that the trial court did not abuse its

discretion in sustaining Kramer's objection to exhibit 11, but it did abuse its discretion in sustaining Kramer's objection to exhibit 17.

Exhibit 11 is a report of Kramer's October 12, 2006 IA interview. The trial court sustained Kramer's objection to exhibit 11 based on lack of authentication. Manuel and Schievelbein contend the trial court abused its discretion because exhibit 11 was authenticated by Schumacker's deposition testimony and by CDCR's verified response to Manuel's request for production of documents. We disagree. The excerpt from Schumacker's deposition transcript cited by Manuel and Schievelbein does not support their contention that Schumacker authenticated exhibit 11. We also cannot conclude from CDCR's verified discovery response that exhibit 11 is what Manuel and Schievelbein purport it to be, because CDCR's response to Manuel's request for production of documents and the accompanying verification do not identify the documents CDCR produced in discovery.

Exhibit 17 is a September 10, 2007 letter from deputy inspector general Debra Derosier to Manuel. The trial court sustained the objection to exhibit 17 based on lack of authentication. Manuel and Schievelbein argue that Manuel authenticated the letter in her declaration, but Kramer counters that Manuel's declaration was filed late. We agree with Manuel and Schievelbein that the trial court abused its discretion in sustaining Kramer's evidentiary objection to exhibit 17.

Manuel's declaration said that she received exhibit 17 in response to her complaint against Kramer. Exhibit 17 states that OIG interviewed Manuel on April 17, 2007, as a complainant in an investigation into her allegations against Kramer and that OIG's investigation into the matter was concluded. Manuel's declaration and the matters stated in exhibit 17 are sufficient to authenticate exhibit 17. (Evid. Code, §§ 1420-1421; *California Metal Enameling Co. v. Waddington* (1977) 74 Cal.App.3d 391, 395, fn. 6 [letter from defendant's sales manager to plaintiff's treasurer in response to the treasurer's earlier letter was admissible to authenticate a writing under Evidence Code section 1420].) We do not consider Kramer's argument that the declaration was filed late, because Kramer failed to cite the portion of the record showing that the trial court found Manuel's declaration improper or late-filed. (Cal. Rules of Court, rule 8.204(a).) Additionally, during the summary judgment hearings, counsel for Manuel and Schievelbein referred to the evidence filed in response to the evidentiary objections asserted by Kramer and CDCR, but counsel for Kramer and CDCR did not object to Manuel's declaration. (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1426 [failure to object to new evidence submitted in reply brief resulted in a waiver].)

We next turn to the claims asserted by Manuel and Schievelbein that the trial court abused its discretion in sustaining CDCR's evidentiary objections. Once again Manuel and Schievelbein incorporate by reference arguments made in the

trial court, and except as to evidentiary objection number 80, they make a blanket assertion that the objections by CDCR lacked merit. Except as to objection number 80, the claims asserted by Manuel and Schievelbein are forfeited by their failure to discuss each evidentiary objection number and ground for objection individually. (*Parker v. Wolters Kluwer United States, Inc.*, *supra*, 149 Cal.App.4th at p. 290.)

Regarding the trial court's order on CDCR's evidentiary objection number 80, Manuel and Schievelbein assert that their exhibit 32 -- a statement by Scott Kernan -- was admissible under the official records exception to the hearsay rule. But Manuel and Schievelbein fail to establish any of the foundational matters required to admit exhibit 32 as an official record. (Evid. Code, § 1280.)

The trial court did not abuse its discretion in sustaining CDCR's evidentiary objections.

II

Manuel next contends that the trial court erred by finding no triable issue of material fact regarding hostile environment sexual harassment. A plaintiff claiming hostile environment sexual harassment must demonstrate that the alleged wrongful conduct was sufficiently severe or pervasive to alter the conditions of his or her employment and create a hostile or abusive work environment because of his or her gender. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462; *Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 161 [harassment need not be severe and

pervasive; the plaintiff need only show severe or pervasive harassment].) Manuel urges that Kramer's conduct towards her was severe because it was retaliation for Manuel's rejection of his advances. But as we explain in part III below, Manuel did not establish a triable issue of fact regarding the alleged retaliation. Manuel also contends that Kramer's conduct toward her was pervasive. We conclude, however, that considering the totality of the circumstances, no reasonable juror could find that the conduct Manuel complains about was sufficiently pervasive to alter the conditions of Manuel's employment and create a hostile or abusive work environment for Manuel.

"Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances.

[Citation.] The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's . . . work performance . . . and that [the plaintiff] was actually offended.' [Citation.] [¶] 'The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred. [Citation.] [¶] In determining what constitutes "sufficiently pervasive" harassment, the courts have held that acts of harassment cannot be occasional, isolated,

sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature. [Citation.]’” (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 142, 144-145 [three incidents of sexual conduct over a five-week period -- an offensive comment about plaintiff’s marital status; defendant pulled plaintiff toward his body while making a suggestive remark; and defendant made offensive remarks to plaintiff, placed his arm around her and, in the process, his arm rubbed against her breast -- were not pervasive].)

