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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

EDDY LEURIDAN, JR.,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS & REHABILITATION et
al.,

Defendants and Respondents.

E051626

(Super.Ct.No. RIC468455)

OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge.

Affirmed.

Law Offices of Maryann P. Gallagher and Maryann P. Gallagher for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Alicia M. B. Fowler, Assistant Attorney General, and Chris A. Knudsen, Deputy Attorney General, for Defendants and Respondents.

Eddy Leuridan, Jr., plaintiff, appeals from a summary judgment and an order sustaining a demurrer, in favor of defendants. Plaintiff filed an action against California Department of Corrections and Rehabilitation (CDCR) and Francine Munoz (Munoz) for sexual harassment, retaliation, failure to investigate or prevent sexual harassment, and wrongful termination.¹ The trial court determined that there was no sexual harassment, Munoz was not an agent of CDCR or a supervisor, and the sexual harassment claims were barred by the statute of limitations. The wrongful termination claim was dismissed because plaintiff failed to amend the complaint after a demurrer was sustained for failure to present a timely claim against the governmental entity. Plaintiff appealed.

On appeal, plaintiff claims the trial court erred where (1) there were triable issues of fact as to whether Munoz sexually harassed plaintiff and whether she was an agent or supervisor of CDCR, (2) the action was not barred by the statute of limitations because sexual harassment is a continuing offense and because the CDCR's delay in informing plaintiff of the results of the investigation equitably tolled the statute of limitations, and (3) a claim against the governmental entity is not a prerequisite to an action for wrongful termination based on the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.) violations. We affirm.

¹ Other individual defendants were named in the complaint, but demurred to the complaint separately, resulting in a dismissal as to them at an earlier stage of the proceedings. They were not involved in the motions at issue here.

BACKGROUND

In 1996 or 1997, both plaintiff and defendant Munoz (whose surname was later changed to Mitchell) were correctional officers at the California Rehabilitation Center (CRC) in Norco, where they met and became friends. In 1997 or 1998, the relationship between plaintiff and Munoz became physically intimate.

In 1998 or 1999, both plaintiff and Munoz became parole agent I's with the CDCR, working in different areas. On his application, plaintiff represented that he had obtained a bachelor's degree in business administration from Columbia State University. Of all applicants being considered for the position of parole agent I, plaintiff ranked second, and he was hired for the position because it was believed that he had five years of experience as a correctional officer and possessed the bachelor's degree.²

Munoz was promoted to parole agent II Specialist in 2002. As parole agent II, Munoz worked out of the parole region IV headquarters in Diamond Bar. The parole agent II specialist in community education/employment program coordinator position is a specific classification within the CDCR. Parole agent II specialist is not a supervisory classification, and such employees have no authority to hire, transfer, suspend, promote, or discipline other employees. Plaintiff's direct supervisor was Raymond Phillips.

Munoz and plaintiff's intimate relationship continued until 2002. After the breakup, plaintiff and Munoz remained friends and stayed in contact. In 2003, plaintiff

² Plaintiff's application actually stated he had less than four years experience.

told Munoz not to contact him except for business. Plaintiff had met and become engaged to another woman, whom he married on June 12, 2004; in late September or early October 2004, plaintiff and his wife separated and they subsequently divorced. During this time frame, Munoz continued to call plaintiff at work, sent text messages, and emailed plaintiff. When Munoz came to plaintiff's unit office, she also rubbed her hands on his shoulder and buttocks. This continued until plaintiff made a sexual harassment complaint against her.

The official sexual harassment complaint was submitted after plaintiff's supervisor noticed plaintiff was uncomfortable when Munoz was at their unit office and appeared ill. After plaintiff explained that he was having problems with Munoz, the supervisor suggested that plaintiff document the problems. Plaintiff submitted a sexual harassment complaint on October 4, 2004. After plaintiff made the complaint, Munoz stopped contacting him.

An administrative inquiry into the harassment complaint was initiated and investigated. In the course of the investigation, plaintiff was interviewed on November 30, 2004, and Munoz was interviewed on December 9, 2004. At the time of her interview, the investigator admonished Munoz that she did not have the right to refuse to answer questions. During his interview of Munoz, it became clear to the investigator that plaintiff and Munoz saw the events between them very differently. The investigator therefore asked Munoz if she had ever known plaintiff to be untruthful. In response to

the question, Munoz revealed that plaintiff had submitted a false bachelor's degree to get his job.

