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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CHERYL RISTOW,

Plaintiff and Appellant,

v.

COUNTY OF SAN BERNARDINO et al.,

Defendants and Respondents.

E053531

(Super.Ct.No. CIVDS1010909)

OPINION

APPEAL from the Superior Court of San Bernardino County. Frank Gafkowski, Jr., Judge. (Retired judge of the former Mun. Ct. for the Southeast Jud. Dist. of L.A., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Reiss & Johnson, James V. Reiss and Christine H. Bachman for Plaintiff and Appellant.

Manning & Kass Ellrod, Ramirez, Trester, Eugene P. Ramirez and Julie M. Fleming for Defendants and Respondents County of San Bernardino.

Gresham Savage Nolan & Tilden, Richard D. Marca and Jamie E. Wrage for Defendant and Respondent District Attorney Michael A. Ramos.

Plaintiff and appellant Cheryl Ristow (Ristow) sued (1) the County of San Bernardino (the County); (2) the San Bernardino County District Attorney's Office (the Office); and (3) San Bernardino County District Attorney Michael A. Ramos (Ramos) (the three defendants are collectively referred to as "defendants"). Ristow's lawsuit involved claims, against all defendants, of (1) sexual harassment (Gov. Code, § 12940, subd. (j));¹ (2) failure to prevent harassment (§ 12940, subd. (j)(1)); (3) retaliation (§ 12940, subd. (h)); and (4) assault and battery. The trial court sustained defendants' demurrers without leave to amend.

Ristow raises three contentions on appeal. First, Ristow asserts the trial court erred in sustaining defendants' demurrers. Second, Ristow contends the trial court erred by denying her leave to amend her first amended complaint. Third, Ristow asserts the trial court erred by engaging in prejudicial ex parte communications. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. FIRST AMENDED COMPLAINT

Ristow filed her original complaint on August 9, 2010; her first amended complaint (hereinafter "FAC") was filed on December 15, 2010. The facts in this subsection are taken from Ristow's FAC. In the FAC, Ristow alleged that, in February 2002, she was hired by the Office as an Investigative Technician. Ristow's job involved providing clerical support to the Office's Sexually Violent Predator Unit.

¹ All subsequent statutory references will be to the Government Code, unless otherwise indicated.

In September 2003, Ristow and Ramos were at a conference center in the city of Lake Arrowhead. While at the conference center, Ristow and Ramos began a consensual sexual relationship. An incident in Lake Arrowhead involved kissing, fondling, oral copulation, and sexual intercourse. In October 2003, another incident occurred in an office. The October incident involved kissing, fondling, oral copulation, and sexual intercourse. Other consensual sexual acts occurred between Ristow and Ramos in December 2004, in a Mervyn's parking lot; and February 2005, in a Starbucks parking lot. In October 2005, Ramos, without consent, grabbed and fondled Ristow's breast, and said, "I just want to touch and suck your nipples one last time."

On May 26, 2009, a local newspaper published information about Ristow's and Ramos's relationship. Three days later, Ramos instructed Ristow to deny their relationship, if anyone were to ask about it. Ramos informed Ristow that he would be denying the relationship. In July 2009, a senior investigator in the Office informed Ristow that she should not come forward with information concerning her relationship with Ramos.

On July 6, 2009, Ristow's supervisor issued Ristow a written reprimand for violating the dress code policy. Specifically, Ristow was cited for displaying a nose ring and tattoo. Ristow received the nose ring and tattoo years before being reprimanded, but the nose ring and tattoo were not presented as problems prior to the issues with Ramos. The following day, Ristow "was placed on medical leave from her employment due to stress." On July 30, 2009, at Ramos's behest, two investigators from the Office arrived at Ristow's residence. The investigators approached Ristow

with their hands on their guns, and gave her a letter. It is unclear what information was in the letter.

In August 2009, Ristow lodged a complaint with the Office. The complaint cited sexual harassment and a hostile work environment. In October 2009, Ristow returned to work, but found her desk had been emptied and her nameplate had been removed. Ristow found the hostile work environment to be intolerable, and has been unable to return to work.