The court in *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 611, provided the following illustrations of pervasive conduct: constant verbal abuse, requests for sexual relations, and unwanted touching directed at female traffic controllers (*Hall v. Gus Const. Co., Inc.* (8th Cir. 1988) 842 F.2d 1010, 1012);⁴ supervisors’ constant rude comments to and requests for sexual favors from plaintiffs (*Yates v. Avco Corp.* (6th Cir. 1987) 819 F.2d 630, 632); and co-workers’ systematic use of extremely vulgar and offensive sexual slurs (*Katz v. Dole* (4th Cir. 1983) 709 F.2d 251, 254, abrogated on another point in *Mikels v. City of Durham, NC* (4th Cir. 1999) 183 F.3d 323, 329 &

⁴ We look to federal authorities interpreting Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) for assistance in interpreting the FEHA and its prohibitions against sexual harassment and retaliation. (*Miller v. Department of Corrections, supra*, 36 Cal.4th at p. 463; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 475-476.)

fn. 4). The conduct of which Manuel complains is distinguishable from the conduct courts have deemed pervasive.

Manuel nonetheless contends the following actions by Kramer created a hostile work environment: (1) Kramer asking Manuel about her marital status and family, (2) Kramer inviting Manuel to have drinks with him on three occasions, (3) Kramer backing Manuel against a wall and asking her about her confidential OIG interview, (4) Kramer patting the chair next to him on three or four occasions, signaling Manuel to sit next to him at meetings, leaning close to her and whispering "chit chatty," non-sexual things, (5) Kramer putting his arm around Manuel's shoulders for two to three minutes during a break in a training class and steering her to the parking lot, and (6) Kramer telling Manuel, in response to her request for his contact information, that he had special numbers for her, and giving her his cell phone and hotel room numbers.⁵

The contention that Kramer's questions about Manuel "became more personal and persistent" is not supported by the portions of the record cited in the opening brief. Manuel testified that Kramer asked her about her family when he began working at the Prison, and such questions did not continue "months and months and months." Manuel has not shown that Kramer's questioning was

⁵ We do not consider Kramer's statement to Popovich about Manuel because the trial court sustained CDCR's evidentiary objection to this evidence.

"persistent" or offensive from the perspective of a reasonable woman.

Nor could it reasonably be concluded that three invitations to have drinks and three or four incidents of inviting Manuel to sit next to Kramer at meetings, in the context of weekly executive staff meetings, during a six- or seven-month period was pervasive conduct. The other incidents Manuel complains about were one-time occurrences. Viewed as a whole, the conduct in this case was not constant or systematic.

There is no evidence that Kramer's drink invitations were imbued with sexual connotation. Manuel admitted that one drink invitation may have included Shepherd when Manuel, Shepherd and Kramer were leaving work. Another invitation was made in the context of a lengthy and apparently friendly conversation during which Kramer and Manuel discussed Kramer's move to the area. Manuel does not assert that any drink invitation was associated with a sexual demand, comment or innuendo.

Although Manuel characterized Kramer's conduct during the "I have a special number for you" incident as "suggestive," she testified that Kramer made the remark in the context of joking with her and in response to her request for contact information. Manuel did not take the incident seriously. Indeed, Manuel, Schievelbein and Captain Vince Mini joked about Manuel getting Kramer's special number. They treated the incident as a joke as it was funny to them. Occasional teasing and offhand comments are not actionable. (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 788 [141 L.Ed.2d 662, 676-677].)

Kramer touched Manuel once by placing his arm around her shoulders for two to three minutes and on three or four occasions when his arm touched Manuel's arm during meetings. The meetings took place in a small room and were typically attended by 20 to 25 executive employees. There is no evidence that any of the meeting attendees regarded any touching of Manuel by Kramer as inappropriate or complained about inappropriate touching. None of the incidents of touching were accompanied by sexual remarks.

The circumstances surrounding Kramer's placing his arm around Manuel's shoulders and guiding her to the parking lot also do not show that Kramer's conduct was based on Manuel's gender. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279-280 [harassing conduct must be based on sex].) According to Manuel, Kramer had a private conversation with her in the parking lot to instruct her to "sabotage" the class they were attending because Kramer believed his boss had a financial interest in the company offering the class and Kramer did not believe in the program.

There is also no reasonable basis for inferring that Kramer's conduct after Manuel's OIG interview was, as Manuel contends, based on Kramer's attempt to date Manuel. As Manuel described the incident, Kramer's actions were intended to get Manuel to disclose information about her OIG interview.

Significantly, Manuel admitted that she did not perceive Kramer's questions about her marital status and family, Kramer's conduct during two meetings, and the incident following her OIG

interview as sexual harassment. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130 [there is no FEHA violation if the plaintiff did not subjectively perceive the environment to be abusive].)