After the sexual harassment investigation was completed, the investigator prepared a memorandum to the regional parole administrator dated December 28, 2004, regarding the administrative inquiry of Munoz's conduct. Although it appeared Munoz had continued to call and inquire of plaintiff after he last broke off their relationship, the report concluded that there was no sexual harassment, because the parties had been in a relationship. However, because of the strict policy on any form of harassment, and because plaintiff claimed there had been unwanted contact, the regional parole administrator sent a letter of counseling to Munoz on January 26, 2005, reminding her of California Code of Regulations, title 15, section 3391, subdivision (a), requiring employees to be courteous and professional in their dealings with fellow employees and members of the public.

In the meantime, immediately after Munoz's interview, a memorandum was sent to the regional parole administrator recommending an administrative inquiry into the allegations that plaintiff had submitted fabricated documentation reflecting that he had earned a four-year college degree. Plaintiff had signed his State of California examination application for the parole agent I position, certifying that all statements were true and complete, and asserting that he had completed a bachelor of science degree in business administration on August 1, 1997. An investigation into plaintiff's dishonesty

was initiated, based on the allegation of obtaining state employment using falsified documents.

During the investigation, it was learned that Columbia State University was a diploma mill, was never accredited, and plaintiff never attended classes on campus to earn his degree. Although plaintiff asserted he was unaware that his degree was invalid, he described the program as a correspondence course; he never attended classes at the campus in New Orleans; he got credit for “life experience” and read from two to four books, on which he wrote summaries. To qualify for the position of parole agent I, a candidate was required to have two years of college (60 units) and four years of experience. Plaintiff did not have quite four years experience. But for his purported educational background, another candidate would have been hired.

After reviewing the report of the investigation into plaintiff’s dishonesty, the regional administrator concluded plaintiff had committed misconduct insofar as the investigation showed he had been dishonest on his application form. The administrator noted that plaintiff’s responses during the investigative interview were evasive, incomplete and combative, and believed plaintiff knew his degree was not a valid bachelor’s degree when he made his application. Fraud and dishonesty are considered terminable offenses because honesty, candor, credibility and integrity are fundamental to all peace officer positions. Plaintiff was subsequently terminated, effective October 14, 2005.

Following his discharge, plaintiff made a complaint against the CDCR, Munoz, and other individual defendants, to the Department of Fair Employment and Housing (DFEH), on the ground he was fired in retaliation for his sexual harassment complaint on April 3, 2006, requesting an immediate right-to-sue notice. On April 14, 2006, the DFEH issued a right-to-sue notice. On October 5, 2006, plaintiff filed a complaint seeking damages for four causes of action: (1) sexual harassment in violation of Government Code section 12940; (2) retaliation in violation of Government Code section 12940; (3) failure to investigate and prevent harassment and retaliation in violation of Government Code section 12940; and (4) wrongful termination in violation of public policy.

The CDCR demurred to the fourth cause of action on the ground that it was not an FEHA claim and plaintiff had failed to exhaust remedies by failing to file a claim against the governmental entity as required by the California Tort Claims Act. (Gov. Code, § 945.4.) On June 29, 2007, the court sustained defendants' demurrer to the fourth cause of action for wrongful termination with leave to amend. Plaintiff did not file an amended complaint.

On May 23, 2008, the individual defendants demurred to the second, third, and fourth causes of action of the complaint on the grounds they each failed to allege facts sufficient to constitute a cause of action. The basis for the demurrers was that the individual defendants were not employers of plaintiff and thus were not liable under the holding of *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158. On June

27, 2008, the demurrers were sustained without leave to amend as to the individual defendants, including Munoz.

On December 10, 2009, defendants CDCR and Munoz filed a motion for summary judgment as to the first, second, and third causes of action. On June 14, 2010, notice of ruling that summary judgment had been granted in favor of the defendants was issued. After considering plaintiff's objections to the ruling, the trial court found that CDCR was not liable for sexual harassment under a respondeat superior theory because (a) Munoz was a coemployee and not a supervisor, and (b) once CDCR became aware of allegations of sexual harassment, it took appropriate actions and the harassment stopped.