Ristow's first cause of action set forth a claim for sexual harassment against defendants. (§ 12940, subd. (j).) Ristow alleged defendants sexually harassed her and/or failed to take immediate and appropriate corrective action. Ristow asserted she continued to suffer medical expenses and lost wages due to defendants' actions or inactions.

Ristow's second cause of action alleged defendants failed to prevent the harassment from occurring. (§ 12940, subd. (j).) The third cause of action asserted against defendants involved an allegation of retaliation. (§ 12940, subd. (h).) Ristow alleged defendants retaliated against her after she admitted the existence of her and Ramos's sexual relationship. Ristow contended defendants engaged in conduct that adversely affected her, and resulted in her constructive dismissal.

The fourth cause of action involved allegations of assault and battery against defendants. Ristow asserted from the beginning of 2009 and continuing thereafter she was "placed in extreme apprehension and fear of her physical well-being by Defendant, District Attorney Ramos." Ristow alleged, "Defendants, and each of them, knew, or

should have known, of the assaults and batteries.” Ristow asserted the County ratified Ramos’s conduct by failing to adequately discipline him. Ristow asserted that, as a result of defendants’ actions or inactions, she suffered anxiety, depression, post-traumatic stress disorder, weight loss, insomnia, and agitation. As to all four causes of action, Ristow sought (1) compensatory and general damages, (2) punitive damages, (3) statutory attorneys’ fees and costs, and (4) other relief the court deemed proper.

B. DEMURRERS

In Ramos’s demurrer, he asserted Ristow’s FAC failed to set forth facts sufficient to constitute a cause of action. Ramos’s demurrer did not specify which elements of the four causes of action were not satisfied by the factual allegations.

The County also demurred to Ristow’s FAC. The County asserted the four causes of action were time-barred. The County argued Ristow had to file a complaint within one year of the incident(s) at issue, and she missed the filing deadline. In addition to asserting that the assault and battery cause of action was time-barred, the County argued the cause of action should be covered by workers’ compensation laws.

C. OPPOSITION TO THE DEMURRERS

Ristow opposed the demurrers. Ristow asserted that her claims were not time-barred pursuant to the continuing violation doctrine. Ristow asserted that, under the continuing violation doctrine, the date when the statute of limitations began to run was October 2009—when Ristow returned to work to find her desk emptied and her nameplate removed. Ristow argued October 2009 was the relevant time period, because that was when the adverse employment action acquired a degree of permanency or

finality. Ristow further asserted assault and battery are explicitly excepted from Workers' Compensation laws.

D. RAMOS'S REPLY TO THE OPPOSITION TO THE DEMURRER

Ramos replied to Ristow's opposition. First, Ramos asserted the continuing violation doctrine was not applicable to this case. Ramos argued Ristow failed to assert a continuing course of sexual harassment; rather, Ristow alleged a consensual relationship occurred, then a touching without consent, and finally non-sexual conduct. Ramos argued Ristow failed to allege a continuing violation, because a continuing violation must involve sufficiently similar acts that occur with reasonable frequency, and Ristow only alleged a single non-consensual touching with a three-year gap between incidents. Ramos pointed out that consensual touching does not constitute harassment.

Second, as to the cause of action for failing to prevent harassment, Ramos asserted Ristow failed to exhaust her administrative remedies. Ramos argued that Ristow did not include the "failure to prevent" issue in her administrative complaint, and thus, the cause of action was jurisdictionally barred.

Third, Ramos asserted Ristow did not allege sufficient facts to support a claim for retaliation. Ramos argued that having one's desk emptied and nameplate removed cannot, as a matter of law, constitute an adverse employment action in the sense that the conditions or privileges of her employment were adversely affected.

Fourth, Ramos asserted Ristow's claim for assault and battery failed to set forth sufficient facts and was preempted. Ramos argued that Ristow's claim related to the investigators approaching her with their hands on their guns was "false," and Ristow did not allege any violence upon her person, so there were no facts supporting the assault and battery cause of action. In regard to preemption, Ramos asserted the assault and battery claim was preempted by Workers' Compensation laws. Ramos argued that only willful physical assaults are exempt from workers' compensation laws, and Ristow failed to allege such an attack.