Manuel was aware that CDCR took sexual harassment very seriously and required sexual harassment to be reported as soon as possible. Manuel asserted that she would have gone to an equal employment opportunity (EEO) counselor if she felt that Kramer's conduct had to be reported. No one told Manuel not to report harassment. Nonetheless, Manuel never complained to an EEO counselor while she worked at the Prison. She did not complain about harassment or retaliation to OIG or to IA during her September 6, 2006, investigative interview. Manuel did not report Kramer's conduct until almost one year after the alleged sexual conduct had stopped and only after Manuel learned that she was under investigation for misconduct.

But let us be clear. It is understandable if Manuel felt uncomfortable with Kramer's unwanted touching, invasions of her personal space, and invitations to his hotel. Our decision should not be construed as condoning such conduct by a manager or supervisor. We simply conclude that more is required to survive summary judgment on a claim for hostile environment sexual harassment.

The FEHA does not require a sterile work environment. Annoying or "'merely offensive'" conduct in the workplace is not actionable. (*Lyle v. Warner Brothers Television Productions, supra*, 38 Cal.4th at p. 283.) Conduct must be extreme to amount

to sexual harassment. (*Faragher v. City of Boca Raton, supra*, 524 U.S. at p. 788 [141 L.Ed.2d at pp. 676-677].) Viewed as a whole and in context, the alleged wrongful conduct was not extreme and was not the "concerted pattern of harassment" necessary to create a hostile or abusive work environment. (*Fisher v. San Pedro Peninsula Hospital, supra*, 214 Cal.App.3d at p. 610.) The facts in this case are far different from the facts in the cases upon which Manuel relies. (*Cf. Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, 1461-1464 [plaintiff's supervisor habitually used sexually-explicit, offensive and gender-based terms to refer to female employees]; *Miller v. Department of Corrections, supra*, 36 Cal.4th at pp. 466-468 [plaintiffs presented evidence of widespread sexual favoritism toward women with whom the defendant had sexual affairs and retaliation against employees who complained about the favoritism].)

Accordingly, the trial court did not err in its ruling on Manuel's sexual harassment cause of action.

III

Regarding their retaliation causes of action, Manuel and Schievelbein contend that the trial court erred by finding that they failed to establish a causal link between their protected activity and the adverse employment actions taken against them. We find no error.

To recover for retaliation, a plaintiff must show that (1) he or she engaged in an activity protected by the FEHA, (2) he or she subsequently suffered an adverse employment

action, and (3) there is a causal connection between the protected activity and the adverse employment action. (*Miller v. Department of Corrections, supra*, 36 Cal.4th at p. 472.)

There is no dispute that Manuel and Schievelbein engaged in protected activity by filing complaints against Kramer, or that they suffered adverse employment actions when Manuel was demoted and terminated, and when Schievelbein was terminated. Instead, the parties dispute whether there is a causal connection between their protected activity and the adverse employment actions.

We start with the retaliation claim based on Manuel's demotion. CDCR produced evidence of legitimate, non-retaliatory reasons for Manuel's demotion. The notice of adverse action for Manuel's demotion stated that Manuel's request to postpone her drug test obstructed the random drug-testing process and Manuel's December 20, 2005 memorandum to Shepherd about her delayed drug test was dishonest because (1) on December 6, Manuel did not go to Wagner's office, ask to drive her own car, nor comply with the testing policy, as stated in her memorandum, and (2) on December 7, Manuel did not report to Wagner's office. The notice appeared to be based on witness interviews and IA's investigation reports. Manuel admitted her failure to test for three days violated CDCR's policies. She also admitted she had no evidence to show that Schumacker consulted with Kramer before requesting an investigation into her delayed drug test or that Schumacker harbored retaliatory animus against her.

Moreover, by the time Manuel filed her first complaint against Kramer (dated October 24, 2006), the IA investigation

concerning her delayed drug test was already under way. The IA investigation cannot be deemed retaliatory because it preceded Manuel's earliest protected activity. (*Sabinson v. Trustees of Dartmouth College* (1st Cir. 2008) 542 F.3d 1, 5; *Yartzoff v. Thomas* (9th Cir. 1987) 809 F.2d 1371, 1375 (*Yartzoff*); *Bibiloni Del Valle v. Puerto Rico* (D. Puerto Rico 2009) 661 F.Supp.2d 155, 173.)

The burden then shifted to Manuel to establish a triable issue of material fact regarding retaliation. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) She was required to produce "substantial responsive evidence" that CDCR's proffered reasons were pretext for retaliation. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1109, 1112.) She could do so by "'directly 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.'" (*Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061, 1066.) Manuel did not meet her burden.⁶

There is no evidence that Kramer was aware of Manuel's October 24, 2006 complaint when he issued the notice of adverse action for Manuel's demotion. Without such evidence, Manuel cannot establish that Kramer intended to retaliate against her

⁶ The portions of the record cited by Manuel and Schievelbein in footnotes 351, 352, 354 (as to December 6, 2005), and 363 of their opening brief do not support their factual assertions.

by demoting her, or that there was a causal connection between her protected activity and the adverse action. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 70, 73-74; *Fisher v. San Pedro Peninsula Hospital, supra*, 214 Cal.App.3d at p. 615.)

