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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BERNICE STANLEY,

Plaintiff and Appellant,

v.

SWEETWATER UNION HIGH SCHOOL
DISTRICT,

Defendant and Respondent.

D058854

(Super. Ct. No. 37-2009-00077353-
CT-WT-SC)

APPEAL from a judgment of the Superior Court of San Diego County, William S. Cannon, Judge. Affirmed.

Bernice Stanley appeals an unfavorable summary judgment ruling in her employment discrimination lawsuit against the Sweetwater Union High School District (the District). We conclude that Stanley's appellate arguments are without merit, and accordingly we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Stanley, who is an African-American woman, was hired by the District in 2002 as the assistant director of special services. When the director of special services, Angela Hawkins, announced her retirement in 2004, Stanley applied for the position and was interviewed, but the District hired Timothy Glover¹ for the position instead. After Glover announced he was resigning in 2006, Stanley again applied for the director position and was interviewed, but the District chose Ronald Lopez² for the position.

In 2009, in the midst of a budget crisis, the District's governing board approved a far-reaching reorganization in which it eliminated 40 administration, management and staff positions, saving the District approximately \$2.8 million. Six positions in the special services department were eliminated, including assistant director of special services, which was held by Stanley. As part of the reorganization, two new positions were created in the special services department — employment development specialist and program manager, but Stanley did not apply for the new position of program manager, as the District had not suggested to her that she transfer into that position. Stanley's employment with the District was terminated effective June 30, 2009. In July 2009, Stanley filed a complaint of discrimination with the Department of Fair

1 Glover is a Caucasian male.

2 Lopez is a Hispanic male.

Employment and Housing (DFEH). After receiving a right to sue letter from DFEH, Stanley filed suit against the District on July 31, 2009.

The operative second amended complaint contains two causes of action. The first cause of action is for discrimination based on race in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.). The second cause of action is for discrimination based on gender in violation of FEHA. Specifically, Stanley alleges that she was not promoted to the director position in 2004 and 2006 because of her race and gender, and that the elimination of her position in 2009 was based on her race and gender in that a disproportionate number of African-Americans and women purportedly had their positions eliminated in the District's reorganization.

The District filed a motion for summary judgment that was originally scheduled to be heard on August 13, 2010. Before Stanley's opposition was due, the trial court accepted the parties' stipulation to move the hearing date to September 10, 2010, making Stanley's opposition due on August 27, 2010. The continuance was apparently for the purpose of allowing time for the District to consider a settlement proposal. Two days before Stanley's opposition to the summary judgment motion was due to be filed, counsel for Stanley filed a declaration in support of a request for a second continuance of the summary judgment motion. The declaration explained that counsel was awaiting responses to discovery concerning the District's promotion history of particular racial categories, and discovery responses concerning "the alleged costs that were saved by the reorganization that led to Stanley's termination." According to the declaration, counsel did not earlier complete the discovery because he was focusing on other issues and was

waiting for a response to a settlement proposal. The declaration was not accompanied by an ex parte application, and the request for a continuance of the summary judgment motion contained in the declaration was accordingly not acted upon by the trial court. The August 27, 2010 deadline for Stanley's opposition to the summary judgment motion passed without Stanley filing any opposition.

After Stanley failed to file an opposition, the parties attempted to file a stipulation with the trial court that would have continued the hearing on the summary judgment motion to October 1, 2010, and extended the deadline for Stanley to file an opposition to the summary judgment motion by 15 court days.³ The stipulation also suggested a 60-day continuance of the October 29, 2010 trial date. The trial court did not accept the stipulation and apparently directed the parties to seek relief by way of an ex parte application.

