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

ROSIE HERNANDEZ,

Plaintiff and Appellant,

v.

COUNTY OF YOLO et al.,

Defendants and Respondents.

C067631

(Super. Ct. No. CV082690)

Rosie Hernandez sued the County of Yolo and Steve Jensen (when used collectively, the County), alleging three violations of the Fair Employment and Housing Act (Gov. Code, § 12900, et seq. (FEHA)).¹ Specifically, Hernandez asserted causes of action for sexual harassment (§ 12940, subd. (j)), failure to prevent sexual harassment (§ 12940, subd. (k)), and retaliation (§ 12940, subd. (h)). Hernandez also asserted four common law tort causes of action for defamation, intentional infliction of emotional

¹ Undesignated statutory references are to the Government Code.

distress, invasion of privacy, and battery. The trial court granted the County's motion for summary judgment. Hernandez appeals from the judgment entered thereon.

We conclude summary judgment was properly granted and affirm the judgment. As we explain, Hernandez's evidence offered in opposition to the County's summary judgment motion, viewed in a light most favorable to Hernandez, falls short of establishing she was "subjected to sexual advances, conduct, or comments that were *severe enough or sufficiently pervasive to alter the conditions of her employment and create a hostile or abusive work environment.*" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283 (*Lyle*)). Having concluded Jensen's conduct was not severe or pervasive enough to create a hostile work environment, Hernandez's claim that she should be able to proceed against the County for failing to prevent this conduct also fails. Hernandez's retaliation claim fails because the evidence does not reveal any "adverse treatment that [was] reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054-1055 (*Yanowitz*)). Indeed, Hernandez was twice promoted after complaining about Jensen's conduct. Finally, Hernandez's common law tort claims are barred because she failed to file her lawsuit against the County within the limitations period prescribed by the Government Claims Act. (See § 945.6, subd. (a)(1).)

Finally, we have identified a number of misrepresentations of the record by Hernandez's counsel. Whether intentional or negligent, such misrepresentations are inexcusable. (Bus. & Prof. Code, § 6068, subd. (d).) Based on this pattern of misrepresentations, we are compelled to provide a copy of this opinion to the State Bar of California to address the issue.

BACKGROUND

In accordance with the standard of review, we recite the facts in a light favorable to Hernandez as the losing party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 [on appeal from a grant of summary judgment, "we must view the evidence in a

light favorable to plaintiff as the losing party”].) “[W]e focus in particular on the nature, frequency, timing, and context of [Jensen’s] conduct.” (*Brennan v. Townsend & O’Leary Enterprises, Inc.* (2011) 199 Cal.App.4th 1336, 1340.) Because we conclude Hernandez’s common law tort claims are barred by the Government Claims Act, we recite the facts relating to these claims only to the extent they relate to Hernandez’s FEHA claims.

In 2007, Hernandez worked for the county’s health department in the nutrition education program. Maryfrances Collins was Hernandez’s immediate supervisor. Collins also supervised Connie Melgoza, Beate Booth, and Ana Enriquez. Jensen supervised the health department’s tobacco education program. His office was on the opposite side of the building from where Hernandez worked. Hernandez did not report to Jensen. Nor did Jensen direct her daily activities, evaluate her work performance, or possess the authority to discipline, demote, transfer, or otherwise affect her employment with the county. However, as one of the supervisors with authority to charge purchases to the county’s credit card, Jensen periodically accompanied employees, including Hernandez, to the store to purchase supplies for their programs. Jensen was also the “unofficial vehicle monitor.” The keys to county vehicles and a vehicle reservation calendar were located in an empty cubicle near his office. Before taking a vehicle, an employee was required to check the vehicle out on the calendar and immediately check the vehicle back in upon returning to the office.

Evidence of Sexual Harassment

Hernandez provided evidence, in the form of a declaration she filed in opposition to the County’s motion for summary judgment, that she “observed [Jensen] rub and touch women’[s] shoulders and play with their hair. He would also frequently flirt with the women and tease them about their clothing, what they were wearing and make inappropriate comments about their looks.” This behavior occurred sometime in 2006.

While Jensen never engaged in this sort of behavior with her during this time period, Hernandez found it to be “upsetting” that he did so with other women at the office.

The first incident Hernandez considered to be harassment directed towards her occurred on January 29, 2007. Hernandez described in her deposition: “I was going to the shredder machine to shred. I had a whole bunch of stuff to shred. And I had dropped some papers on the floor. And when I looked up, there was [Jensen] at my feet looking down. I don’t know if he was going to grab me, touch me, what he was going to do. And I just looked up -- don’t you dare. Don’t touch me, please. And he just walked away.” In her declaration, Hernandez added that “Jensen was standing very close and reaching down towards [her].” She also added Jensen “laughed” as he walked away from her. Hernandez stated in her deposition that she informed Collins about this incident and about the “several times” she had seen him touch other women; Collins responded that Jensen was “very affectionate.”

The second incident occurred on March 1, 2007. Hernandez described in her declaration: “I was at the copy machine when Jensen came up behind me and rubbed my left shoulder as he slid his hand down my arm and said, ‘Mmmm, you smell good.’ I told him ‘get your hands off me.’ Again, he laughed and walked away.” She did not immediately report this incident to Collins.

The third incident occurred on May 2, 2007. Hernandez testified in her deposition that Jensen passed her in the hallway and grabbed her right forearm. She said nothing at the time. Jensen walked away without saying anything. Later in the day, Hernandez went to Jensen’s office and told him she was going to tell Collins he was sexually harassing her. Jensen again said nothing and walked away. Hernandez described the look on Jensen’s face as he grabbed her as being “like a leery-loo, nasty look.” Hernandez’s version of this incident in the hallway changed by the time she filed her declaration in opposition to summary judgment. There, she stated: “I was in a dark hallway that leads to where the unit’s copy machine is and saw Jensen coming towards

me from the other direction. As soon as I saw him, I dodged him to avoid contact with him. Jensen followed me when I would move from one side to another as in preparing to tackle me. He impeded me from moving forward. Jensen continued to move towards me with his hands stretched in the direction of my breasts. To avoid contact, I placed my left arm across my breasts; he then grabbed and held my left arm. I yanked my arm from his hand. I firmly told him, ‘You are going to be in a lot of trouble’. He laughed and replied, ‘Do you think they are going to believe you?’ I walked away.” This version of events directly contradicts her deposition testimony and must be disregarded. (*Barton v. Elexsys Internat., Inc.* (1998) 62 Cal.App.4th 1182, 1191 [where statements in a party’s declaration “directly contradict [his or her] discovery responses, they must be disregarded”]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1120 [“A party cannot evade summary judgment by submitting a declaration contradicting [his or her] own prior deposition testimony”].)²

Following the incident in the hallway, Hernandez went to Collins to report Jensen’s behavior. Collins was not in her office, so Hernandez wrote a note complaining that she was being sexually harassed by Jensen and briefly describing the three incidents. She slid the note under the office door. Later, Hernandez asked Collins whether she received the note. Collins acknowledged she did and said she would talk to Jensen.³

² The same is true of Hernandez’s statement in her declaration that she immediately reported the March 2007 incident to Collins. In her deposition, Hernandez testified she reported Jensen’s conduct at the shredding machine in January 2007 and “the next time” she reported Jensen’s conduct to Collins was “[a]fter the incident in the hallway on May 2nd,” two months after the March 2007 incident at the copy machine. We disregard the contrary statement in Hernandez’s declaration that she immediately reported the March 2007 incident. (*Guthrey v. State of California, supra*, 63 Cal.App.4th at p. 1120; *Barton v. Elexsys Intern., Inc., supra*, 62 Cal.App.4th at p. 1191.)

³ We must also disregard two statements in Hernandez’s declaration that conflict with her deposition testimony: (1) Contrary to Hernandez’s deposition testimony, the note attached to Hernandez’s declaration purported to be the actual note does not describe the

The final incident occurred on May 14, 2007.⁴ Hernandez and Jensen met at Raley's to buy groceries for one of Hernandez's nutrition presentations. Jensen wanted to ride to the store together in a county vehicle, but Hernandez insisted on driving her own car and meeting him at the store. The incident occurred at the register after Hernandez was done shopping. Hernandez testified in her deposition: "And so I bring my cart up to the register to -- for [Jensen] to pay with the Visa, and there was two bags full of food that they filled up. And the bag boy said to me, ma'am, would you like me to help you carry those bags out? And I says, no, thank you. I can handle it. And [Jensen] says to me, here is the copy for you, because we had to keep copies of the transactions . . . [¶] So I says, no, that's okay, I can handle it. And as soon as I got the two bags with my hands, [Jensen] turned around and said, oh, yeah, she can handle it, bam, and socked me. Socked me. And I told him what did you do that for? And so I just started to walk out, and -- I called him a bad name, and I says I'm going to go straight to the office and tell [Collins] what you just did." In her declaration, Hernandez clarified that Jensen "punched [her] with a closed fist" in the arm. She also added Jensen asked her why "Mexicans [ate] so much rice and beans" while the two waited in line to buy the groceries.

three incidents; and (2) While Hernandez stated in her declaration that "Collins never got back to [her]," she testified in her deposition that Collins acknowledged receiving the note and said she would talk to Jensen about the incident. Collins denied receiving this note or any other complaint before August 2007.