Schumacker requested the investigation into Manuel's delayed drug test in response to a May 5, 2006 anonymous call to IA. Darrell Cain's investigation supported the findings in the notice of adverse action that Manuel postponed her drug test to December 7, and that Manuel and Wagner's accounts of what happened on December 6 and 7, 2005, were substantially different. Wagner did not, as appellants contend, admit fault for the three-day delay in Manuel's drug-testing. Wagner said she did not recall Manuel going to Wagner's office on December 6. Wagner's equivocal deposition testimony that it was possible that Manuel went to Wagner's office on December 6 and it was possible that Manuel brought up the issue of using her own car is speculative and does not raise a triable issue of fact, particularly where Wagner clearly stated that she had no such recollection. (*Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1014 [an issue of fact is not raised by conjecture or mere possibilities].)

Regarding Manuel's discharge, CDCR showed that Manuel was terminated from employment following an IA investigation initiated before Manuel filed her first complaint against Kramer. The notice of adverse action for Manuel's termination stated non-retaliatory reasons for the discharge: Manuel

interfered with the investigation into Norris's misconduct, was discourteous to Williams, neglected her duty to ensure that inmates' civil rights were protected, and was dishonest in her January 6, 2006 memorandum and during her September 6, 2006 investigative interview. Manuel was not the only person dismissed as a result of IA's investigation into the 115s incident.

In response to CDCR's evidence, Manuel did not show that Kane knew about her October 24, 2006, or January 26, 2007 complaints against Kramer when Kane made the decision to dismiss Manuel. Footnotes 338 and 410 through 412 of appellants' opening brief do not support Manuel's assertion that Kane was aware of Manuel's complaints.

CDCR also met its initial burden on summary judgment by presenting legitimate, non-retaliatory reasons for Schievelbein's termination. The notice of adverse action for Schievelbein's discharge states that Schievelbein was terminated for deliberately interfering with the investigation into Norris's misconduct, neglecting his duty to investigate Norris's misconduct and to protect the due process rights of inmates, and dishonesty during his investigative interview. Kramer reduced Schievelbein's discipline for an August 2006 incident,⁷ an action

⁷ In August 2006, Schievelbein left an anonymous voicemail message for lobbyist Matt Gray in response to an editorial Gray wrote about prison reform. In his message, Schievelbein used profane language and referred to the fact that Gray's father, an inmate at the Prison, had shot Gray in the back. A notice of adverse action was issued to Schievelbein based on his voicemail

that contradicts the claim that Kramer harbored retaliatory animus against Schievelbein.

Manuel and Schievelbein failed to show that the reasons CDCR stated for their discharge were false. Their appellate briefs do not dispute the following: that Norris admitted writing the 115s and forging Stevens's signature; Williams reported the allegation that Norris "falsified" documents; Manuel and Schievelbein did not interview Stevens or the inmates or review the 115s; four inmates were convicted and punished based on the 115s Norris wrote; Kramer had requested an IA investigation into Stevens's allegations against Norris; Manuel chastised Williams for reporting Stevens's allegations to Kramer; Manuel and Schievelbein interviewed Norris after Kramer had requested an IA investigation; Manuel and Schievelbein did not provide Norris an advisement of rights; Manuel and Schievelbein issued a Counseling Record to Norris; Manuel and Schievelbein were responsible for reviewing 115s for due process violations but did nothing about the inmates' convictions after learning of Stevens's allegations against Norris; and Manuel's January 6, 2006 memorandum to Glensor did not disclose that Manuel had already issued a Counseling Record to Norris on October 25, 2005.

The record also supports CDCR's finding that the statements in the 115s authored by Norris were inconsistent with the

message to Gray, reducing Schievelbein's salary effective March 13, 2007. However, Kramer reduced Schievelbein's discipline from a reduction in pay to a letter of instruction.

statements in Stevens's crime/incident report. Although Stevens subsequently testified in this lawsuit that he told an investigator the substance of the 115s was accurate,⁸ unlike the 115s, Stevens's crime/incident report did not state that the inmates Stewart subsequently identified were the inmates who attacked Tucker. When Vickrey and Brizendine questioned Stevens about his identification of an inmate in the 115s, Stevens stated that he could not explain the identification.

Manuel and Schievelbein also did not show that CDCR's criticism of their failure to advise Norris of her rights before her interview was a sham. Even supposing the first interview of Norris was "preliminary," Manuel and Schievelbein interviewed Norris on a subsequent occasion without an advisement of rights. Norris testified that after Manuel and Schievelbein interviewed her, she felt she might be subject to discipline for signing Stevens's name on the 115s. And, during the appeal of her discharge, Norris argued that her termination should be set aside because Manuel and Schievelbein violated her due process rights when they interrogated her without providing her the protections set forth in the police officer's bill of rights.