The District filed an ex parte application on September 2, 2010, which attached the parties' proposed stipulation and requested that the trial court move the trial date, continue the summary judgment hearing, and extend the due date for Stanley's opposition. The trial court denied the ex parte application. The summary judgment hearing went forward on September 10, 2010. Shortly before the hearing, Stanley attempted to file an untimely opposition to the summary judgment motion. At the summary judgment hearing, the trial court decided to continue the hearing for two weeks

³ Counsel for Stanley executed the stipulation on August 27, 2010, which was the due date for Stanley's opposition to the summary judgment motion, but counsel for the District did not execute the stipulation until August 31, 2010.

so that it could consider Stanley's tardy opposition to the summary judgment motion and allow the District to file a reply.

At the continued hearing, the trial court granted the District's motion for summary judgment, concluding that Stanley's claims of employment discrimination arising from the District's failure to promote her to the director position in 2004 and 2006 were barred by the statute of limitations, and that no triable issue of material fact existed as to whether Stanley was terminated in 2009 for discriminatory reasons. The trial court entered judgment in favor of the District, and Stanley filed a timely notice of appeal.

II

DISCUSSION

A. *The Statute of Limitations Bars Stanley's Claims That the District Discriminated Against Her on the Basis of Race and Gender by Failing to Promote Her in 2004 and 2006*

We first consider whether the statute of limitations bars Stanley's claims that the District discriminated against her on the basis of race and gender when it declined to promote her from assistant director to director of the special services department in 2004 and 2006.

A defendant may obtain summary judgment by establishing that no triable issue of material fact exists on the affirmative defense that the statute of limitations bars the plaintiffs' claims. (See Code Civ. Proc., § 437c, subd. (o)(2); *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112; *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 (*Romano*)). We review a summary judgment ruling de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to

judgment as a matter of law. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.)

A civil action for damages under FEHA is timely only if the plaintiff files an administrative complaint with DFEH within the statutory time limit, which — with certain exceptions — is one year from the date that the unlawful employment practice occurred. (Gov. Code, § 12960, subd. (d).) "The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA." (*Romano, supra*, 14 Cal.4th at p. 492.) Stanley filed her administrative complaint with the DFEH in 2009, which was more than a year after the District denied applications for promotion to the position of director in 2004 and 2006. Therefore, unless an exception applies, Stanley's claims that she was denied the promotions in 2004 and 2006 because of racial and gender discrimination are barred by the statute of limitations.

Stanley contends that the "continuing violation doctrine" applies here. The continuing violation doctrine "allows liability for unlawful employer conduct occurring outside the statute of limitations if it is sufficiently connected to unlawful conduct within the limitations period." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802 (*Richards*); see also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1056 (*Yanowitz*).)

As formulated in *Richards*, the continuing violation doctrine extends the limitations period when acts inside and outside the limitations period are "(1) sufficiently similar in kind . . . ; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence." (*Richards, supra*, 26 Cal.4th at p. 823, citation

omitted.)⁴ The question before us is whether, applying the three-pronged test in *Richards*, the continuing violation applies in this case to allow Stanley to pursue employment discrimination claims based on the promotions that the District denied to her in 2004 and 2006.

Stanley contends that the District's allegedly discriminatory failure to promote her in 2004 and 2006 was part of the same continuing unlawful discrimination based on race and gender that allegedly led to her termination in 2009. Stanley argues that because her lawsuit is timely as to the discrimination that allegedly occurred in connection with her termination in 2009, it is also timely as to all acts in the discriminatory course of conduct that began with the District's failure to promote her in 2004.

Before we turn to an application of the three-part test set forth in *Richards*, we pause to discuss an initial matter. Specifically, Stanley contends that although the continuing violation doctrine should apply to her case, the three-part test set forth in *Richards* should not. As we have explained, the three-part *Richards* test applies when the plaintiff is seeking to impose liability for unlawful employer conduct occurring *outside* the limitations period on the ground that it is sufficiently connected to unlawful conduct *within* the limitations period. (*Richards, supra*, 26 Cal.4th at p. 802.) However, as our

⁴ Although *Richards* first formulated the three-pronged test in the context of harassment claims, our Supreme Court later applied it to claims of unlawful retaliation in violation of FEHA. (*Yanowitz, supra*, 36 Cal.4th at pp. 1059-1060.) The *Richards* test has also been applied to allegations that employment opportunities within a company were denied for discriminatory reasons. (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1043 (*Cucuzza*).