⁴ Hernandez testified in her deposition that the incident occurred on May 14, 2007. Her declaration places the incident on July 9, 2007. Jensen stated in his declaration that the incident occurred on August 13, 2007. For reasons previously stated, we use the date to which Hernandez testified in her deposition and disregard the contrary date stated in her declaration. We note Jensen's statement concerning the date is supported by other evidence, i.e., a receipt from the store in which the incident occurred and Collins's statement in her declaration that Hernandez reported the incident on August 16, 2007.

Following the incident at the grocery store, Hernandez went to Collins and showed her a “red mark” on her arm. Collins “said that she was going to take care of it.” Two days later, Hernandez received an e-mail from Collins saying that “she was going to talk to [Jensen]” and that “she would let [Hernandez] know the outcome” of the conversation.

On July 17, 2007, Hernandez “went to Collins to ask her what she had done about [her] complaint about Jensen and his punching. [Collins] told [Hernandez] she was working on it and proceeded to tell [Hernandez] ‘to get out of her office’ and walked towards the door and shut it on [Hernandez].”

On August 15, 2007, Hernandez checked out one of the county’s vehicles and used it to drive to a presentation. When she returned to the office, Hernandez did not immediately check the vehicle back in and return the keys. Instead, she went to her desk and was putting her purse down when, as she testified in her deposition: “[Jensen] comes over screaming at me, and who did I think I was, and where were the county keys and -- you know, that his program was a lot more important than mine.” An employee who witnessed the incident reported Jensen as saying: “ ‘You need to sign off and return the keys now.’ ” When Hernandez said, “ ‘Give me a minute,’ ” Jensen twice said, “ ‘No, you need to do it now,’ ” and also asked if she thought her program was more important than the other programs.

The following day, Hernandez went to Collins and said: “I can’t take this anymore. I don’t know why he keeps on coming to me, doing, grabbing, hitting. I don’t know why. I don’t know what seems to be his problem.” Hernandez also told Collins: “[H]e has no right to be putting his hands on me. And . . . then he screams at me for no reason.” Collins responded: “I’m going to take care of it, I’ll get back to you.” Collins immediately talked to Jensen about the grocery store incident and told him not to touch Hernandez. Collins also reported the incident to Jensen’s supervisor, Cheryl Boney. A follow-up meeting with Hernandez was scheduled for the following Monday, August 20, 2007, but Hernandez was not able to attend due to a medical leave of absence taken

between August 20 and October 1, 2007. Upon her return, Hernandez met with Collins and Boney and was informed the situation with Jensen “had been taken care of.”⁵ There were no further incidents.

Hernandez’s Leave of Absence

As mentioned, Hernandez took a medical leave of absence from August 20, 2007, until October 1, 2007. The leave of absence was prompted by an incident of domestic violence perpetrated by her husband, Raul Hernandez⁶, on August 19, 2007. Thereafter, Hernandez obtained a domestic violence restraining order against Raul and filed for dissolution of marriage. The morning after the incident, Hernandez went into Collins’s office to request a medical leave of absence, informed Collins her husband had choked her the previous day, and gave Collins a copy of the restraining order.

On August 29, 2007, while Hernandez and her attorney were in court on the dissolution matter, Raul told the judge he had called Hernandez’s place of employment and was told Hernandez had been suspended from work and would be fired upon her return. The same day, Hernandez’s attorney sent a letter to the county’s director of

⁵ Boney stated in her declaration that she discussed the vehicle return and grocery store incidents with Jensen upon her return from a leave of absence on September 4, 2007. With respect to the vehicle return incident, Jensen stated he and Collins “had spoken to [Hernandez] several times before about returning the keys and signing the vehicles back in immediately upon returning to the office so that they would be available for other employees to use.” He “felt [Hernandez’s] response to his inquiry about returning the keys, raising her voice and arguing with him about it, had been inappropriate.” With respect to the grocery store incident, Boney “counseled [Jensen] about touching people at work and explained to him that even though he may consider some of the other County employees to be friends, that not everyone is comfortable with those types of friendly gestures or joking.” Boney also decided that “Jensen would no longer go to the store with [Hernandez] to purchase supplies for her program. When she returned from her leave of absence, [Hernandez] would instead go to the store to purchase supplies for her program with the Department’s administrative supervisor, Joanne Berg.”

⁶ We will refer to Hernandez’s husband by his first name.

public health, Dr. Betty Hinton, requesting “that no one gives out any information about [Hernandez] to any person unless [Hernandez] has specifically given permission to do so.” According to Raul’s deposition testimony, his cousin Rosalinda Flores told him Melgoza had told her Hernandez had been suspended from work. According to Flores’s declaration, Melgoza called her because she wanted to know whether Flores “thought Raul was capable of coming into the [c]ounty offices where [Melgoza] and [Hernandez] worked armed and if [Flores] thought [Raul] might hurt people at the [c]ounty if they got in his way.” Flores also stated Melgoza did not tell her “that [Hernandez] had been suspended from work or that [Hernandez] would be fired from her job or anything else about [Hernandez’s] job performance.” Melgoza confirmed she called Flores because she was “concerned for [her] safety and the safety of the other [c]ounty employees in light of [Hernandez’s] statements about domestic abuse, her restraining order against [Raul], rumors that he owned a lot of guns and speculation that he might be a dangerous man.”

On August 30, 2007, Dr. Hinton sent an e-mail to all employees at the health department advising them she had been informed a county employee “gave out personal and incorrect information about another employee via a phone call from an outside caller.” Dr. Hinton reminded employees “to give NO personal information to anyone about other employees.” The same day, Collins received a phone call from Hernandez’s niece, Aide Silva. Raul listened in on the phone call. Silva told Collins that Melgoza was calling family members asking for information about Raul. She asked that these phone calls stop and told Collins that Raul wanted to speak with her. Collins did not agree to speak with Raul. After the phone call, Collins spoke with Melgoza and told her not to contact Hernandez’s family. Later in the day, Raul called Melgoza on her cell phone. Melgoza stated in her declaration: “[Raul] sounded very upset on the phone and said he was concerned about his reputation at the health department and that people would think he was a ‘terrorist.’ I assured him that no one believed he was a terrorist.”

Melgoza denied discussing Hernandez's employment with the county during this phone call. Raul confirmed in his deposition testimony that Melgoza did not say anything about Hernandez being terminated and also stated he did not remember whether she said anything about Hernandez being suspended. Melgoza told Collins about the phone call.

On September 7, 2007, Raul again called Melgoza, this time on her work phone. He recorded the phone call. Raul asked Melgoza several times whether she had heard any rumors that a man named Tony had invited Hernandez out to get coffee and Hernandez was considering cheating on him with this man. Melgoza denied hearing these rumors, but stated she heard that Hernandez and a neighbor named Tony had "talked but that was all." Raul accused Melgoza of telling Flores this man named Tony had invited Hernandez out to coffee or lunch and Hernandez thought about cheating on Raul with him. Melgoza denied making this statement. Twice during the phone call, Melgoza told Raul she had been warned not to discuss these matters. Raul confirmed in his deposition testimony that Melgoza never told him Hernandez was having an affair. Melgoza told both Collins and Boney that Raul had again called her, this time on her work phone.

On September 10, 2007, Hernandez came into Collins's office to turn in a request to extend her leave of absence for another three weeks. Hernandez testified in her deposition: "[Collins] was very cold to me and -- that's when she stood up on her desk [*sic*] and put her hands down. She says, you need to be very careful in what you do. And I looked at her and I says, what are you talking about? She says you need to be very careful in what you do. I gave her my absence request and walked right out." Hernandez claimed not to know what Collins was talking about. Collins stated in her declaration that Hernandez asked whether she had seen the letter from her attorney about not sharing information about Hernandez with outside callers, accused Collins of doing so, and said the phone call was recorded. Hernandez then stated Melgoza was also sharing information about her. According to Collins, this prompted her to respond: "I caution

you about listening and believing what other people tell you.” Collins reported this conversation to Boney. The same day, Boney sent a memorandum to the administrative supervisor, who was in charge of the reception area staff, “setting forth the procedure for dealing with any phone calls from [Raul’s] known phone numbers [and] how to handle the situation if he were to show up at the [c]ounty’s offices.” As mentioned, Hernandez returned to work on October 1, 2007.