Additionally, Manuel and Schievelbein did not demonstrate that the reasons CDCR proffered for its dismissal decisions were

⁸ We disregard the assertions by CDCR, Manuel and Schievelbein concerning Stevens's statement to IA investigators, because the parties failed to provide record citations for such a statement and we did not find such a statement in the record. (Cal. Rules of Court, rule 8.204(a).)

pretext for retaliation. They contend that Kramer influenced Kane's decision to discharge them. But this claim is not supported by the record, and there is no showing of a causal connection.

On August 31, 2006, when he asked IA to investigate Stevens's allegations against Norris and when he was interviewed by IA about the 115s incident on October 12, 2006, Kramer could not know about Manuel's subsequent October 24, 2006 or January 26, 2007 complaints or Schievelbein's subsequent November 2006 complaint. Kramer could not have harbored retaliatory motive based on the protected activity of Manuel or Schievelbein when he asked IA to investigate the 115s incident or provided investigators information concerning that matter.

Kramer was aware of Manuel's complaint by mid-December 2006 when Manuel requested a *Skelly* hearing concerning her demotion. But Manuel does not establish that the reasons given for the demotion were pretext. And regarding Manuel's discharge, there is no evidence that Kramer communicated with Kane about the 115s incident after October 24, 2006. Manuel cannot meet her burden without evidence that Kane was aware that Manuel complained or that Kramer influenced Kane's discharge decision after Kramer learned that Manuel complained. (*Fisher v. San Pedro Peninsula Hospital, supra*, 214 Cal.App.3d at p. 615.)

Manuel and Schievelbein point to Kane's deposition testimony as proof that Kramer influenced Kane. But the trial court sustained CDCR's objection number 69 regarding Kane's deposition testimony, and in any event, the testimony does not

support the factual assertion by Manuel and Schievelbein. Kane did not testify that Kramer influenced Kane's discharge decisions.

Manuel and Schievelbein also contend that Kernan instructed Kramer not to dismiss Schievelbein if Kramer had approved the issuance of a Counseling Record to Norris. Manuel and Schievelbein suggest that Kernan believed Kramer was involved in the decision to discharge Schievelbein. They cite appellants' exhibit 32 in support of this contention, but the trial court sustained a hearsay objection to exhibit 32. In any event, exhibit 32 states that Kernan felt Kramer should not discipline Schievelbein if Schievelbein approved the Counseling Record to Norris while Schievelbein was the acting warden. Exhibit 32 does not state that Kernan instructed Kramer not to dismiss Schievelbein, that Kramer was involved in the dismissal decision, or that Kernan believed Kramer was so involved. Exhibit 32 states that at some unspecified time, Kernan was concerned about Kramer's "handling of the situation and they specifically discussed the Norris investigation" because someone at the Prison complained to Kernan that Kramer was taking a bad action against Norris. As stated in Exhibit 32, the "situation" Kernan discussed with Kramer concerned the investigation against Norris, not an investigation against Manuel or Schievelbein.

Kane testified he could have discussed Schievelbein's complaint with Kramer. Even if this equivocal testimony established that Kramer was aware of Schievelbein's November 1, 2006 complaint before March 15, 2007, Schievelbein has not

demonstrated a basis for concluding that Kramer retaliated against Schievelbein. Kramer's reduction of Schievelbein's discipline for the Gray incident suggests that Kramer did not harbor retaliatory animus against Schievelbein. There is also no evidence that Kane intended to retaliate against Schievelbein because Schievelbein complained about Kramer.

Citing various acts by CDCR and Kramer, Manuel and Schievelbein assert that they presented direct evidence of retaliatory motive. Many of their assertions, however, are not supported by the portions of the record cited or contain no citation to the record. As an example, appellants' exhibit 17 (Derosier's September 10, 2007, letter to Manuel) does not support the assertion that CDCR did not investigate the complaints brought by Manuel and Schievelbein against Kramer until after Manuel and Schievelbein were terminated. Derosier's letter does not state when OIG began its investigation into Manuel's sexual harassment complaint and does not address Schievelbein's complaint at all.

Manuel and Schievelbein contend that Kramer's conduct toward Rianda and reaction to Manuel's refusal to take the downtown assignment are direct evidence of retaliation. But that conduct preceded the filing of the complaints by Manuel and Schievelbein against Kramer. As we have explained, events that preceded the filing of the complaints against Kramer cannot be a reasonable basis for finding intent to retaliate based on the filing of the complaints. (*Yartzoff, supra*, 809 F.2d at p. 1375.)

Manuel and Schievelbein also claim that Kramer gave inconsistent reasons for requesting an investigation into the 115s incident and that his shifting justifications evidence pretext. However, the trial court sustained objections to the evidence upon which Manuel and Schievelbein rely to support their assertion of shifting justifications. Manuel and Schievelbein cite the same evidence to support other contentions. Manuel and Schievelbein fail to demonstrate that the trial court's evidentiary rulings concerning appellants' exhibits 11 and 32 were an abuse of its discretion. Manuel and Schievelbein cannot show that a triable issue of material fact exists based on inadmissible evidence. (*Thousand Trails, Inc. v. California Reclamation Dist. No. 17* (2004) 124 Cal.App.4th 450, 457.)