Supreme Court has observed, the term "continuing violation doctrine" also refers loosely to "a number of different approaches, in different contexts and using a variety of formulations, to extending the statute of limitations in employment discrimination cases." (*Id.* at p. 813.) In one such formulation, the continuing violation doctrine provides a legal framework for statute of limitations issues that arise when a plaintiff alleges "a systematic corporate policy of discrimination against a protected class that was enforced during the limitations period, to the detriment of members of the class during that period," and where the plaintiff simply seeks to recover for injury *during* the limitations period and "[n]o relief is sought for employer conduct *predating* the limitations period." (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 370, italics added.) The fundamental issue in such cases is whether liability for the unlawful acts occurring *during* the limitations period are barred by the statute of limitations on the ground that they arise from a discriminatory policy that was also enforced *before* the limitations period. (*Id.* at pp. 370, 375, 377.)⁵ Because a completely different legal issue is present in such cases, the three-part test formulated by our Supreme Court in *Richards* does not apply to them. (*Alch*, at p. 375.) Instead, in such cases, courts conclude that unlawful acts occurring inside the

⁵ For example, *Richards* cited two cases in which the issue was whether a discriminatory promotions policy that existed *prior* to the limitations period served to bar claims based on promotions that were denied *during* the limitations period. (*Richards, supra*, 26 Cal.4th at p. 813 [citing *Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1052-1054, and *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal.App.3d 976, 983].)

one-year limitations period are not barred by the statute of limitations when those acts arise from a policy that first came into existence in the preceding years. (*Ibid.*)

Stanley contends that she is alleging "a systemic policy" of discrimination, and thus the three-part test set forth in *Richards* does not apply here. We disagree. The statute of limitations issue in this case is whether Stanley may bring suit based on acts occurring in 2004 and 2006, when those acts occurred *outside* of the limitations period. The issue is not — as in the alternative formulation of the continuing violation doctrine — whether claims arising *inside* the limitations period are barred because of a preexisting discriminatory policy. Therefore, the three-part test set forth in *Richards* is the appropriate legal standard to determine whether claims for unlawful acts occurring outside of the one-year limitations period are time barred.

Applying the three-part test set forth in *Richards*, we reject Stanley's position that she has established a discriminatory course of conduct — beginning with the District's denial of promotions to her in 2004 and 2006 and ending with her termination in 2009 — that satisfies the continuing violation doctrine.

The first prong of the *Richards* test requires that the discriminatory acts outside the limitations period be "sufficiently similar in kind" to those inside the limitations period. (*Richards, supra*, 26 Cal.4th at p. 823.) Here, the District's failure to promote Stanley in 2004 and 2006 is very different in kind from the elimination of the assistant director position in the 2009 reorganization. First, when an employee is not selected from among competing candidates to receive a promotion, that decision is based on a close evaluation of the employee's qualifications as compared to the other candidates. In

contrast, when an employer decides to terminate an employee because her position has been eliminated in a reorganization, that action is not centered on an evaluation of the employee's qualifications but on the need of the organization for the position that she holds. Second, the two types of decisions are also very different because of the different consequences to the employee. When an employee loses a promotion, she suffers no adverse impact to her current position, but when an employee is terminated in a reorganization, she loses her employment. Finally, here, the evidence shows that promotion decisions and the reorganization decision are dissimilar because they were "made by many different decision makers, with no evidence the decisions were connected to each other in any way." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 66-67.) We conclude, therefore, that the District's denial of promotions to Stanley in 2004 and 2006 and its termination of her in 2009 are fundamentally dissimilar events.