Evidence of Retaliation

Hernandez testified in her deposition that Collins began treating her differently beginning in May 2007, after she reported the grocery store incident: “She would avoid me. I would notice that she would avoid me completely.” Hernandez elaborated: “I would want to talk to her and she’d say can we meet later? And there was never a ‘later’ for me. Or she would have meetings with the other coworkers, even though it was with a different program, I was never included anymore. I was -- I wasn’t involved anymore in the meetings with [Melgoza] and [Enriquez] and [Booth]. It was just them.” This happened on two occasions. Each time, she returned from a presentation to find Collins, Melgoza, Enriquez, and Booth already in a meeting. Hernandez did not know whether these meetings were planned or impromptu. Hernandez also described an incident in which she tried to access Collins’s calendar and was “blocked out.” Hernandez felt “very hurt” because she had previously been able to access Collins’s calendar and other employees were able to access the calendar. Collins “sent an e-mail stating that she had problems with her calendar and her computer.” Hernandez also testified she “tried to leave messages on [Collins’s] phone, and [her] messages wouldn’t go through.” Hernandez further testified, as previously mentioned, that when she requested an additional three weeks of leave time on September 10, 2007, Collins was “very cold” to her and said: “[Y]ou need to be very careful in what you do.”

On October 2, 2007, following Hernandez’s return from her leave of absence, she requested a transfer to another program within the health department or to a different

department within the county. Three days later, Boney informed Hernandez she was unable to find any openings, but she would continue to look. Hernandez told Boney she felt as though Collins was avoiding her. During this time period, Collins was filling out paperwork to have Hernandez reclassified from Community Health Assistant II to Outreach Specialist I, a promotion with a 10-percent pay increase. On October 9, Collins informed Hernandez the reclassification was almost complete. Hernandez contacted Boney and told her she wanted to decline the reclassification, but was told once a determination was made that Hernandez's work more closely resembled the Outreach Specialist I classification, the reclassification had to go forward.

On October 10, 2007, Boney began an internal investigation into complaints from Hernandez's coworkers that Hernandez would "get angry easily" and exhibited "bullying behavior." One of these complaints came from Melgoza, who went to Boney with concerns about the "ongoing tension" she felt when she was around Hernandez. According to Melgoza, she overheard Hernandez "loudly talking on the phone with someone supposedly from the DA's office" and also overheard "another conversation with a lawyer about a taped conversation she had in her possession." Melgoza asked to be relocated to another work station. On October 31, Hernandez's request to transfer out of the nutrition education program was granted. She was transferred to the car seat safety program effective November 19, 2007. Her reclassification paperwork was also completed in November and the pay increase was applied retroactively to July 2007.

The investigation into Hernandez's alleged bullying behavior concluded in February 2008 with Boney determining "there was some evidence of Hernandez bullying her coworkers and interns in the nutrition program. However, most of the evidence was of the he said/she said variety and there was nothing concrete." Boney "had a conversation with [Hernandez] about how others might perceive our actions, i.e., tone of voice, might not be what was intended. [Boney] also discussed the fact that we may not always agree with our coworkers but that we needed to do so in a respectful manner.

[Hernandez] agreed and stated that she would be more aware of how she presented herself. [Boney] gave her a verbal counseling/warning about her behavior prior to October 2007.” Boney also acknowledged Hernandez’s behavior had improved since her transfer to the car seat safety program.

In March 2008, Hernandez received a performance evaluation covering the period from June 30, 2007, to January 8, 2008. Hernandez’s “overall employee performance” was rated: “meets standards.” However, her “work performance” was given an “improvement needed” rating. Hernandez’s new supervisor, Jaime Ordonez, filled out the evaluation except for a portion of the “comments/goals section,” which was provided by Collins. The following month, Hernandez received a “merit pay increase” effective January 6, 2008.

Funding for the car seat safety program ran out in September 2008. Because of this, effective October 1, 2008, Hernandez’s job duties were divided between the indigent health program, the public health nursing program, and the health education program doing car seat safety demonstrations.

On November 3, 2008, Hernandez provided written notice to her new supervisor, Dee Dee Gillian, that she would be retiring effective December 12, 2008. The retirement notice cited “depression, anxiety, emotional distress, humiliation, and last but certainly not least high blood pressure” as having “forced” her decision to retire. Hernandez asserted: “These health concerns have all been correlated to the unhealthy stress environment that I have been experiencing at work. The aforementioned conditions are serious and I have no other option but to retire from my position as an outreach specialist.”

Hernandez’s Lawsuit and the Summary Judgment Motion

Hernandez sued the County alleging three FEHA violations, specifically: sexual harassment (§ 12940, subd. (j)); failure to prevent sexual harassment (§ 12940, subd. (k)); and retaliation (§ 12940, subd. (h)). Hernandez also asserted four common law tort

causes of action for defamation, intentional infliction of emotional distress, invasion of privacy, and battery. As mentioned, the trial court granted the County's motion for summary judgment. With respect to the first and second causes of action, the trial court ruled Hernandez did not "raise a triable issue of fact about whether the alleged harassing conduct was sufficiently severe or pervasive so as to alter the conditions of [her] employment and create a hostile work environment based on sex." With respect to the third cause of action, the trial court ruled Hernandez "did not raise a triable issue of fact about whether she filed an administrative complaint under the [FEHA] in relation to her retaliation claim *before* filing a civil action alleging retaliation under the FEHA. . . . Assuming that [Hernandez] can cure this defect by filing an administrative complaint after she filed her civil lawsuit, [her attorney's] declaration does not establish that [Hernandez's] amended administrative complaint was actually filed." With respect to the common law tort causes of action, the trial court ruled Hernandez "did not file her civil action within six months of the notice of rejection of her government claim" as required by section 945.6, subdivision (a)(1). The trial court entered judgment in favor of the County. Hernandez appeals.

DISCUSSION

I

Summary Judgment Principles

We begin by summarizing several principles that govern the grant and review of summary judgment motions under section 437c of the Code of Civil Procedure.

"A defendant's motion for summary judgment should be granted if no triable issue exists as to any material fact and the defendant is entitled to a judgment as a matter of law. [Citation.] The burden of persuasion remains with the party moving for summary judgment. [Citation.]" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003 (*Kahn*); Code Civ. Proc., § 437c, subd. (c).) Thus, a defendant moving for summary judgment "bears the burden of persuasion that 'one or more elements of' the

‘cause of action’ in question ‘cannot be established,’ or that ‘there is a complete defense’ thereto. [Citation.]” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; Code Civ. Proc., § 437c, subd. (o)(2).) Such a defendant also “bears the initial burden of production to make a prima facie showing that no triable issue of material fact exists. Once the initial burden of production is met, the burden shifts to [plaintiff] to demonstrate the existence of a triable issue of material fact.” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1250, citing *Aguilar, supra*, 25 Cal.4th at pp. 850-851.)

On appeal from the entry of summary judgment, “[w]e review the record and the determination of the trial court de novo.” (*Kahn, supra*, 31 Cal.4th at p. 1003.) “While we must liberally construe plaintiff’s showing and resolve any doubts about the propriety of a summary judgment in plaintiff’s favor, plaintiff’s evidence remains subject to careful scrutiny. [Citation.] We can find a triable issue of material fact ‘if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ [Citation.]” (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433; see *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163 [“responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact”].) Moreover, as previously mentioned, where statements in a party’s declaration “directly contradict [his or her] discovery responses, they must be disregarded.” (*Barton v. Elexsys Intern., Inc., supra*, 62 Cal.App.4th at p. 1191; *Guthrey v. State of California, supra*, 63 Cal.App.4th at p. 1120 [“A party cannot evade summary judgment by submitting a declaration contradicting [his or her] own prior deposition testimony”].)

II

FEHA Claims

As mentioned, Hernandez alleged three FEHA violations: sexual harassment (§ 12940, subd. (j)); failure to prevent sexual harassment (§ 12940, subd. (k)); and

retaliation (§ 12940, subd. (h)). As to the first two causes of action, Hernandez contends there are triable issues of fact as to whether Jensen’s conduct was sufficiently severe or pervasive to create a hostile work environment and that she should be allowed to proceed against the county for failing to prevent this conduct. With regard to the retaliation cause of action, Hernandez contends the trial court erred by concluding she failed to exhaust her administrative remedies. We address her contentions immediately below.