But even if we were to consider appellants' exhibit 11, we would not conclude that the reason Kramer provided for requesting an investigation into the 115s incident was false, as Manuel and Schievelbein contend. According to exhibit 11, Kramer requested an investigation into the 115s incident because Stevens disagreed with the content of Manuel's memorandum to Glensor. Manuel's memorandum is not part of the record before us, and we cannot discern from the record whether Stevens disagreed with Manuel's memorandum to Glensor. Even assuming that the Manuel memorandum referenced in appellants' exhibit 11 is the Counseling Record Manuel issued to Norris, as appellants claim, the Counseling Record states that, according to Norris, Stevens agreed with the content of the 115s and authorized

Norris to sign his name on the 115s. Such statements are contrary to Stevens's allegation that he did not review the 115s and could not answer Lieutenant Vickrey and Officer Brizendine's questions about an identification made in the 115s. Stevens testified at Norris's *Skelly* hearing that he did not know about, or consent to, Norris writing and signing the 115s. Manuel and Schievelbein have thus failed to demonstrate that Kramer's reason for requesting an investigation into the 115s incident, as stated in exhibit 11, was false.

Manuel and Schievelbein next suggest that because Kramer approved the issuance of a Counseling Record to Norris, Manuel and Schievelbein did not neglect their duty. They contend that appellants' exhibit 31 (lockdown meeting minutes) shows that Kramer was at the Prison during the time they assert Kramer approved the issuance of a Counseling Record to Norris. But Manuel and Schievelbein cannot rely on exhibit 31 to create a triable issue of fact because the trial court sustained CDCR's evidentiary objection to exhibit 31 on hearsay grounds. Moreover, the fact that Kramer approved the issuance of a Counseling Record after discussion with Schievelbein does not contradict CDCR's finding that Manuel and Schievelbein neglected their duty to adequately investigate Norris's misconduct and to protect inmates' civil rights.

Manuel and Schievelbein also make a number of arguments based on the timing and sequence of events. A close examination of these contentions discloses no triable issue of material fact.

Manuel and Schievelbein contend: that Kramer did not request an investigation into the 115s incident until after rumors circulated around the Prison that Manuel and Shepherd were dating; Manuel and Schievelbein did not become the focus of investigation until after they complained about Kramer's conduct; 989 Forms requesting an investigation against Manuel and Schievelbein were never prepared; and at the beginning of the investigation against Manuel and Schievelbein, Kane instructed Kramer to "stay out of it" because Manuel and Schievelbein had complained against Kramer. The portions of the record cited, however, do not support the factual assertions made by Manuel and Schievelbein.

Schievelbein's deposition testimony does not show when he heard that Manuel and Shepherd might have been dating and, more importantly, that Kramer was aware of any rumor about Manuel and Shepherd. Nor could such knowledge by Kramer be reasonably inferred from Schievelbein's testimony.

Schumacker testified that Schievelbein became the subject of investigation after Kramer's second (i.e., October 12, 2006) IA interview. By September 6, 2006, Manuel was aware that she was the subject of investigation for a conspiracy to cover up Norris's misconduct. Manuel knew by July 2006 that she was under investigation for failing to promptly take her drug test. Manuel did not complain against Kramer until on or about October 24, 2006. Schievelbein submitted his complaint against Kramer in November 2006. The assertion by Manuel and Schievelbein that they did not become the subject of

investigation until after they had complained against Kramer is, thus, not supported by the record.

In Manuel's view, if on October 24, 2006, she was already under investigation and subject to discharge for the 115s incident, CDCR would not have issued a notice of demotion on December 1, 2006. The record shows, however, that the IA investigation into Manuel's delayed drug test was separate from the IA investigation into her role in the 115s incident. Manuel has not demonstrated through evidence in the record that retaliation was the reason she was under investigation for mishandling the 115s incident and disciplined for her failure to promptly take her random drug test.

As for Kane's instruction to Kramer, Kane testified that he directed Kramer "not to be involved in the situation with Manuel and Schievelbein." Kane did not recall when he gave Kramer this instruction. Without more, there is insufficient evidence to draw an inference that Kramer was involved in the decisionmaking process leading to appellants' discharge. Kane told Kramer not to be involved; he did not tell Kramer to "stop" being involved. Kane did not testify that Kramer was involved in any decisionmaking.

In addition, the fact that Manuel and Schievelbein were discharged for "code of silence" violations -- an action supported by the non-retaliatory reasons CDCR proffered -- does not imply retaliatory animus. We have not been directed to any evidence in the record from which a trier of fact could reasonably find that the complaints brought by Manuel and

Schievelbein against Kramer played a part in the IA investigation or the decision to discharge them. Instead, the record shows that CDCR initiated an investigation into the 115s incident before Manuel and Schievelbein complained about Kramer and, based on the IA investigation, CDCR determined that Norris falsely accused six inmates of committing battery and Manuel and Schievelbein deliberately failed to adequately investigate Norris's wrongdoing. According to Kane, discharge was an appropriate action for dishonesty. Manuel and Schievelbein did not show that their discharge was inappropriate under the circumstances. Although the termination of Manuel and Schievelbein occurred within months of the filing of their complaints against Kramer, this temporal proximity, standing alone, is insufficient to create a triable issue of fact about whether CDCR's articulated reasons were pretext for retaliation. (*Loggins v. Kaiser Permanente Internat.*, *supra*, 151 Cal.App.4th at p. 1112.)