The court further found that plaintiff's action for sexual harassment was barred by his failure to exhaust remedies under Government Code section 12960, subdivision (d), because he filed his DFEH complaint more than one year after the alleged harassment, which was not a continuing violation. The trial court also determined that CDCR terminated plaintiff for a legitimate, nonretaliatory reason, and that the claim for wrongful termination was dismissed pursuant to the demurrer which had been sustained earlier. On September 7, 2010, judgment was entered in defendants' favor and the defendants were awarded costs. Plaintiff appealed.

DISCUSSION

On appeal, plaintiff challenges both the order granting summary judgment as to the first three causes of action brought under Government Code section 12940, and

sustaining the demurrer to the wrongful termination cause of action.³ Specifically, plaintiff claims there were triable issues of fact as to whether (1) the statute of limitations had lapsed on the sexual harassment cause of action, (2) Munoz was plaintiff's supervisor; (3) the conduct constituted sexual harassment as opposed to a romantic relationship; and (4) plaintiff committed fraud when he submitted his employment application stating he had a bachelor's degree. Plaintiff also asserts the trial court erred in sustaining the demurrer to the fourth cause of action because it was based on FEHA violations for which a government claim is not required. We disagree with all plaintiff's assertions.

1. Summary Judgment Was Proper as to the Sexual Harassment, Retaliation, and Failure to Prevent Causes of Action.

a. General Principles and Standard of Review Relating to Summary Judgments.

The purpose of a motion for summary judgment is to discover whether the parties possess evidence which requires the fact-weighting procedures of a trial. (*Soto v. County of Riverside* (2008) 162 Cal.App.4th 492, 496, quoting *City of Oceanside v. Superior Court* (2000) 81 Cal.App.4th 269, 273.) A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

³ The first cause of action asserted a claim against both CDCR and Munoz. The second, third and fourth causes of action remained only as to CDCR.

We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476, citing *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) Because we review de novo, the trial court's stated reasons for granting summary judgment are not binding on us; we review the ruling, not the rationale. (*Soto v. County of Riverside, supra*, 162 Cal.App.4th at p. 496; *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

A cause of action has no merit if the defendant shows either: (1) one or more elements of the cause of action cannot be established, or (2) that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o).) Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (*Jones v. Dept. of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1375-1376 (*Jones*).) The plaintiff may not rely upon the mere allegations or denials of his pleadings to show that a triable issue of material fact exists but instead must set forth the specific facts showing that a triable issue of material fact exists. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) An opposition to a summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative, or based on conjecture and speculation. (*MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.*

(2010) 187 Cal.App.4th 766, 777; *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.)

In reviewing the evidence, we strictly construe the moving party's evidence and liberally construe the opposing party's evidence, and accept as undisputed only those portions of the moving party's evidence that are uncontradicted. "Only when the inferences are indisputable may the court decide the issues as a matter of law. If the evidence is in conflict, the factual issues must be resolved by trial. "Any doubts about the propriety of summary judgment . . . are generally resolved against granting the motion, because that allows the future development of the case and avoids errors." [Citation.]'" (*Ogborn v. City of Lancaster* (2002) 101 Cal.App.4th 448, 457.) However, we must presume the judgment is correct, and the appellant bears the burden of demonstrating error. (*Jones, supra*, 152 Cal.App.4th at p. 1376.)

b. There was No Actionable Sexual Harassment Under Government Code Section 12940.

Sexual harassment occurs when an employer creates a hostile environment for an employee because of that employee's sex. (*Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 345.) It is unlawful for an employer to discriminate against an individual because of his or her sex. (*Id.* at pp. 347-348; Gov. Code, § 12920.) The sine qua non of any sexual harassment claim is that the plaintiff suffered discrimination because of sex. (*Kelly v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 203.) The critical issue is whether members of one sex are exposed to disadvantageous terms or conditions

of employment to which members of the other sex are not exposed. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279.) It is the disparate treatment of an employee on the basis of sex—not the mere discussion of sex or use of vulgar language—that is the essence of a sexual harassment claim. (*Id.* at p. 280.)

The FEHA prohibits a variety of unfair labor practices, including discrimination on the basis of specified characteristics, including harassment of an employee based on his or her sex. (Gov. Code, § 12940, subd. (j)(1).) The statutory scheme requires an employer to take all reasonable steps to prevent harassment from occurring in the workplace, and to take immediate and appropriate action when it is or should be aware that harassment has occurred. (*Jones, supra*, 152 Cal.App.4th at p. 1376.) Under the FEHA statutory scheme, an “employer” includes any person (other than a religious association or nonprofit corporation) regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state and cities. (Gov. Code, § 12926, subd. (d).) The statute defines “sex” as including, but not limited to, a person’s gender. (Gov. Code, § 12926, subd. (p).)