Fifth, Ramos contended the problems with Ristow's FAC could not be cured, because in Ristow's opposition to the demurrer she did not assert that additional facts could be alleged.

E. THE COUNTY'S REPLY TO THE OPPOSITION TO THE DEMURRER

The County also disputed the application of the continuing violation doctrine in this case. Specifically, the County asserted a consensual relationship could not form the basis for sexual harassment liability, thus, none of the consensual incidents were relevant, and the more recent incidents, such as the investigators at Ristow's home, were not sexual in nature. The County asserted all of Ristow's claims were time-barred, and that the assault and battery claim should be subject to Workers' Compensation laws.

F. HEARING

The trial court held a hearing on the demurrers on March 3, 2011. At the beginning of the hearing, the trial court asked if anyone was present to represent Ristow.

Counsel for Ramos, Richard Marca (Marca), informed the trial court that he believed a “young lady” who represented Ristow had been in the courtroom earlier. The trial court said, “Well, she may be returning.” The trial court then proceeded with the hearing. The trial court stated its tentative decision was to sustain the demurrers, but grant leave to amend. At that point, Marca argued the trial court should not grant Ristow leave to amend.

Marca argued Ristow failed to show the trial court how she would amend her pleading, and therefore should not be given an opportunity to amend. Further, Marca argued Ristow could not amend her FAC to allege facts inconsistent with those already set forth, because it would amount to a sham pleading. Marca asserted Ristow admitted the sexual relationship was consensual.

After Marca’s argument, the trial court clerk said, “Your Honor, [Ristow’s] Counsel did check in and she had requested second call, but it is ten to nine. I don’t know if she is in another department.” The trial court responded, “Well, she is probably in another department, but Counsel, did you wish to add anything?” Brandon Takahashi (Takahashi), counsel for the County, said, “First to be fair to [Ristow’s] Counsel, she indicated she might have to appear in a CMC with another department, I don’t know if it is with this Court or another, but for fairness we do want to bring that to the Court’s attention.”

Takahashi stated that he joined in Marca’s argument. Takahashi explained the trial court’s tentative opinion correctly concluded the causes of action were time-barred, and the FAC did not support the application of the continuing violation doctrine. The

trial court responded, “Well, Counsel, if I am to go contrary to my tentative then I think we need to wait for [Ristow’s] Counsel, we need to wait for [Ristow’s] Counsel.”

There was a pause in the proceedings.

When the proceedings resumed, Christine Bachman (Bachman) was present representing Ristow. The trial court informed Bachman that the County argued the demurrers should be sustained without leave to amend, because the statute of limitations had run and “there is no way that you are going to be able to plead around it.” Bachman informed the court she had spoken with Ristow and found there were additional facts to be included in an amended pleading, which would “link everything together and the continuing violation doctrine will be more clear and will be applied.” Bachman stated the new facts would address the time gap problem that was present in the FAC.

The trial court responded, “Well, I was suspecting that you might have some information, but Counsel were quite strenuously arguing.” Takahashi then argued Ristow already had two opportunities to allege the facts of her case, in that she had the original pleading and the FAC. Takahashi asserted if Ristow now presented facts bridging the time gap, then “that would be in and of itself a sham, it would be adding facts that are inconsistent with what already exists twice now that have been filed with this Court.” Marca argued Ristow failed to explain, in her opposition to the demurrer, what facts she would add to a second amended complaint. Marca asserted the trial court should not encourage Ristow to plead inconsistent facts.

Bachman argued she had an e-mail from Ristow listing additional facts that would bridge the time gap. Bachman stated she would rather present the facts in an amended pleading than present them in open court. The trial court asked why Ristow had delayed giving Bachman the additional facts. Bachman explained the case involved a “very touchy subject,” and she believed enough facts had been presented to go forward with the case without going into greater detail regarding the parties’ relationship. Ristow “implore[d] the Court to just sustain with leave to amend.”