A.

Sexual Harassment

Hernandez contends there are triable issues of material fact as to whether Jensen’s conduct was sufficiently severe or pervasive to create a hostile work environment. We disagree.

“California law prohibits sexual harassment in the workplace.” (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1042 (*Hughes*); § 12940, subd. (j)(1).) California’s FEHA recognizes two forms of prohibited sexual harassment: (1) quid pro quo harassment, “ ‘expressly or impliedly conditioning employment benefits on submission to or tolerance of unwelcome sexual advances’ ”; and (2) “ ‘the creation of a work environment that is hostile or abusive on the basis of sex.’ ” (*Lyle, supra*, 38 Cal.4th at p. 277.) Hernandez does not allege quid pro quo sexual harassment. Instead, she alleges defendants created a hostile or abusive work environment.

“[T]he hostile work environment form of sexual harassment is actionable only when the harassing behavior is *pervasive* or *severe*. [Citation.] This limitation mirrors the federal courts’ interpretation of Title VII. [Citation.] To prevail on a hostile work environment claim under California’s FEHA, an employee must show that the harassing conduct was ‘severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex.’ [Citations.]” (*Hughes, supra*, 46 Cal.4th at p. 1043.) “To be actionable, ‘a sexually objectionable environment must be both objectively and

subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.’ [Citations.] That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff’s position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so.” (*Lyle, supra*, 38 Cal.4th at p. 284.)

With respect to the severity of the harassment, “[t]he United States Supreme Court has warned that the evidence in a hostile environment sexual harassment case should not be viewed too narrowly: “[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’ [Citation.] . . . [T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.” [Citations.]’ ” (*Lyle, supra*, 38 Cal.4th at p. 283, quoting *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.)

“With respect to the pervasiveness of harassment, courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature. [Citations.] That is, when the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions. [Citations.] Moreover, when a plaintiff cannot point to a

loss of tangible job benefits, she [or he] must make a ‘ “commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment.” ’ [Citations.]’ (Lyle, supra, 38 Cal.4th at pp. 283-284; Hughes, supra, 46 Cal.4th at p. 1043 [“an employee seeking to prove sexual harassment based on no more than a few isolated incidents of harassing conduct must show that the conduct was ‘severe in the extreme’ ”].)

In *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121 (*Mokler*), the Court of Appeal held that three incidents of harassing conduct engaged in by a county supervisor (Norby) over a five-week period did not establish a hostile work environment as a matter of law. The first incident occurred at an off-site budget meeting, during which Norby “asked [Mokler] about her marital status and called her an ‘aging nun’ when he learned she was not married.” (*Id.* at p. 144.) The second incident occurred at a hotel during a victory party for a newly-elected supervisor: “Norby took Mokler by the arm, pulled her to his body, and asked, ‘Did you come here to lobby me?’ When she answered no, Norby, [*sic*] responded: ‘Why not? These women are lobbying me.’ He told Mokler she had a nice suit and nice legs, and looked up and down at her.” (*Ibid.*) The third incident occurred at Norby’s office: “Norby told Mokler she looked nice and put his arm around her. He then asked Mokler where she lived, demanding to know her exact address. Norby again put his arm around Mokler and, as he did so, his arm rubbed against her breast. When Mokler tried discussing the services provided by [her department], Norby interrupted, stating: ‘Why . . . do you have to do something special for Mexicans?’ ” (*Ibid.*)

The Court of Appeal held “these acts of harassment fall short of establishing ‘a pattern of continuous, pervasive harassment’ [citation], necessary to show a hostile working environment under FEHA. Norby did not supervise Mokler or work in the same building with her. The first incident involved no touching or sexual remarks; rather, Norby uttered an isolated but boorish comment on Mokler’s marital status. The second

incident did not occur at work, and involved a minor suggestive remark and nonsexual touching. The third incident involved touching when Norby placed his arm around Mokler and rubbed his arm against her breast in the process. The touching, however, was brief and did not constitute an extreme act of harassment. Norby's request for Mokler's home address was brazen, but this conduct falls short of what the law requires to establish a hostile work environment. Norby's derogatory statement regarding Mexicans was unmistakably foul and offensive, but not sexual. [¶] Taken as a whole, the foregoing acts demonstrate rude, inappropriate, and offensive behavior. To be actionable, however, a workplace must be "permeated with 'discriminatory intimidation, ridicule and insult,' [citation] that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" [Citation.] The acts Mokler has alleged here are similar in scope to those found insufficient to constitute a hostile work environment in other cases." (*Mokler, supra*, 157 Cal.App.4th at p. 145, citing *Quinn v. Green Tree Credit Corp.* (2d Cir. N.H. 1998) 159 F.3d 759, 768 [statement that plaintiff had been voted the "sleekest ass" in the office and single deliberate act of touching plaintiff's breasts with papers he was holding in his hand held insufficient to create a hostile work environment]; *Chamberlin v. 101 Realty, Inc.* (1st Cir. 1990) 915 F.2d 777, 783 [five sexually motivated advances on plaintiff over a four- or five-week period held insufficient to create a hostile work environment].)

Here, like *Mokler, supra*, 157 Cal.App.4th 121, the evidence of harassment provided by Hernandez falls short of establishing a hostile or abusive work environment. Like *Mokler*, the first incident involved no touching or sexual remarks. Hernandez was shredding documents and dropped some papers on the floor. Jensen walked over and looked down at her. Hernandez told him not to touch her. He laughed and walked away. Also like *Mokler*, the second incident involved a minor suggestive remark and nonsexual touching. Jensen told Hernandez she smelled good as he rubbed her left shoulder and arm. The third incident involved Jensen grabbing Hernandez's arm as he passed her in

the hallway. While the “nasty look” on his face suggests the touching was sexual in nature, it was less severe than the third incident in *Mokler*, where Norby put his arm around Mokler and rubbed his arm against her breast. The final incident in this case involved a crude comment about Mexicans and a punch on Hernandez’s arm to demonstrate to the grocery store courtesy clerk that Hernandez was strong enough to carry the groceries herself. While obnoxious, there was nothing sexual about this incident. These four incidents occurred over the span of roughly 14 weeks, supporting the conclusion the harassment was “occasional, isolated, sporadic, or trivial.” (*Lyle, supra*, 38 Cal.4th at p. 283.) Moreover, because Hernandez “cannot point to a loss of tangible job benefits,” she “must make a ‘ ‘commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment.’ ” [Citations.]” (*Id.* at p. 284.) Hernandez has made no such showing.

Nevertheless, Hernandez argues Jensen’s conduct was both severe and pervasive, relying on the version of these events stated in her declaration. However, as we have explained, we must disregard those portions of Hernandez’s declaration that contradict her deposition testimony. (See *Guthrey v. State of California, supra*, 63 Cal.App.4th at p. 1120; *Barton v. Elexsys Intern., Inc., supra*, 62 Cal.App.4th at p. 1191.)

Hernandez also points out that she witnessed Jensen sexually harass other women in the office prior to her personal encounters with him. In support of this claim, Hernandez submitted a declaration from Stephanie Miller, who stated Jensen stared at her legs on one occasion and asked: “Where are you[r] fishnet stockings?” Miller also stated Jensen “would often give [her] ‘side hugs,’ ” that he made “inappropriate jokes in the workplace,” and that he “engage[d] in inappropriate flirtatious behavior” with other women at the office, who “allowed Jensen to touch and joke with them.” For obvious reasons, “sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff.” (*Lyle, supra*, 38 Cal.4th at p. 284, citing *Gleason v. Mesirow Financial Inc.* (7th Cir. 1997) 118

F.3d 1134, 1144 [“the impact of ‘second-hand harassment’ is obviously not as great as the impact of harassment directed at the plaintiff”].) Moreover, “the plaintiff generally must show that the harassment directed at others was in her [or his] immediate work environment, and that she [or he] personally witnessed it. [Citation.] The reason for this is obvious: if the plaintiff does not witness the incidents involving others, ‘those incidents cannot affect . . . her [or his] perception of the hostility of the work environment.’ [Citation.]” (*Lyle, supra*, 38 Cal.4th at p. 285.) Here, there is no evidence that Hernandez witnessed the incident involving the fishnet stockings or the side hugs described by Miller in her declaration. And while Hernandez stated in her declaration that she “observed [Jensen] rub and touch women’[s] shoulders and play with their hair,” and he “would also frequently flirt with the women and tease them about their clothing, what they were wearing and make inappropriate comments about their looks,” this conduct also falls short of demonstrating that “the conduct ‘permeated’ her direct workplace environment and was ‘pervasive and destructive.’” [Citation.]” (*Id.* at p. 289.)