The second inquiry under *Richards* is whether the discriminatory acts alleged to be part of a continuing violation "have occurred with reasonable frequency." (*Richards, supra*, 26 Cal.4th at p. 823.) Here, there was a three-year gap between District's second denial of Stanley's promotion in 2006 and its decision to eliminate the assistant director position in 2009. Further, Stanley identifies only three instances of discrimination in the five-year period from 2004 to 2009, which is a sporadic occurrence in that time span. Thus, the allegedly discriminatory acts did not occur with reasonable frequency to constitute a continuing violation.

Third, *Richards* requires that the discriminatory conditions "have not acquired a degree of permanence." (*Richards, supra*, 26 Cal.4th at p. 823.) "Permanence" in this context means that an employer's statements and actions make clear to a reasonable employee that any further efforts to end the discrimination will be futile. (See *ibid.*) "[T]he statute of limitations begins to run . . . when the employee is on notice that further efforts to end the unlawful conduct will be in vain." (*Ibid.*) Here, the 2004 and 2006 decisions on whether to promote Stanley to director became permanent when a different applicant was hired, and there is no indication in the record of any attempts by Stanley to obtain a change in any discriminatory policy that allegedly led to her not being selected for the promotions. (See *Cucuzza, supra*, 104 Cal.App.4th at p. 1043 [plaintiff's loss of job duties for allegedly discriminatory reasons had become permanent when her job title changed].) Therefore, the discriminatory acts that occurred in 2004 and 2006 acquired a degree of permanence that precludes the application of the continuing violation doctrine.

Applying all three of the factors articulated in *Richards*, we thus conclude that the gender and race discrimination that Stanley alleges she experienced in 2004 and 2006 are not sufficiently connected to the discrimination that allegedly occurred in 2009 so as to permit application of the continuing violation doctrine. Stanley's claims for discrimination occurring in 2004 and 2006 are therefore barred by the statute of limitations.

B. *Summary Judgment Was Properly Granted on the Remaining Claims That the District Unlawfully Discriminated Against Stanley on the Basis of Race and Gender in 2009*

We now consider whether summary judgment was warranted on Stanley's remaining claims that she was unlawfully terminated in 2009 based on her race and gender.

1. *Relevant Legal Standards*

As pertinent here, FEHA makes it "an unlawful employment practice" for "an employer because of the race, . . . [or] sex . . . of any person, . . . to discharge the person from employment." (Gov. Code, § 12940, subd. (a).) To establish a claim of discrimination under FEHA, "the plaintiff must provide evidence that (1) [s]he was a member of a protected class, (2) [s]he was qualified for the position [s]he sought or was performing competently in the position [s]he held, (3) [s]he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*)). At trial, the employee would have an initial burden to prove each of these elements in order to raise a presumption of discrimination; and then the burden would shift to the employer to rebut the presumption, often by introducing evidence of legitimate, nondiscriminatory reasons for the adverse employment action. (*Id.* at pp. 355-356.)

"A defendant employer's motion for summary judgment slightly modifies the order of these showings." (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097.) An employer may satisfy its initial burden "by setting forth competent, admissible

evidence to show legitimate, nondiscriminatory reasons for its action. [Citation.] It is then the employee's burden to rebut the employer's showing by pointing to evidence which raises an inference that intentional discrimination did occur. '[A] plaintiff's showing of pretext, combined with sufficient prima facie evidence of an act motivated by discrimination, may permit a finding of discriminatory intent, and may thus preclude judgment as a matter of law for the employer.'" (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1194.) If the employee is unable to rebut the employer's showing of a legitimate, nondiscriminatory reason for its action against the employee, the employer is entitled to summary judgment. (*Guz, supra*, 24 Cal.4th at pp. 369-370.)