The trial court questioned why Bachman did not present the additional facts in the opposition to the demurrer. Bachman explained, “[W]hat I can say is that I have spoken with our client now and discussed the issues involved in the Complaint and she has given us additional information.” Another attorney for the County, Eugene Ramirez (Ramirez), argued that this was a high profile case, and therefore Ristow had a duty to present her best case at the initial pleading stage. Ramirez asserted Bachman should have done a better job of initially questioning Ristow.

The trial court asked Bachman to give her appearance for the record, which Bachman did. The trial court then said, “I am very reluctant to do this but I am going to sustain without leave to amend; that will be the Court’s order.”

DISCUSSION

A. CLARIFYING DEFENDANTS AS PARTIES

At the outset, we try to clarify exactly who defendants are in this case, because the exact identities of the parties and how they differ from one another is unclear from the caption on Ristow’s FAC. The FAC lists three defendants: (1) “County of San

Bernardino”; (2) “San Bernardino County District Attorney’s Office”; and (3) “District Attorney Michael A. Ramos.” We conclude (1) the County and the Office are the same entity for purposes of this case, and (2) it is unclear in what capacity Ramos is being sued.

1. *THE OFFICE*

In an order for supplemental briefing, we asked Ristow (1) if the Office is party to this appeal, and (2) which contentions in the opening brief, if any, concern the Office. Ristow asserted the Office is party to this appeal, but did not provide a record citation. (Cal. Rules of Court, rule 8.204(a)(1)(C) [record citations].) Ristow concedes the Office never made a formal appearance in the lawsuit—either at the trial court or on appeal. Ristow reasons the Office prevailed in the trial court, because “judgment was entered against the County of San Bernardino (erroneously sued and served as San Bernardino County District Attorney’s Office).”

In the County’s supplemental letter brief to this court, it concedes, “The San Bernardino County District Attorney’s Office is not a separate entity from the County of San Bernardino, but is a department within San Bernardino County.” The County goes on to write, “Since the Office is not a separate entity from the County of San Bernardino, but is a department within San Bernardino County, it stands in the same shoes as the County.”

Given that (1) the County’s counsel concedes the County is the same entity as the Office, and (2) Ristow appears to be asserting the judgment against the County was in fact a judgment against the Office, we conclude the Office and the County are the same

entity as far as being a party in this lawsuit. Thus, our review of the law, FAC, and briefing, reflects the Office is not a separate defendant in this case, rather, as a party, the Office is subsumed by the County.

2. RAMOS

We now turn to the naming of Ramos as a defendant, and try to determine in what capacity Ramos is being sued. We conclude the FAC is unclear as to whether Ramos is being sued in his official capacity or his personal/individual capacity.

“[I]f a judgment is sought against an official in his individual capacity he should be so designated in the complaint. ‘Identity of parties means not only that they must be identical in person, but that the capacity in which they appear must be the same. A judgment for or against a party in one right or capacity cannot affect him when acting in another right or capacity.’ [Citation.]” (*Holman v. County of Santa Cruz* (1949) 91 Cal.App.2d 502, 513; see also § 951.)

Portions of the FAC support a conclusion that Ramos is being sued in his official capacity. First, in the caption, Ramos is listed as “District Attorney.” Second, in the “Parties” section of the FAC, Ramos is described as “an elected official” who was “serving” the County. Third, in the “Parties” section, it is alleged “that at all times relevant hereto and in *all their actions described herein*, Defendants, County of San Bernardino, District Attorney’s Office, and District Attorney Ramos, and each of them, were acting under color of authority and *pursuant to their authority as officials of their respective county agencies.*” (Italics added.)

Given the foregoing caption and allegations, it appears Ramos is being sued only in his official capacity, because Ristow has alleged that at all pertinent times Ramos was acting under his authority as district attorney. Ramos being named only in his official capacity is arguably important because official capacity suits ““generally represent only another way of pleading an action against an entity of which an officer is an agent.”” [Citations.]” (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 350.) In other words, ““an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.’ [Citation.]” (*Ibid.*) Accordingly, the possibility that Ramos is being sued only in his official capacity is important because it could mean the only defendant in this matter is the County; because (1) Ramos in his official capacity is the same as the County, and (2) the Office is the same as the County.