The FEHA prohibits “an employer” from engaging in improper discrimination. (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 123.) This includes liability where the sexual harassment is perpetrated by a coworker, if the employer fails to take immediate and appropriate corrective action when reasonably made aware of the conduct. (Gov. Code, § 12940, subd. (j)(1); *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th

1174, 1182-1183.) If the harassment is perpetrated by an employee, that employee is personally liable for harassment prohibited by the statute regardless of whether the employer knows or should have known of the conduct. (Gov. Code, § 12940, subd. (j)(3); *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471.)

The law prohibiting harassment is violated when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 263.) If the harasser is a nonsupervisory employee, and the employer takes immediate and appropriate corrective action when informed of the conduct, this standard is not met. (*Id.* at p. 264; *Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1137.)

To prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was *severe enough or sufficiently pervasive* to alter the conditions of employment and create an environment that qualifies as hostile or abusive to employees *because of their sex*. (*Lyle v. Warner Brothers Television Productions, supra*, 38 Cal.4th at pp. 278-279.) An employee 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. (*Id.* at p. 283.)

As previously demonstrated, the alleged harassment in this case arises from Munoz's contact with plaintiff in her attempt to resume a relationship with him. All

contact ceased after October 4, 2004. No other male employees were exposed to any harassment because of their sex. The undisputed evidence shows that plaintiff was not harassed because of his sex (gender), but because of the prior sexual relationship with Munoz. Any conduct that might be categorized as harassment was attributable to Munoz, individually, respecting plaintiff, individually, and not to a hostile environment created by CDCR or its policies.

A coworker's romantic involvement with a supervisor does not, by itself, create a hostile work environment. (*Candelore v. Clark County Sanitation Dist.* (9th Cir. 1992) 975 F.2d 588, 590.) Further, isolated incidents of sexual horseplay are not so egregious as to render the work environment hostile. (*Ibid.*; see also *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1043.) It follows that a coworker's romantic involvement with a coworker does not create a hostile work environment within the meaning of the FEHA.

In this regard, plaintiff failed to present evidence of a workplace atmosphere so discriminatory and abusive that a reasonable person would find it hostile, and that he perceived the environment as hostile. (*Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21-22 [114 S.Ct. 367, 126 L.Ed. 2d 295].) Any harassment was trivial, because the contact between Munoz and plaintiff, while unwanted by the latter, was not hostile or abusive. Insofar as there was no actionable sexual harassment by Munoz, summary judgment on the cause of action against her as an individual was proper.

Plaintiff's theory of CDCR's liability for harassment is grounded on his assertion Munoz acted or held herself out as a supervisor and CDCR failed to investigate the

harassment claim or prevent the harassment. In determining if Munoz was an agent or supervisor of CDCR, we are required to give great weight to an administrative agency's interpretation of its own regulations and the statutes under which it operates. (*Bradley v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1625.) The CDCR job specification for parole agent II Specialist reveals it is not a supervisory classification, and such individuals cannot, on behalf of CDCR, hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, including persons holding the rank of parole agent I. Munoz was not an agent or supervisor, relieving CDCR of liability for sexual harassment. There was no triable issue of material fact as to whether Munoz was a supervisor.

More significantly, immediately upon being informed of plaintiff's claim of harassment by Munoz, CDCR acted by sending a counseling letter to her despite the conclusion that her conduct did not amount to harassment, in an abundance of caution. Even if Munoz's conduct in 2004 could be categorized as sexual harassment, the undisputed evidence shows that when plaintiff made a complaint to his employer, immediate and appropriate action was taken and no further sexual harassment occurred. Having taken immediate corrective action, there was no actionable sexual harassment by CDCR. (*Carrisales v. Dept. of Corrections, supra*, 21 Cal.4th at p. 1136.)

c. The Sexual Harassment and Failure to Investigate or Prevent Sexual Harassment Causes of Action Were Barred by the Statute of Limitations.