Hernandez’s reliance on *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17 [126 L.Ed.2d 295] (*Harris*) is misplaced. Contrary to her argument on appeal, the facts of this case are not “at least as severe” as those in *Harris*. There, over the span of two and a half years, “Hardy [president of Forklift Systems, Inc.] told Harris [one of Hardy’s managers] on several occasions, in the presence of other employees, ‘You’re a woman, what do you know?’ and ‘We need a man as the rental manager’; at least once, he told her she was ‘a dumb ass woman.’ Again in front of others, he suggested that the two of them ‘go to the Holiday Inn to negotiate [Harris’] raise.’ Hardy occasionally asked Harris and other female employees to get coins from his pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendos about Harris’s and other women’s clothing.” (*Id.* at p. 19.) When Harris complained, Hardy apologized and said he would stop. But the following month, “Hardy

began anew: While Harris was arranging a deal with one of Forklift’s customers, he asked her, again in front of other employees, ‘What did you do, promise the guy . . . some [sex] Saturday night?’ ” (*Ibid.*) The district court ruled Hardy’s conduct did not create an abusive environment as a matter of law because his conduct was not “ ‘so severe as to be expected to seriously affect [Harris’] psychological well-being,’ ” and Harris was not “ ‘subjectively so offended that she suffered injury.’ ” (*Id.* at p. 20.) The United States Supreme Court reversed, holding that “the District Court erred in relying on whether the conduct ‘seriously affect[ed] plaintiff’s psychological well-being’ or led her to ‘suffe[r] injury.’ . . . So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, [citation], there is no need for it also to be psychologically injurious.” (*Id.* at p. 22.)

Here, unlike *Harris*, Hernandez was not harassed over the span of two and a half years by someone with the authority to fire her. Jensen never suggested, in front of other employees, that Hernandez could secure a raise by having sex with him. Jensen never belittled Hernandez because of her gender. Nor did he joke about her promising to have sex with customers. Assuming Hernandez’s deposition testimony is to be believed, Jensen’s conduct more closely resembles that held to be insufficient to constitute a hostile work environment in *Mokler, supra*, 157 Cal.App.4th 121.

Hernandez also relies on *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714 (*Dominguez*), a case in which a male coworker (Gutierrez) made “crude and offensive comments to Dominguez relating to her sexual orientation,” including “asking about her favorite sexual position, whether she liked giving or getting oral sex, and whether she was the ‘stud’ with her girlfriend.” (*Id.* at p. 717.) When Dominguez complained to their shared supervisor, Gutierrez “stopped making the offensive comments but began interfering with Dominguez’s work by several means: throwing balls of paper that would jam up the wheels of her pallet jack; stacking heavy boxes in areas that blocked her access to various workstations; and by telling her that he had no

mail to send, then later changing his mind after she had prepared all the other mail for distribution, forcing her to re-sort the mail and revise her written report about her work output. Gutierrez also began to whistle an offensive tune whenever he walked by Dominguez. According to Dominguez, the tune was widely known in Mexico as the melodic accompaniment for the Spanish phrase, ‘Chinga tu madre, cabron.’ Dominguez testified that ‘chinga tu madre’ means ‘go fuck your mother,’ while ‘cabron’ is a term commonly used to insult men.” (*Id.* at pp. 717-718, fn. omitted.) The trial court entered summary judgment in favor of Washington Mutual and Gutierrez. The Court of Appeal reversed, holding that “Gutierrez’s offensive remarks were certainly abusive and hostile. As discussed above, that harassing conduct was replaced by what appears to have been a daily or near-daily campaign of interference with Dominguez’s work that a trier of fact could find was motivated by the same discriminatory intent. On this record, we believe triable issues of fact exist concerning whether this conduct was sufficiently hostile and pervasive.” (*Id.* at p. 725.)

Here, unlike *Dominguez*, Jensen’s harassing conduct was not replaced by an ongoing campaign of interference with Hernandez’s work. In an apparent attempt to make this case more closely resemble *Dominguez*, Hernandez asserts in her opening brief that she complained to Collins about Jensen’s conduct on August 15, 2007, and that “[o]n that same day, after [she] reported his behavior, Jensen came to her desk, screamed at her [about returning the keys to the vehicle she reserved] and acted in a hostile manner toward her. He humiliated and berated her in front of other employees.” The purported fact that Hernandez reported Jensen’s conduct to Collins on August 15, before the vehicle return incident, is not supported by any citation to the record and may be disregarded on that basis. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481, fn. 1.) Moreover, our review of the record does not reveal any evidence supporting the purported fact that Hernandez reported Jensen’s conduct to Collins on August 15, before Jensen confronted her about her failure to promptly check

in and return the keys to the vehicle she reserved. Indeed, Hernandez stated in her declaration that she went to Collins on August 16 to complain about the vehicle return incident and told Collins that “since she had not done anything about the previous incident regarding Jensen,” Hernandez would be “going above” Collins. Collins stated in her declaration that she was away from her office on August 15, and Hernandez *first* reported Jensen’s harassing conduct on August 16. Thus, while there is a factual dispute concerning whether Hernandez reported Jensen’s conduct to Collins following the first incident on January 29, 2007, following the third incident on May 2, 2007, following the fourth incident on May 14, 2007, and then again on July 17, 2007, there is no evidence Collins told Jensen about these complaints, no evidence Hernandez complained about Jensen on August 15, 2007, and therefore no evidence the vehicle return incident was prompted by Hernandez’s complaints against him.

Hernandez also asserts in her opening brief that “Jensen’s friends at work, including [Collins], were upset with [Hernandez] for complaining about Jensen. Some of them ostracized her and stopped talking to her. Collins threatened [Hernandez] on one occasion and told her to ‘get out of her office’ on another. A serious [*sic*] of retaliatory acts followed this last complaint to Collins about Jensen.” As we explain more fully below, we find no basis for a retaliation claim. Nor does any of the claimed retaliatory acts make this case analogous to the “near-daily campaign of interference with Dominquez’s work” held by the Court of Appeal in *Dominguez, supra*, 168 Cal.App.4th 714 to be “sufficiently hostile and pervasive” to survive summary judgment. (*Id.* at p. 725.) For the same reason, we are not persuaded by Hernandez’s reliance on *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994. There, the Court of Appeal held that an ongoing campaign of staring at a coworker, after that coworker complained about prior acts of sexual harassment, may be sufficiently severe or pervasive to create a hostile work environment. (*Id.* at pp. 1001-1002.) Here, Jensen engaged in no

such campaign after he was told by both Collins and Boney that he was not to touch Hernandez. Indeed, Hernandez admitted there were no further incidents.

Finally, we find *Rorie v. UPS* (8th Cir. 1998) 151 F.3d 757 (*Rorie*) to be distinguishable. There, the plaintiff's supervisor "would often tell her that she smelled good, pat her on the back, and brush up against her"; he "was constantly 'coming on' to her" and was "'always flirty.'" (*Id.* at p. 761.) The United States Court of Appeals for the Eighth Circuit reversed the district court's grant of summary judgment for the employer, explaining: "While we concede that the facts of this case are on the borderline of those sufficient to support a claim of sexual harassment, we cannot say that a supervisor who pats a female employee on the back, brushes up against her, and tells her she smells good does not constitute sexual harassment as a matter of law." (*Id.* at p. 762.) Here, unlike *Rorie*, Jensen did not *often* tell Hernandez that she smelled good. He did so once. Jensen did not *often* touch Hernandez in a flirtatious manner. On one occasion, he rubbed her left shoulder and slid his hand down her arm. On another occasion, he grabbed her right forearm with a "nasty look" on his face. On a third occasion, he punched her in the arm to demonstrate to the grocery store courtesy clerk that Hernandez was strong enough to carry the groceries herself. As mentioned, there was nothing remotely sexual about this third touching. Also unlike *Rorie*, while Jensen was a supervisor for the county, he was not Hernandez's supervisor. The facts of *Rorie* were on the borderline of those sufficient to support a claim of sexual harassment; the facts of this case are firmly rooted on the side of those that are insufficient as a matter of law.

B.