On this record, Manuel and Schievelbein have not shown that CDCR's non-retaliatory reasons for dismissing them were false and were pretext for retaliation. The trial court did not err in its ruling on the retaliation causes of action.

IV

Manuel next contends that the trial court erred in concluding that she did not plead a quid pro quo sexual harassment cause of action. CDCR and Kramer disagree, but argue that even if she did there was no evidence to support a prima facie case of quid pro quo sexual harassment.

A plaintiff states a claim for quid pro quo sexual harassment by alleging that a "tangible employment action" resulted from the plaintiff's refusal to submit to a supervisor's sexual demands. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1049; *Dept. Fair Empl. & Hous. v. Livermore Joe's, Inc.* (May 8, 1991) FEHC No. 91-08 [retaliation for resistance to defendant's sexual demands constitutes both sexual harassment and retaliation under the FEHA and similar standards govern both violations].)⁹ Manuel's first amended complaint alleged that Kramer sought a sexual relationship with Manuel and that Manuel was demoted and then fired because she did not engage in a sexual relationship with Kramer. We agree with Manuel that she pleaded a cause of action for quid pro quo sexual harassment.

Nonetheless, Manuel must do more to survive a motion for summary judgment. Manuel "must present evidence that she was subject to unwelcome sexual conduct, and that her reaction to that conduct was then used as the basis for decisions affecting the compensation, terms, conditions or privileges of her employment." (*Karibian v. Columbia University* (2d Cir. 1994) 14 F.3d 773, 777.) She must show a "tangible employment action," i.e., "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing

⁹ We give administrative decisions by the Fair Employment and Housing Commission, the agency charged with administering the FEHA, great weight. (*Reno v. Baird* (1998) 18 Cal.4th 640, 660.)

a significant change in benefits." (*Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 753-754, 761 [141 L.Ed.2d 633, 647-648, 652-653 (*Ellerth*).])

Manuel lists five actions which she contends are retaliation for her rejection of Kramer's advances: (1) Kramer's request that Manuel transfer out of the Prison and his criticism of her when she refused to transfer; (2) Kramer's "hide the convict" exercise; (3) the unwarranted criticism of Manuel by her peers; (4) Kramer denying Rianda an assignment; and (5) the investigation into Manuel's delayed drug test and her resulting demotion.

Certainly, Manuel was subjected to tangible employment actions when she was demoted and then terminated. But her other examples do not even rise to that level.

Regarding the request to transfer, Manuel declined the request and did not transfer downtown. Even if Kramer's statement that Manuel should get to work on time and stop bypassing her supervisor constituted a threat, as Manuel contends, there is no evidence that Manuel was disciplined for tardiness or for going over Schievelbein's head. (*Ellerth, supra*, 524 U.S. at pp. 753-754 [141 L.Ed.2d at pp. 647-648] [an unfulfilled threat is not quid pro quo harassment]; *Mormol v. Costco Wholesale Corp.* (2d Cir. 2004) 364 F.3d 54, 58 [unsigned disciplinary notice that did not result in any further action against plaintiff does not constitute a tangible employment action].)

Similarly, there is no evidence that the "hide the convict" exercise, criticism by Manuel's peers, or action taken against Rianda affected the compensation, terms, conditions or privileges of Manuel's employment. The evidence Manuel cites in the opening brief does not show that Kramer criticized Manuel based on the "hide the convict" exercise. Manuel admitted she was not disciplined as a result of that exercise. As for the claim that action taken against Rianda constituted retaliation against Manuel, Manuel forfeited this claim by failing to cite supporting legal authority for the proposition that denying Rianda a job assignment constituted a "tangible employment action" against Manuel. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408 ["When a point is asserted without argument and authority for the proposition, 'it is deemed to be without foundation and requires no discussion by the reviewing court.'"].)

There must also be a causal link between Manuel's reaction to unwelcome sexual conduct and the "tangible employment action." (*Hughes v. Pair, supra*, 46 Cal.4th at p. 1049.) Manuel failed to meet her ultimate burden to establish a triable issue of material fact regarding a causal connection between her resistance to Kramer's conduct and the tangible employment actions. CDCR and Kramer identified legitimate, non-retaliatory reasons for Manuel's demotion and discharge. After CDCR presented evidence of non-retaliatory reasons for its actions, the burden shifted to Manuel to show that the employment actions were taken because she resisted Kramer's sexual conduct. (*Dept.*