The sexual harassment cause of action and the failure to prevent or investigate the sexual harassment cause of action were barred by the statute of limitations. The undisputed facts reveal that any alleged sexual harassment ceased after plaintiff made the complaint to CDCR in October 2004. On this evidence, the trial court determined the harassment was not continuing or pervasive. Plaintiff takes issue with this conclusion. We hold that the harassment was not continuous, and that the harassment-related claims were not equitably tolled.

i. The Sexual Harassment and Failure to Prevent or Investigate Harassment Causes of Action Were Not Continuous.

In a harassment or discrimination case, the FEHA statute of limitations begins to run when the alleged adverse employment action acquires some degree of permanence or finality. (Gov. Code, § 12960, subd. (d); *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1059.) Thus, the DFEH complaint was timely as for the retaliation claim. However, the same cannot be said of the sexual harassment claim or the claim for failure to investigate or prevent harassment. For purposes of the authorized remedies, multiple acts of discrimination against the same complainant on the same unlawful basis establish only one unlawful practice. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 819 (*Richards*.)

When an employer engages in a continuing course of unlawful conduct under the FEHA, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, *either* when the course of conduct is brought to an end, as by the employer's cessation of the conduct or the employee's resignation, *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain. (*Richards, supra*, 26 Cal.4th at p. 823.)

The California Supreme Court adopted a three-pronged test to determine whether the continuing violation doctrine applies to harassment claims, in *Richards, supra*. Under this test, an employer's persistent failure to reasonably accommodate a disability, or to eliminate a hostile work environment targeting a disabled employee, is a continuing violation if the employer's unlawful actions are (1) sufficiently similar in kind; (2) have occurred with reasonable frequency; and (3) have not acquired a degree of permanence. (*Richards, supra*, 26 Cal.4th at p. 823.) The statute of limitations begins to run when the unlawful practice ends. (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1042, citing *Richards*, at p. 823.)

The continuing violation doctrine could only apply to save plaintiff's sexual harassment claims if they are sufficiently connected to the unlawful conduct alleged to have been committed within the limitations period. (*Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319, 325-326.) A continuing violation exists if the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period. (*Id.* at p. 326.) Here, the conduct of Munoz in attempting to resume a

relationship with plaintiff is not similar in kind to CDCR's conduct of investigating an allegation of dishonesty on plaintiff's employment application.

By plaintiff's own acknowledgment, the alleged sexual harassment by Munoz ceased upon his submission of a formal complaint to the CDCR in October 2004. This means the second and third prongs could not be met, because the conduct had been brought to an end, and had therefore acquired a degree of permanence. (*Richards, supra*, 26 Cal.4th at p. 823.) At that point, the statute of limitations for bringing a DFEH claim against both Munoz and CDCR began to run.

Additionally, because CDCR's act of discharging plaintiff on the ground of dishonesty is not similar in kind to Munoz's conduct in attempting to rekindle a relationship or CDCR's actions in investigating or preventing that conduct, plaintiff could not meet the first prong of the test for a continuing violation. The fact that plaintiff's dishonesty met the light of day during the investigation of harassment complaint does not make the action of CDCR similar in kind to the alleged unlawful sexual harassment.

ii. **The Sexual Harassment and Failure to Prevent or Investigate Harassment Causes of Action Were Not Subject to Equitable Tolling.**

Because any alleged harassment was not a continuing violation, plaintiff was required to file his DFEH complaint within one year of the harassment in order to preserve his right to sue. (Gov. Code, § 12960, subd. (d).) Plaintiff asserts that the

doctrine of equitable tolling should apply to extend the limitations period for the sexual harassment causes of action.⁴

The express provisions of the FEHA evince a legislative intent that it and its statute of limitations must be liberally interpreted in favor of both allowing attempts at reconciliation and ultimately resolving claims on the merits. (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 107-108.) Thus, the equitable tolling of statutes of limitations, which suspends or extends a statute of limitations applicable when an injured person has several legal remedies and, reasonably and in good faith, pursues one, applies in FEHA cases. (*Id.* at pp. 99-100, 107-108.)

Plaintiff sought but one remedy for the alleged harassment, to wit: the filing of an administrative complaint against Munoz on October 4, 2004. That complaint was investigated and a report issued in December 2004, resulting in a letter of counseling as to Munoz. The undisputed evidence was that the harassment ceased upon making of plaintiff's complaint in October 2004. But the DFEH complaint was not made until April 2006, more than one year later.