2. *The District Met Its Initial Burden to Show a Legitimate Nondiscriminatory Reason for Stanley's Termination*

In this case, the District satisfied its initial burden by submitting evidence showing a legitimate nondiscriminatory reason for Stanley's termination. Specifically, the District explained in detail, through declarations of the District's administrators and accompanying documentation, that Stanley was terminated because of the District's reorganization, in which it eliminated 40 positions across several departments, including six positions in the special services department, in order to reach its goal of bridging a \$3 million budget shortfall. As the relevant declarations explained, the District chose to eliminate administrative and management positions such as Stanley's because it wanted to limit the amount of classroom cuts, and it selected the positions to be eliminated based on considerations of functionality, cost savings and District or departmental needs. Even more specifically, the declarations and an accompanying flow chart established that the

position of assistant director of the special services department, held by Stanley, was eliminated because the assistant director's job functions were able to be reassigned to other employees within the Department, resulting in a cost savings.

Where, as here, the employer identifies a reduction in force as the nondiscriminatory reason for the termination, "[i]nvocation of a right to downsize does not resolve whether the employer had a discriminatory motive for cutting back its work force, or engaged in intentional discrimination in deciding which individual workers to retain and release. Where these are issues, the employer's explanation must address them." (*Guz, supra*, 24 Cal.4th at p. 358.) A more detailed explanation is necessary because "an employer may very well implement an economically necessary reduction in force and still, at the same time, violate antidiscrimination laws because the *selection* of who is to be laid off is based on some illegal criteria." (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 580.) The District has met its burden to produce evidence showing a legitimate nondiscriminatory reason for Stanley's termination, going beyond the bare fact of a reduction in force. The District has done this by setting forth specific facts explaining how it selected Stanley's position for elimination in the reorganization, and how her job duties were able to be reallocated to other employees. (See *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1732 [the employer carried its burden of setting forth a legitimate nondiscriminatory motive for terminating the plaintiff as part of a reduction in force based on specific evidence of why the plaintiff's position was eliminated].)

3. *Stanley Did Not Satisfy Her Burden to Raise a Permissible Inference That the District Terminated Her for Discriminatory Reasons*

With the District having met its burden to establish a legitimate nondiscriminatory reason for Stanley's termination, it is entitled to summary judgment unless she "'offer[s] substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.'" (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 806-807.) Put another way, Stanley's discrimination claims cannot survive the motion for summary judgment "unless the evidence in the summary judgment record places [the District's] creditable and sufficient showing of innocent motive in material dispute by raising a triable issue, i.e., a permissible inference, that, in fact, [the District] acted for discriminatory purposes." (*Guz, supra*, 24 Cal.4th at p. 362.) Stanley may succeed in meeting her burden of persuasion "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 256.) As we will explain, Stanley did not meet that burden.

Stanley makes several arguments in an attempt to show that the District's legitimate nondiscriminatory reason for terminating her was pretextual, and that the District in fact terminated her based on race and gender.

First, Stanley contends that the District must have terminated her for discriminatory reasons because she was not asked to apply for the position of program manager that was created in the reorganization. We reject this argument because evidence that Stanley was not asked to apply for a different position after her job was eliminated does not, without more, call into question the District's legitimate reasons for eliminating Stanley's position. "When an employer modifies its workforce for business reasons, it has no obligation to transfer an employee to another position within the company. [Citations.] To the extent that defendant voluntarily assumed such an obligation . . . , we can draw an inference of discrimination only if plaintiff "can show that others not in the protected class were treated more favorably." (*Gibbs v. Consolidated Services* (2003) 111 Cal.App.4th 794, 800 (*Gibbs*).) Stanley has not made such a showing.