Despite the foregoing portions of the FAC, there is also the possibility that Ramos is being sued in his individual/personal capacity due to other allegations in the FAC, in particular the harassment allegations.

““[H]arassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer’s business or performance of the supervisory employee’s job. [Citations.] [¶] Discrimination claims, by contrast, arise out of the performance of necessary personnel management duties.”” (*Reno v. Baird* (1998) 18 Cal.4th 640, 645-646.)

Arguably, by alleging a harassment cause of action against Ramos, Ristow is contradicting her assertion that *at all times* Ramos was acting within his authority as district attorney, because harassment almost by necessity cannot be within a supervisor's job duties. Thus, it is possible Ristow intended to sue Ramos in his personal capacity.

In sum, the FAC leaves us in a quandary. It is unclear in what exact capacity Ristow is suing Ramos. We have tried to determine the capacity issue, because it would clarify the discussion of the demurrer and how exactly Ristow could amend her pleading to state a sufficient cause of action. However, the parties discuss the demurrer issues without reference to the capacity in which Ramos is being sued. Since the parties do not find the capacity issue to be troublesome at this point in the proceedings, we will discuss the issues as they are raised on appeal, while allowing the capacity issue to remain vague.

B. DEMURRERS

1. *STATUTE OF LIMITATIONS/EXHAUSTION OF
ADMINISTRATIVE REMEDIES*

a) Contention

Ristow contends the trial court erred in sustaining defendants' demurrers to her FAC. Before addressing the substantive merits of the allegations in the FAC, we address the County's and Ramos's procedural contention that the causes of action for (1) sexual harassment, and (2) failure to prevent harassment, are time-barred. The County and Ramos contend the sexual harassment causes of action (the first and second

causes of action) are time-barred due to Ristow's untimely filing of her administrative complaints. We conclude the two causes of action are not time-barred against defendants to the extent Ramos is being sued in his official capacity; however, the two causes of action are time-barred to the extent Ramos is being sued in his personal/individual capacity.

b) Law

Section 12960, subdivision (b), provides, in relevant part: "Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department." Subdivision (d) of section 12960, provides, "No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred, except that this period may be extended as follows." The statutes goes on to describe various exceptions, which Ristow is not asserting apply in this case.

Thus, section 12960 provides an employee must exhaust her administrative remedy by filing a complaint with the California Department of Fair Employment and Housing (DFEH) and receive a notice of right to sue, before the employee is entitled to file a civil action in court based on violations of California's Fair Employment and Housing Act (FEHA). "The timely filing of an administrative complaint is a

prerequisite to the bringing of a civil action for damages under the FEHA. [Citations.]” [Citation.]” (*Blum v. Superior Court* (2006) 141 Cal.App.4th 418, 422.)

Since this argument relates to whether the demurrer was properly sustained, we apply the de novo standard of review. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) In determining whether the statute of limitations has been missed, we must confine ourselves to the four corners of the complaint, any attached exhibits, and matters judicially noticed. (*Ibid*; *Barnett v. Fireman’s Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.)

c) Facts

Ristow filed three administrative complaints, one each against: (1) the County; (2) Ramos; and (3) the Office.² In all three complaints, Ristow asserted, under penalty of perjury, that the date the “most recent or continuing” violation took place was July 7, 2009. Ristow filed her administrative complaint against the Office on July 2, 2010, which was timely. Ristow filed her administrative complaints against the County and Ramos on August 6, 2010. August 6, 2010, is approximately 13 months after July 7, 2009, thus, the administrative complaints against the County and Ramos were not filed within the one-year deadline.

d) Discussion

Although Ristow missed the filing deadline for two of her complaints, she satisfied the deadline for her complaint against the Office. As set forth *ante*, the Office

² The administrative complaints are attached to the FAC as exhibits.

and the County are the same entity for purposes of this case. Thus, the timely complaint against the Office would serve as a timely complaint against the County, since they are one and the same.