⁴ At oral argument, plaintiff's counsel argued that the statute of limitations was tolled when plaintiff filed an EEOC (Equal Employment Opportunity Commission) complaint on November 22, 2004, which was not acted on. However, after reviewing the record, we have determined that there is no EEOC complaint, which is required to be submitted on EEOC form 573, and submitted to the EEOC, not the CDCR. The form to which counsel referred is on a Department of Corrections form, apparently taken from a sexual harassment guide and workbook, and there is no indication whatsoever that the document in question was submitted to any agency, state or federal.

Plaintiff did not pursue alternative remedies for his sexual harassment claim after the administrative complaint of October 2004, and that process was concluded in December 2004. Because he did not pursue any further alternative administrative remedies following the closure of the harassment investigation, the doctrine of equitable tolling does not apply. Plaintiff's DFEH complaint was untimely as to the alleged sexual harassment and failure to prevent or investigate the alleged sexual harassment causes of action. Summary judgment was proper as to the first three causes of action.

d. Plaintiff's Dishonesty Was a Legitimate, Non-Retaliatory Reason for Termination.

As to the second cause of action for retaliation, plaintiff argues that he was engaged in protected activity (the complaint against Munoz for sexual harassment) when the information about the validity of his bachelor's degree came to light. He asserted that CDCR's action of terminating his employment was directly linked to the unlawful harassment. He implies that Munoz falsely claimed he had been dishonest in submitting his employment application, claiming to have the degree, when it was invalid.

To establish a prima facie case of retaliation, a plaintiff must show that he engaged in protected activity, that he was thereafter subjected to adverse employment action by his employer, and there was a causal link between the two. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69.) However, a nonsupervisory employee cannot be held personally liable for retaliation. (*Jones v. Lodge at Torrey Pines Partnership, supra*, 42 Cal.4th at pp. 1173-1174.) As a matter of law, Munoz

could not be held liable for retaliation as an individual. As to Munoz, summary judgment on the retaliation claim was proper.

A retaliatory motive is proved by showing that plaintiff engaged in protected activities, that the employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter. (*Ibid.*) The timing of retaliatory action or animus is not necessarily determinative of its evidentiary value. (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1491.)

Temporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination. (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353.) In any event, case law suggests that nine months does not qualify as a “relatively short time” when the protected conduct is first followed by non-adverse actions. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1110, fn. 6.)

Here, his protestations notwithstanding, the disclosure of plaintiff’s dishonesty was properly made in the course of CDCR’s investigation, and CDCR’s conclusion that plaintiff knew or should have known of the invalidity of his degree was reasonable. Plaintiff claimed to have earned 120 units by reading four books and writing summaries of his reading, and claimed to have earned a 3.8 grade point average, without taking tests or attending classes. No reasonable person would believe that a valid four-year degree program could be completed within a one-year period, without ever attending a class or

taking an exam, and after reading only four books, even with a transfer of credits, and even if the program was a correspondence course.

The CDCR concluded that plaintiff's denials and his professed ignorance that his degree was invalid at the time of his application were evasive and coy. This conclusion was buttressed by Munoz's testimony that plaintiff's actions indicated he did not believe it was legitimate at the time he obtained it. While a court in determining a motion for summary judgment does not "try" the case, the court is bound to consider the competency of the evidence presented. (*Hayman v. Block* (1986) 176 Cal.App.3d 629, 638.)

In any event, plaintiff's belief that his degree was valid was irrelevant to the trial court's determination that CDCR was entitled to summary judgment on the retaliation cause of action. The sole issue raised by the summary judgment motion was whether CDCR had a legitimate, nonretaliatory ground for termination. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation drops out of the picture, and the burden shifts back to the employee to prove intentional retaliation. (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1042.) Because the termination occurred more than one year after plaintiff made his sexual harassment complaint, there was insufficient temporal proximity to raise an inference of retaliation. Further, plaintiff presented no evidence that dishonesty was pretext for any retaliatory discharge.

There was no triable issue of fact as to whether CDCR had a legitimate, nonretaliatory reason for discharging him. CDCR was entitled to summary judgment on the retaliation cause of action.

e. Because the Alleged Sexual Harassment Was Not a Continuing Violation, the DFEH Complaint was Untimely.