Next, Stanley submits evidence that after the District eliminated several positions from the special services department at the end of the 2008-2009 school year, four new employees were hired by the special services department. Specifically, as established in interrogatory responses from the District, the special services department hired two new school psychologists, a new speech pathologist and a transition program teacher.⁶

Stanley argues that these new hires must have resulted in an expense for the District that

⁶ The interrogatory responses actually identify *five* new hires when the newly hired program manager position created in the reorganization is included, but as we understand Stanley's argument, because the program manager position was part of the reorganization, she does not include the cost of that new hire when arguing that *four* new hires in the special services department cut into the cost savings from the reorganization.

would cancel out the savings in the department from the reorganization. According to Stanley, because the District assumed additional expenses by hiring new employees, it is doubtful whether the District eliminated Stanley's position for budgetary reasons, allowing an inference that the District's purported goal of eliminating positions to cut costs was merely a pretext for discriminating against Stanley based on race and gender.

We reject Stanley's argument because the evidence does not support it. Although Stanley's evidence establishes that the District made four new hires in the special services department, the evidence does not establish that the District incurred any additional expense in connection with those hires that would cancel out the savings from the reorganization. Significantly, the District's interrogatory responses do not establish that the District created four new *positions* in the special services department. Instead, the responses establish only that the department hired four new *employees*. Those new employees may have filled positions that were vacated due to retirement or resignation, meaning that the District would not have incurred a significant additional expense in hiring them.⁷ Further, the District's interrogatory responses state that the hiring of the transition program teacher was "funded with grant monies," also negating any additional expense. Due to her failure to establish that the District added new positions inconsistent

⁷ We note that the organizational chart for the special services department indicates that the department employed 24 psychologists and 20 specialists in language, speech or hearing. A reasonable possibility exists that three of those 44 employees resigned or retired at the end of the 2008-2009 school year and were replaced by the newly-hired school psychologists and speech pathologist. Stanley did not carry her burden to establish that the newly hired employees were not filling already-existing positions that were vacant because of retirement or resignation.

with the stated cost-saving goals of the reorganization, Stanley has not succeeded in establishing that the District's asserted reason for terminating her was "implausible, or inconsistent or baseless." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1009.)

Finally, Stanley attempts to rely on a statistical argument to establish that the District decided to eliminate her position based on race and gender. In support of her gender discrimination claim, Stanley argues "there were four certificated administrators who were terminated by [the District] as a result of its alleged financial reorganization," and "[a]ll four . . . were women . . . [,] thus supporting an inference of gender discrimination." In support of her race discrimination claim, Stanley points out that of the four certificated administrators who were terminated, she was the only African American, and was treated less favorably than the other three terminated certificated administrators because those three employees "were all eligible for early retirement[,], which they all exercised[,], thus supporting an inference of race discrimination."

To prove discrimination with statistical evidence, "the statistics 'must show a stark pattern of discrimination,'" unexplainable on other grounds. (*Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1283; see also *Aragon v. Republic Silver State Disposal Inc.* (9th Cir. 2002) 292 F.3d 654, 663.) The statistical disparities among comparable employee groups must be sufficiently substantial that they raise an inference that the challenged employment practice has harmed certain employees because of their membership in a protected group. (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1323-1324.) A plaintiff may not rely on a statistical sampling that is

too small or contains data that is irrelevant to the plaintiff's situation. (*Guz, supra*, 24 Cal.4th at p. 367.) Thus, for instance, evidence that three of four coworkers who were laid off at the same time as the plaintiff belonged to the same race as the plaintiff did not raise an inference of race discrimination because the sample size was too small and the plaintiff's evidence did not account for possible nondiscriminatory variables such as job performance. (*Aragon*, at p. 663; see also *Carter*, at pp. 1325-1326 [data set incomplete when plaintiff suing for gender and age discrimination offered no evidence on gender or age composition of all of defendant's employees]; *Gibbs, supra*, 111 Cal.App.4th at p. 801 [statistical sample of three employees of large company too small to support inference of discrimination].) Here, Stanley's statistical sample — limited to herself and the three other certificated administrators whose positions were eliminated along with hers — is far too small of a sample, and too far incomplete a data set, to show a stark pattern of discrimination that is unexplainable on other grounds.