Failure to Prevent Sexual Harassment

Having concluded Jensen's conduct was not severe or pervasive enough to create a hostile work environment, Hernandez's claim that she should be able to proceed against the county for failing to prevent this conduct also fails. This conclusion also makes it unnecessary to decide whether Hernandez is correct that the county is strictly liable for

Jensen's conduct because he was a supervisor for the county despite the fact he was not Hernandez's supervisor. We express no opinion on the matter.

C.

Retaliation

Hernandez also claims the trial court erred by concluding she failed to exhaust her administrative remedies with respect to the retaliation cause of action. We need not determine whether Hernandez exhausted her administrative remedies with respect to this cause of action because the evidence offered by Hernandez in opposition to the summary judgment motion does not reveal any "adverse treatment that [was] 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.)

Section 12940, subdivision (h), provides in relevant part that it is an unlawful employment practice "[f]or any employer [to] discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." The term "otherwise discriminate against" in this provision "refer[s] to and encompass[es] the same forms of adverse employment activity that are actionable under [section 12940, subdivision (a)]." (*Yanowitz, supra*, 36 Cal.4th at pp. 1050-1051.) "Appropriately viewed, this provision protects an employee against unlawful discrimination with respect not only to so-called 'ultimate employment actions' such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Id.* at pp. 1053-1054.) Stated differently, "an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable." (*Id.* at p. 1052.) "[T]he 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.” (*Id.* at p. 1054, fn. omitted.) At the same time, “a mere offensive utterance or even a pattern of social slights by either the employer or co-employees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of [section 12940, subdivision (a)] (or give rise to a claim under [section 12940, subdivision (h)]).” (*Ibid.*)

As a preliminary matter, we note that “[t]he pleadings are the ‘outer measure of materiality in a summary judgment proceeding.’ [Citation.]” (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 412.) Hernandez’s operative complaint put the County on notice that the following alleged facts supported the retaliation cause of action: (1) on August 15, 2007, after Hernandez complained to Collins about Jensen’s conduct, “Jensen came to [her] desk, screamed at her and acted in a hostile manner toward her”; (2) “[Jensen’s] friends at work, including Collins, were upset with [Hernandez] for complaining about Jensen and some of them ostracized her and stopped talking to her”; (3) “the [c]ounty ignored [Hernandez’s] complaint of sexual harassment and never investigated her complaint against Jensen”; (4) “the [c]ounty failed . . . to take any disciplinary action against Jensen”; (5) “[t]he harassment at work was affecting [Hernandez] at home,” in the form of “domestic violence perpetrated by her husband” on August 19, 2007; (6) during Hernandez’s leave of absence, “Collins and Melgoza were engaged in a campaign to defame [Hernandez’s] character” by making various phone calls to Raul and other family members, one of which involved Melgoza informing Raul that Hernandez “was going to be terminated from her position with the [c]ounty and that she had engaged in adultery”; (7) “Collins threatened [Hernandez]” on September 10, 2007; (8) on October 17, 2007, Boney “informed [Hernandez] that she was the subject of an ‘investigation’ concerning her harassing behavior towards another employee”; (9) “[Hernandez] was laterally transferred” on October 30, 2007, and again on September 17, 2008; (10) “[o]n March 5, 2008, [Hernandez] received her worst evaluation in 24 years with the [c]ounty”;

(11) “[Hernandez] has received numerous anonymous phone calls by a male referring to her as [‘fucking bitch,’ ‘stupid bitch,’ and ‘fucking whore’]” and her “mailbox has also been tampered with”; (12) “[Hernandez] was isolated and her work was closely monitored”; and (13) “[Hernandez] was forced to retire on December 12, 2008.” Hernandez has failed to support several of these purported facts with an evidentiary submission. Those that remain do not materially affect the terms or conditions of her employment.

With respect to the vehicle return incident, as we have already explained, our review of the record does not reveal any evidence supporting the purported fact Hernandez reported Jensen’s conduct to Collins on August 15, 2007, before Jensen confronted her about her failure to promptly check in and return the keys to the vehicle she reserved. Thus, there is no evidence this confrontation was done in retaliation for Hernandez’s complaint about his conduct, rather than frustration over the fact that she had not returned the car keys. Nor was Jensen’s verbal reprimand about the prompt return of car keys reasonably likely to do more than anger or upset Hernandez. “Minor or relatively trivial adverse actions by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee do not materially affect the terms or conditions of employment.” (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387.)

With respect to Jensen’s friends ostracizing Hernandez following her complaints about Jensen’s conduct, Hernandez testified in her deposition that Collins began treating her differently beginning in May 2007, after she reported the grocery store incident: “She would avoid me. I would notice that she would avoid me completely.” Hernandez elaborated: “I would want to talk to her and she’d say can we meet later? And there was never a ‘later’ for me. Or she would have meetings with the other coworkers, even though it was with a different program, I was never included anymore. I was -- I wasn’t involved anymore in the meetings with [Melgoza] and [Enriquez] and [Booth]. It was

just them.” This happened on two occasions. Each time, she returned from a presentation to find Collins, Melgoza, Enriquez, and Booth already in a meeting. Hernandez did not know whether these meetings were planned or impromptu. Hernandez also described an incident in which she tried to access Collins’s calendar and was “blocked out.” Hernandez felt “very hurt” because she had previously been able to access Collins’s calendar and other employees were able to access the calendar. Collins “sent an e-mail stating that she had problems with her calendar and her computer.” Hernandez also testified she “tried to leave messages on [Collins’s] phone, and [her] messages wouldn’t go through.” The claim that these events were caused by Hernandez’s complaint about Jensen’s conduct is pure speculation. Nor can they be said to have materially affected the terms or conditions of her employment. (See *Yanowitz, supra*, 36 Cal.4th at p. 1054 [“pattern of social slights by either the employer or co-employees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment”].)

With respect to the county ignoring Hernandez’s complaints about Jensen’s conduct and failing to take disciplinary action, both Collins and Booth talked to Jensen following Hernandez’s August 16, 2007, complaint and counseled him not to touch his fellow employees. Hernandez admitted there were no further incidents following the verbal warning Jensen received. And while there is a factual dispute concerning whether Hernandez complained to Collins before August 16, 2007, the failure of Collins or Boney to take action against Jensen between January 29 and August 16 cannot be said to be retaliatory in nature.

With respect to Hernandez’s allegation that Jensen’s conduct affected her at home in the form of domestic violence perpetrated by her husband Raul, as we explain more fully in the section of this opinion titled, “Misrepresentation of the Record,” this assertion is directly contradicted by the evidence Hernandez cites in the record to support it.

With respect to the allegedly defamatory conduct engaged in by Melgoza and Collins during Hernandez's leave of absence, there is no evidence Collins had any conversations with Raul. Nor is there any evidence Melgoza told Raul or anyone else that Hernandez was suspended from work, that she would be fired upon her return, or that she was having an affair. Moreover, undisputed evidence reveals Melgoza made the phone calls, not in retaliation for Hernandez's complaints about Jensen's conduct, but out of concern "for [her] safety and the safety of the other [c]ounty employees in light of [Hernandez's] statements about domestic abuse, her restraining order against [Raul], rumors that he owned a lot of guns and speculation that he might be a dangerous man." With respect to Collins's alleged threat, Hernandez testified that when she requested an additional three weeks of leave time on September 10, 2007, Collins was "very cold" to her and said: "[Y]ou need to be very careful in what you do." Collins painted a different picture of the conversation. But assuming Hernandez's testimony were to be believed, the claim that this statement was made in retaliation for Hernandez's complaint about Jensen's conduct is pure speculation. Moreover, in light of the promotions Hernandez received upon her return from her leave of absence, we cannot conclude any of the conduct occurring during the leave of absence materially affected the terms or conditions of Hernandez's employment.

With respect to Boney's investigation into complaints from other employees that Hernandez was exhibiting "bullying behavior" following her return to work, Hernandez admits in her opening brief that an "employer owes a duty to investigate complaints of harassment whenever the employer becomes aware of harassment through any means." Moreover, as mentioned, the investigation concluded in February 2008 with Boney determining that "there was some evidence of Hernandez bullying her coworkers and interns in the nutrition program. However, most of the evidence was of the he said/she said variety and there was nothing concrete." Boney "had a conversation with [Hernandez] about how others might perceive our actions, i.e., tone of voice, might not

be what was intended. [Boney] also discussed the fact that we may not always agree with our coworkers but that we needed to do so in a respectful manner. [Hernandez] agreed and stated that she would be more aware of how she presented herself. [Boney] gave her a verbal counseling/warning about her behavior prior to October 2007.” Again, in light of the promotions Hernandez received during and following the conclusion of Boney’s investigation, neither the investigation nor the verbal warning amounts to an adverse employment action. The same is true of the March 2008 performance evaluation, which preceded a merit pay increase. (See *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 392 [letter of instruction did not rise to the level of an adverse employment action]; contrast *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1456-1457 [performance evaluation and counseling memorandum amounted to an adverse employment action because they had the effect of making the plaintiff “unpromotable”].)