The fourth cause of action alleged wrongful termination in violation of public policy. While the allegations within that cause of action duplicate many of the allegations of the second cause of action regarding violations of the FEHA, it seeks damages for CDCR's alleged breach of duty to investigate and prevent harassment and retaliation. Plaintiff, while acknowledging that he did not file a government claim within six months of his discharge (Gov. Code, §§ 911.2, 945.4), argues the trial court erred when it sustained the demurrer. We disagree.

a. Standard of Review

In reviewing the sufficiency of a complaint against a demurrer, we treat the demurrer as admitting all material facts properly pleaded, but we do not assume the truth of contentions, deductions or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We liberally construe the pleading to achieve substantial justice between the parties, giving the complaint a reasonable interpretation and reading the allegations in context. (Code Civ. Proc., § 452; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The judgment must be affirmed if it is correct on any

ground stated in the demurrer, regardless of the trial court's stated reasons. (*Aubry*, at p. 967; *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111.)

When a demurrer is sustained, we must determine de novo whether the complaint alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) When a plaintiff is given the opportunity to amend his complaint and elects not to do so, strict construction of the complaint is required and it must be presumed that the plaintiff has stated as strong a case as he can. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091.) Where a party fails to amend a pleading as to which a demurrer has been sustained, it is subject to dismissal. (Code Civ. Proc., § 581, subd. (f).)

The California Tort Claims Act requires, as a condition precedent to bringing suit against a local public entity, the timely presentation to the defendant of a written claim. (Gov. Code, §§ 905, 945.4.) The limitations period for presentation of a claim of this nature is one year. (Gov. Code, § 911.2.) Actions against governmental entities under the FEHA are excepted from the general requirements of the Tort Claims Act. (*Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 863.)

Under the FEHA, a person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint setting forth the particulars of the unlawful practice within one year from the date of the alleged unlawful practice. (Gov. Code, § 12960, subs. (b), (d).) As to the retaliation claim, plaintiff complied with this requirement. However, the fourth cause of action did not allege retaliation; the

allegations of wrongful termination are grounded in a breach of duty as established by the FEHA.

A claim of wrongful termination in violation of public policy is known as a *Tameny* claim. (See *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167.) A *Tameny* claim is a tort claim based on the recognition that limits exist on an employer's power of dismissal, even as to employees whose employment may be terminated at the will of either party. (*Id.* at p. 172; *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 501.) Because the cause of action is a limitation on the employer's power of dismissal, dismissal on improper grounds is a breach of duty. (*Romano*, at p. 501.) Where the employee's action is for damages for wrongful discharge arising from a breach of duty growing out of the employment contract, the employer is subject to tort liability, and the damages recoverable are not limited to those recoverable under contract. (*Tameny*, at pp. 176, 178.) The Tort Claims Act abolishes tort liability for public entities, including liability under *Tameny*. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899.)

The fourth cause of action seeks relief in the nature of compensatory and punitive damages for the injury caused by the wrongful termination, it is subject to the Tort Claims Act. As a tort action seeking damages against a public entity, presentation of a claim to the public entity was required. (Gov. Code, § 945.4.) Plaintiff acknowledges he did not submit such a claim. This was fatal to his cause of action.

Plaintiff argues that he was not required to submit a claim under the Tort Claims Act because he filed a complaint in compliance with the DFEH. However, his DFEH complaint covered only the FEHA statutory causes of action for sexual harassment, failure to investigate or prevent sexual harassment, and retaliation. (Gov. Code, §§ 12940, 12960.) As to those claims, encompassing the first three causes of action, plaintiff was not required to present a claim. (*Garcia v. L.A. Unified School District* (1985) 173 Cal.App.3d 701, 711.) However, the fourth cause of action is a claim for money or damages for wrongful termination, and thus falls within the scope of the Tort Claims Act. (*Snipes v. City of Bakersfield, supra*, 145 Cal.App.3d at pp. 869-870.)

We are aware that one court has held that once a FEHA claim has been alleged, all other causes of action related to the same facts are exempt from the exhaustion requirement respecting the Tort Claims Act. (*Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 729.) However, even if we were to determine that the demurrer was improperly sustained on that ground, it would not revive the fourth cause of action because the FEHA claims on which the wrongful termination cause of action was dependent were found to lack merit. To the extent the basis of the wrongful termination cause of action was grounded on retaliation in violation of FEHA based on harassment occurring more than a year before the termination, it failed to state facts sufficient to constitute a cause of action.

DISPOSITION

The judgment is affirmed. Defendants are entitled to costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

HOLLENHORST
J.

MILLER
J.