In sum, none of Stanley's attempts to rebut the District's legitimate nondiscriminatory reasons for her termination have any merit. The trial court properly granted summary judgment in favor of the District.

C. *The Trial Court Did Not Err in Denying Stanley a Continuance of the Summary Judgment Hearing for the Purposes of Conducting Discovery*

The final issue is whether the trial court erred in proceeding with a ruling on the summary judgment motion without affording Stanley a continuance to conduct discovery.

Under Code of Civil Procedure section 437c, subdivision (h) (section 437c(h)), the trial court shall grant a request for a continuance "[i]f it appears from the affidavits

submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented" Under the rule, an "application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due." (*Ibid.*)

Stanley contends that the trial court should have continued the summary judgment hearing pursuant to section 437c(h) due to the declaration that her attorney filed two days prior to the date that her opposition was due. However, Stanley's request for a continuance did not comply within the requirements of section 437c(h). It was not made in the "affidavits submitted in opposition to a motion for summary judgment" or "by ex parte motion at any time on or before the date the opposition response to the motion is due." (*Ibid.*) Instead, Stanley's request for a continuance was made in a declaration that was *not* accompanied by an ex parte application. The ex parte application for a continuance that was eventually filed on September 2, 2010, was untimely under section 437c(h) because it was filed *after* Stanley's August 27, 2010 deadline for filing an opposition to the summary judgment motion.⁸ Further, in connection with the untimely opposition to the summary judgment motion that the trial court eventually allowed Stanley to file, the declaration filed by Stanley's attorney did not reiterate the request for a continuance under section 437c(h). Instead, Stanley's attorney only asked for a short

⁸ Moreover, the ex parte application was filed by the District, not by Stanley. However, we will treat the ex parte application as a joint application by Stanley and the District because it attached the stipulation for a continuance that was executed by counsel for both of those parties.

continuance of the hearing so that Stanley's opposition could be considered and the District could file a reply. Therefore, the record contains no request for a continuance to conduct discovery in "the affidavits submitted in opposition to a motion for summary judgment." (*Ibid.*)

Because Stanley's request for a continuance was not made in conformance with the procedures set forth in section 437c(h), the trial court accordingly was not required to act on it pursuant to that provision. (See *Tilley v. CZ Master Assn.* (2005) 131 Cal.App.4th 464, 490-491 (*Tilley*) [§ 437c(h) does not apply to a request for continuance of a summary judgment hearing made after due date of the opposition to motion]; *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1083 ["the trial court was not required to continue the summary judgment motion under . . . section 437c[(h)], because plaintiffs' continuance request was not included in timely filed opposition to the summary judgment motion"].)

When a party has not complied with section 437c(h) in making a request for a continuance, the trial court nevertheless has the discretion to continue the hearing if it determines that a continuance is warranted. (*Tilley, supra*, 131 Cal.App.4th at p. 491.) We apply an abuse of discretion standard in reviewing the trial court's decision. (*Ibid.*)

Here, numerous factors lead us to conclude that the trial court was within its discretion to deny a continuance of the summary judgment hearing. As the trial court explained at the September 7, 2010 hearing on the ex parte application to continue the summary judgment hearing, the summary judgment motion had been pending for a substantial amount of time (i.e., since May 7, 2010). In light of the length of time that the

motion had been pending, counsel for Stanley did not set forth a compelling reason for the delay in conducting discovery. Indeed, the August 25, 2010 declaration filed by Stanley's attorney did not set forth any extenuating circumstance, and instead explained that discovery was not complete because counsel had been concentrating on different issues in his initial discovery and had not pressed forward with the case during settlement discussions. Further, the trial court had already granted one continuance of the summary judgment motion on August 4, 2010. Based on all of these factors, the trial court reasonably denied a further continuance, and Stanley therefore has not established that the trial court abused its discretion.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.