With respect to Hernandez’s transfers, we note she requested the first transfer and the second was caused by a loss of funding for the car seat safety program. “A transfer can be an adverse employment action when it results in substantial and tangible harm. A transfer is not an adverse employment action when it is into a comparable position that does not result in substantial and tangible harm. [Citations.] A transfer is not an adverse action simply because the plaintiff finds it to be ‘personally humiliating.’ [Citation.] The District of Columbia Circuit, in *Brown v. Brody* (D.C.Cir. 1999) 199 F.3d 446, after surveying the relevant case law, stated a formulation that reflects our own view: ‘[A] plaintiff who is made to undertake or who is denied a lateral transfer — that is, one in which she [or he] suffers no diminution in pay or benefits — does not suffer an actionable injury unless there are some other materially adverse consequences . . . such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm. Mere idiosyncrasies of personal preference are not sufficient to state an injury.’ [Citation.]” (*McRae v. Department of Corrections & Rehabilitation, supra*, 142

Cal.App.4th at p. 393.) Hernandez cites isolation, close monitoring of her work, and being forced to retire as materially adverse consequences of these transfers, but offers no evidence in support of these assertions.

Finally, Hernandez has offered no evidence that she received numerous anonymous phone calls by a male referring to her as “fucking bitch,” “stupid bitch,” and “fucking whore,” or that her mailbox was tampered with. Nor does she assert these as retaliatory adverse employment actions in her briefing on appeal.

In sum, the evidence offered by Hernandez in opposition to the summary judgment motion does not reveal any “adverse treatment that [was] 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.) Indeed, Hernandez was twice promoted after complaining about Jensen’s conduct.

III

Common Law Tort Claims

As mentioned, Hernandez also asserted four common law tort causes of action for defamation, intentional infliction of emotional distress, invasion of privacy, and battery. In granting the County’s motion for summary judgment, the trial court ruled Hernandez “did not file her civil action within six months of the notice of rejection of her government claim” as required by section 945.6, subdivision (a)(1). We agree with the trial court’s assessment.

Section 905 “requires the presentation of ‘all claims for money or damages against local public entities,’ subject to exceptions not relevant here. Claims for personal injury and property damage must be presented within six months after accrual; all other claims must be presented within a year. (§ 911.2.) ‘[N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity and has been acted upon . . . or has been deemed to have been rejected’ (§ 945.4.) ‘Thus,

under these statutes, failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity.’ [Citation.]” (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 737-738; *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 990 [“ ‘filing of a claim is a condition precedent to the maintenance of any cause of action against the public entity and is therefore an *element* that a plaintiff is required to prove in order to prevail’ ”].)

Section 945.6, subdivision (a), provides in relevant part: “[A]ny suit brought against a public entity on a cause of action for which a claim is required to be presented in accordance with [the Government Claims Act] must be commenced: [¶] (1) If written notice is given in accordance with section 913 [i.e., written notice of claim rejection], not later than six months after the date such notice is personally delivered or deposited in the mail.” This provision “is a true statute of limitations defining the time in which, after a claim presented to the government has been rejected or deemed rejected, the plaintiff must file a complaint alleging a cause of action based on the facts set out in the denied claim.” (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 209.)

Hernandez presented a claim for damages to the county’s board of supervisors on February 13, 2008. The claim form stated she desired notices and communications to be sent to her attorney, Andrea Rosa, at 980 9th Street, Suite 1600, in Sacramento, California. On March 31, 2008, Hugo Martinez, the county’s risk manager, sent Rosa a letter notifying her Hernandez’s claim for damages had been rejected. The letter was sent to the aforementioned address. On April 8, 2008, the board of supervisors received a letter from Rosa informing them any correspondence relating to Hernandez’s claim should be sent to her new address, at 5050 Laguna Boulevard, Suite 112-580, in Elk Grove, California. As a courtesy, on April 15, 2008, Martinez sent a copy of the rejection notice to Rosa’s new address. Hernandez filed her lawsuit against the County on October 9, 2008, more than six months after the rejection notice was deposited in the

mail. (§ 945.6, subd. (a)(1).) Accordingly, as the trial court ruled, Hernandez's common law tort causes of action were untimely.

Nevertheless, Hernandez argues Martinez's declaration is "conclusory" and "merely recited that he sent the notice of rejection letter to [Hernandez's] counsel, [Rosa], at the address on the claim form. Nowhere in that declaration or in the exhibits attached to his declaration did Martinez state that he mailed it, where it was mailed or deposited in the United States mail facility in a properly addressed sealed postage paid envelope. Martinez fails to indicate any personal knowledge regarding the actual preparation, addressing of the envelope and mailing of the notice. There is nothing in his declaration that addresses whether he personally prepared the letter, addressed it and mailed it." She relies on *Rincon v. Burbank Unified School Dist.* (1986) 178 Cal.App.3d 949, in which the Court of Appeal held the defendant's declarations did not establish that the rejection notice was mailed in accordance with section 915.2, requiring any "notice shall be deposited in the United States post office, a mailbox, sub-post office, substation, mail chute, or other similar facility regularly maintained by the government of the United States, in a sealed envelope, properly addressed, with postage paid" and providing such notice "shall be deemed to have been presented and received at the time of the deposit." (§ 915.2, subd. (a).) There, one declaration stated the rejection notice was mailed on a particular day, but "did not set forth that [the declarant] observed the notice of rejection mailed, by whom or where it was mailed, or that it was deposited in a properly addressed sealed postage paid envelope in the United States mail." (*Rincon, supra*, 178 Cal.App.3d at p. 955.) A second declaration "merely recited that [the declarant] sent the notice of rejection letter to [the minor plaintiff's mother] at the address as set forth in the claim. He then stated '[t]he letter was typed by my secretary . . . ; I signed it, and [the secretary] mailed it.' Nowhere in that declaration *or in the exhibits attached to his declaration* did [the declarant] state that he saw [the secretary] mail it, where or when it was mailed or deposited in a United States mail facility in a properly addressed sealed postage paid

envelope.” (*Ibid.*, italics added.) Finally, the secretary’s declaration stated she mailed the rejection notice on a specified date to the address set forth in the claim, but again failed to specify “that she deposited the notice of rejection in the United States post office or a mail box, sub-post office, substation, or mail chute, or other like facility regularly maintained by the government of the United States, in a sealed envelope, properly addressed with postage paid and stating where she deposited it in the mail, if she was the one who did so.” (*Id.* at p. 956.) Nor did “*other competent evidence*” establish these facts. (*Ibid.*, italics added.) Here, like *Rincon*, Martinez’s declaration stated he sent Rosa the rejection notice to the address set forth in Hernandez’s claim form on March 31, 2008. However, the evidence missing in *Rincon*, i.e., the particulars of the mailing, is supplied by the certified mail receipt attached to Martinez’s declaration, which sets forth that the letter was deposited in the mail on March 31, 2008, at the United States post office in Woodland, California, and the envelope was properly addressed with postage paid. (See *Call v. Los Angeles County Gen. Hosp.* (1978) 77 Cal.App.3d 911, 917 [“return receipt is better evidence of the fact [of where and when a claim or notice is deposited in the mail] than the proof of mailing by the permissive method of affidavit or certification”].)

Nor are we persuaded by Hernandez’s suggestion that because the March 31, 2008, rejection notice was sent to the “wrong address,” the statutory limitations period should begin to run on April 15, 2008, when Martinez sent a copy of the rejection notice to Rosa’s new address. The March 31, 2008, notice was not sent to the wrong address. In accordance with section 915.4, subdivision (a), it was sent to the address “stated in the claim . . . as the address to which [Hernandez] desire[d] notices to be sent.” The statutory limitations period began to run the moment Martinez deposited the notice in the mail, March 31, 2008, regardless of whether Rosa moved and later informed the county she had a new address.