Fair Empl. & Hous. v. Livermore Joe's, Inc., supra, FEHC No. 91-08; *Yanowitz v. L'Oreal USA, Inc.*, supra, 36 Cal.4th at p. 1042.) But as we have explained, Manuel did not show that CDCR's articulated reasons for demoting and then discharging her were false. Moreover, none of the employment actions were accompanied by a discussion about or a demand for sex and there is no temporal proximity between the alleged sexual conduct by Kramer, which Manuel claimed ended in December 2005, and the December 2006 demotion notice or the March 2007 termination notice. (*Paluck v. Gooding Rubber Co.* (7th Cir. 2000) 221 F.3d 1003, 1010 [nearly one-year interval between protected activity and discharge was deemed too long to raise an inference of retaliatory motive]; *Causey v. Balog* (4th Cir. 1998) 162 F.3d 795, 803 [13-month lapse between protected activity and discharge was too long to establish causation absent other evidence of retaliation].) Manuel's unsubstantiated belief that the employment actions were taken because she rebuffed Kramer does not create a triable issue of fact. (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 398.)

Because there is no evidence from which a reasonable juror could find that Manuel was subjected to quid pro quo sexual harassment, reversal is not warranted and we need not address the parties' arguments concerning Kramer's personal liability for quid pro quo sexual harassment.

In addition, Manuel and Schievelbein admit that their causes of action for intentional infliction of emotional

distress depend upon the success of their FEHA claims. Because we affirm the trial court's judgment that no triable issue of material fact exists as to the FEHA causes of action, we also affirm the judgment as to the intentional infliction of emotional distress causes of action.

V

Manuel and Schievelbein further contend that the trial court erred in awarding attorney's fees to CDCR. They argue that their lawsuits were not frivolous, unreasonable or without foundation. We review the trial court's attorney's fee order for abuse of discretion. (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387 (*Cummings*).)

In a FEHA action, the trial court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs. (Gov. Code, § 12965, subd. (b).) Although prevailing plaintiffs in a FEHA action are awarded attorney's fees in all but special circumstances, an award to a prevailing defendant "should be permitted 'not routinely, not simply because he [or she] succeeds . . .'" but only where the plaintiff's claim was frivolous, unreasonable, or without foundation or where the plaintiff continued to litigate after it clearly became so. (*Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 417, 421 [54 L.Ed.2d 648, 653-654, 656-657]; *Cummings, supra*, 11 Cal.App.4th at p. 1386 [California courts have interpreted Government Code section 12965 in accordance with cases construing a similar provision in Title VII].) To prevail on a motion for attorney's fees, a prevailing defendant need not

demonstrate the plaintiff's subjective bad faith.

(*Christiansburg Garment Co. v. EEOC*, *supra*, 434 U.S. at p. 421 [54 L.Ed.2d at pp. 656-657].)

The trial court found that while Manuel and Schievelbein might have held a good faith belief in the merit of their claims during the early stages of litigation, by the time they conducted discovery and were served with the summary judgment motions brought by CDCR and Kramer, Manuel and Schievelbein should have realized that their claims lacked merit. We cannot conclude that the trial court's order was an abuse of its discretion.

On a summary judgment motion, when the moving defendant has met its initial burden of showing that an element of the plaintiff's claim cannot be established, the opposing party must produce substantial responsive evidence to controvert the defendant's showing. (Code Civ. Proc., § 437c, subd. (p)(2).) The record discloses that the parties conducted substantial discovery in this case, including written discovery and numerous depositions. Despite this discovery, unlike the plaintiff in *Cummings*, *supra*, 11 Cal.App.4th at pages 1388-1389, Manuel and Schievelbein did not produce evidence establishing their claims. The conduct of which Manuel complains was not severe or pervasive. Manuel's admissions and the fact that she did not complain about Kramer's conduct until after she learned she was under investigation for "code of silence" violations supports this conclusion. Manuel failed to establish even a *prima facie* case of retaliation because she did not show that decision

makers were aware of her complaint against Kramer when they made the decision to demote or discharge. There was no evidence that, after Manuel and Schievelbein filed their complaints against Kramer, Kramer played any role in the IA investigations against Manuel and Schievelbein or the decisionmaking process leading to their discharge. There was also no evidence establishing a causal link between Manuel's reaction to Kramer's alleged sexual conduct and a tangible employment action. The fact that many of the appellate factual assertions made by Manuel and Schievelbein do not have evidentiary support in the record illustrates the lack of factual basis for their claims.

The trial court limited its attorney's fee award to those fees CDCR incurred in connection with its motions for summary judgment. This award properly recognized that a plaintiff may honestly believe he or she has a valid claim at the outset of the lawsuit but an award of fees under the FEHA is proper where, as here, appellants "pursued litigation after discovery affirmatively disclosed [that] the factual basis for the alleged [unlawful conduct] was patently nonexistent." (*Cummings, supra*, 11 Cal.App.4th at p. 1390.) Because we find no abuse of

discretion by the trial court, we affirm the order awarding CDCR attorney's fees.

DISPOSITION

The judgment is affirmed. CDCR and Kramer shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

_____ MAURO _____, J.

We concur:

_____ BLEASE _____, Acting P. J.

_____ BUTZ _____, J.