Hernandez also argues the doctrine of equitable estoppel. Relying on *Bertorelli v. City of Tulare* (1986) 180 Cal.App.3d 432, in which the Court of Appeal explained that “conduct on behalf of a public agency, which would induce a reasonably prudent person to avoid seeking legal advice or personally commencing litigation, may estop the public agency from asserting a claims defense” (*id.* at p. 440), Hernandez argues: “Robert A. Martin, with the Yolo County Public Agency Risk Management Insurance Authority and counsel were in discussions over the telephone and in correspondence with the goal of possibly settling the claim without further litigation. [Martin] requested information that would allow him to make an assessment of the [c]ounty’s liability. He wrote letters alluding to a resolution of the issues if the information provided by [Hernandez] would lead him to believe the [c]ounty was liable. [Hernandez] and her counsel did not pursue a claim at that time because the need would have been obviated if a settlement had been reached.” We are not persuaded. Our review of the correspondence cited by Hernandez does not reveal any conduct on the part of the [c]ounty “which in its natural and foreseeable effect would lull a reasonably prudent claimant and her reasonably prudent attorney into a belief that the [county was] making an evaluation and investigation of the claim preparatory to its rejection or allowance and that the same had neither been rejected nor allowed, and [Hernandez] and her attorney were so lulled and misled and in reliance thereon refrained from filing suit within six months” of the rejection of the claim. (*Tubbs v. Southern California Rapid Transit Dist.* (1967) 67 Cal.2d 671, 678.) Martin’s letters, three of which were sent after the formal rejection of the claim, would not have induced a reasonably prudent attorney into believing the claim had not actually been rejected, and therefore the six-month limitations period had not began to run.

Finally, we also reject Hernandez’s assertion that the doctrine of excusable neglect should save her common law tort causes of action. In support of this assertion, she cites cases interpreting section 946.6, which allows the trial court to relieve a petitioner from the *claims presentation requirements* of section 945.4 in certain circumstances, one of

which is “[t]he failure to present *the claim* was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of Section 945.4.” (§ 946.6, subd. (c)(1), italics added.) “The law is established that although the procedure for granting relief from the claim statutes is remedial in nature and must be liberally construed in favor of the claimant, [citation], such liberality does not extend to the . . . statute of limitations. [Citations.] The Tort Claims Act indulges late claimants; not late suitors. ‘A late claim suggests late discovery of the proper means of seeking redress. But once a claimant has filed [her or his] claim, [she or he] demonstrates familiarity with the statutory procedures governing [her or his] grievance, and can reasonably be charged with knowledge of the time limitations that are part of that procedure.’ [Citation.]” (*Fritts v. County of Kern* (1982) 135 Cal.App.3d 303, 305-306; *Hunter v. County of Los Angeles* (1968) 262 Cal.App.2d 820, 822; see also *Castro v. Sacramento County Fire Protection Dist.* (1996) 47 Cal.App.4th 927, [relief from dismissal under Code of Civil Procedure section 473 for excusable neglect not available where the dismissal was caused by plaintiff’s failure to comply with the six-month statute of limitations prescribed in section 945.6, subdivision (a)(1)].)

Hernandez’s common law tort claims are barred because she failed to file her lawsuit against the County within the six-month limitations period prescribed by section 945.6, subdivision (a)(1).

IV

Misrepresentation of the Record

In our review of the record, we have identified three incidents in Hernandez’s opening brief where purported facts are not supported by any citation to the record or the citation to the record does not support the purported facts. These misrepresentations of the record are in addition to the four contradictions between Hernandez’s deposition

testimony and her declaration filed in opposition to the County's motion for summary judgment. As mentioned, we must disregard the version of events in the declaration.

It is misconduct to intentionally misrepresent the record. (Bus. & Prof. Code, § 6068, subd. (d) [providing for duty of attorney "never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law"]; *In re S.C.* (2006) 138 Cal.App.4th 396, 419-420 [violation of Bus. & Prof. Code, § 6068 for appellant's counsel to misrepresent the record in the opening brief].)

Here is a summary of the misrepresentations of the record in the opening brief:

1. Hernandez's opening brief, at page 13, contains the following factual statements, unsupported by any citations to the record: "When [Hernandez] would go shopping for groceries in preparation for her nutrition class, Jensen would insist on riding in the same department vehicle with her. [¶] Jensen would force [Hernandez] to cancel grocery-shopping arrangements she had previously set with other supervisors so that he was the only supervisor riding with her in the vehicle. [¶] [Hernandez] was so uncomfortable and felt so harassed by Jensen that she purposely sought out other supervisors to accompany her to the grocery store but Jensen would have no part of that. He would insist that he accompany her and obligated [Hernandez] to cancel the arrangements she had set up with the other supervisor(s). [¶] On other occasions, [Hernandez] was so uncomfortable with Jensen that she would drive her own personal vehicle to the store to avoid having Jensen sit next to her in the same vehicle. Jensen would continually stare at [Hernandez]." California Rules of Court, rule 8.204(a)(1)(C) provides that each brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." Because Hernandez has made no attempt to do so with respect to the above-quoted matters, we disregard these purported facts. (See *Gotschall v. Daley, supra*, 96 Cal.App.4th at p. 481, fn. 1.) This page of the opening brief also states: "The above conduct occurred throughout 2007 at least several times each week. Jensen gradually

increased the frequency.” While Hernandez provides a citation to the record for these purported facts, the citation is to a page in her first amended complaint. A party opposing summary judgment may not rely on a pleading alone. (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 222, p. 663.) Nor does the cited page even allege the facts asserted on page 13 of the opening brief. We therefore disregard these purported facts as well.

2. Hernandez’s opening brief, at page 21, states: “The harassment by Jensen at work was affecting [Hernandez] at home. On August 19, 2007, [Hernandez] told her husband that an employee at work had inappropriately touched her. He became jealous and angry and insisted on knowing who it was. When she refused to tell him the name of the harasser, he became violent towards her. Consequently, she became a victim of domestic violence perpetuated [*sic*] by her husband Raul Hernandez . . . and was forced to apply for an emergency protective order.” In support of these purported facts, Hernandez cites: (1) three lines from her declaration stating she filed for a restraining order against her husband and referring to a copy of the order; (2) the copy of the restraining order, which includes an attached declaration stating Raul violently choked her, causing her to think she was going to die, but containing no statement regarding the reason Raul attacked her; and (3) two pages from Raul’s deposition testimony that *contradicts* her assertion that the reason for the attack had anything to do with Jensen’s conduct in the workplace. Indeed, on the pages cited by Hernandez, Raul testified the *first* conversation he had with her regarding Jensen occurred *after* he went to court about the restraining order. Jensen’s conduct could not possibly have caused Raul to attack Hernandez the day before he knew about it. Thus, the citations to the record provided by Hernandez directly contradict her assertions of fact contained in the brief.

3. Hernandez’s opening brief, at page 22, makes the following unsupported assertion about the September 7, 2007, phone call between Raul and Melgoza: “In this phone conversation, Melgoza informed [Raul] that [Hernandez] was going to be

terminated from her position with the [county] and that she had engaged in adultery.” In purported support, she cites: (1) her opposition to the County’s separate statement, stating that “Melgoza’s conversations with [Raul] endangered [Hernandez’s] life as he believed what was stated by Melgoza that his wife was having an affair”; (2) Raul’s declaration, stating in paragraph 10 that “[Melgoza] confirmed that she had provided [Flores] with the previous information stated in paragraph 3,” i.e., “that [Hernandez] had been suspended from work,” “that she would be terminated upon her return,” and “that [she] had been invited by a neighbor of ours to go out for coffee and/or lunch”; and (3) phone records supporting the fact the call was made. First, Hernandez’s statement in her opposition to the County’s separate statement — that Melgoza told Raul that Hernandez was having an affair, and that Raul believed this to be true — is not evidence. Nor is this statement supported by the evidence she cited to support it. Hernandez cited Raul’s deposition testimony, during which he confirmed Melgoza had *not* told him Hernandez was having an affair; nor did Raul believe Hernandez either was having or wanted to have an affair. She also cited Raul’s declaration, quoted above, which is in direct conflict with his deposition testimony. Finally, Hernandez cited a letter from the county’s department of human resources confirming the September 7, 2007, phone conversation “does include a discussion of [Hernandez] having coffee with a man, however, there was no discussion of [Hernandez’s] employment status.” This is confirmed by the transcript of the phone call. Melgoza said nothing to Raul about Hernandez being either suspended or terminated. She said nothing about Hernandez having an affair. And while Raul pressed Melgoza to confirm she had told Flores that a neighbor named Tony had invited Hernandez to get coffee, Melgoza denied making this statement.

This pattern leads us to believe the misrepresentations of the record are intentional. And even if they are simply negligent, they are nevertheless inexcusable and

compel us to provide a copy of this opinion to the State Bar of California to address the issue.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).) Upon issuance of the remittitur, the Clerk/Administrator of this court is directed to send a copy of this opinion to the State Bar of California.

HOCH, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.