Further, as set forth *ante*, if Ramos is being sued in his official capacity, then the lawsuit against him is arguably a misnamed lawsuit against the County. Thus, to the extent Ramos is being sued in his official capacity, the timely complaint against the Office would also be a timely complaint against Ramos, since all three defendants are essentially one entity—the County.

To the extent Ristow is asserting her harassment claims against Ramos in his private/individual capacity, Ristow's claims would be time-barred for failing to file a timely administrative complaint. The complaint against the Office would not be sufficient to put Ramos on notice that he is being sued in his private capacity, because the administrative complaint against the Office does not contain Ramos's name anywhere on the form. In the section of the form where the employee is directed to explain the particulars of who conducted the harassment, Ristow wrote "San Bernardino District Attorneys Office." Despite already having identified the Office as her employer on the form, Ristow did not identify Ramos as the person who harassed her. Thus, we cannot infer that Ramos would know from the administrative complaint against the Office that he would be facing personal liability for the alleged harassment. From the face of the timely filed administrative complaint, Ristow could have been alleging that anyone at the Office harassed her. (*Cole v. Antelope Valley Union High School Dist.*

(1996) 47 Cal.App.4th 1505, 1511 [“[P]laintiff is barred from suing those individual defendants for failure to name them in the DFEH charge.”].)

Ristow asserts her timely administrative complaint against the Office put Ramos “on notice.” Ristow argues her administrative complaint against the Office would have made Ramos aware of the need to “begin investigating the facts [that] form the basis for Appellant’s complaint.” Ristow fails to explain how an action against the Office should have made Ramos aware that he would be sued as an individual—placing his personal assets at stake. Given that the names of the parties are a fundamental part of a lawsuit (Code Civ. Proc, § 367; *Ikerd v. Warren T. Merrill & Sons* (1992) 9 Cal.App.4th 1833, 1843), we are unable to infer the reasoning supporting a conclusion an administrative complaint that does not contain Ramos’s name would place Ramos on notice of an impending civil lawsuit involving his personal liability. (See *Cole v. Antelope Valley Union High School Dist.*, *supra*, 47 Cal.App.4th at p. 1511 [“[P]laintiff is barred from suing those individual defendants for failure to name them in the DFEH charge.”].) Thus, we find Ristow’s argument to be unpersuasive.

e) Equitable Tolling

Next, Ristow asserts her claims are timely due to principles of equitable tolling. In *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99-115 (*McDonald*), our Supreme Court discussed principles relating to the equitable tolling of statutes of limitation. In *McDonald*, our Supreme Court wrote that equitable tolling “is ‘designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the

plaintiff’s claims—has been satisfied.’ [Citation.] Where applicable, the doctrine will ‘suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.’ [Citation.]” (*Id.* at p. 99.)

Our Supreme Court explained, “the doctrine applies “[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.” [Citation.] Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason. [Citation.]” (*McDonald, supra*, 45 Cal.4th at p. 100.) The court reasoned, “Tolling eases the pressure on parties ‘concurrently to seek redress in two separate forums with the attendant danger of conflicting decisions on the same issue.’ [Citations.] By alleviating the fear of claim forfeiture, it affords grievants the opportunity to pursue informal remedies, a process we have repeatedly encouraged. [Citations.]” (*Ibid.*)

Ristow asserts principles of equitable tolling apply because in August 2009 Ristow lodged a complaint with the “Office County Supervisor, Neil Derry.” The complaint alleged Ristow suffered sexual harassment, a hostile work environment, and workplace retaliation. Ristow asserts she lodged the complaint “against her employer, District Attorney’s Office.” Further, Ristow asserts that on December 29, 2009, she filed a claim for damages against the County. Noticeably absent from Ristow’s argument is an allegation that she was pursuing a complaint against Ramos, as an individual, during the 12-month filing period.

Given that Ristow first filed an administrative complaint against Ramos approximately 13 months after the last incident of discrimination or harassment, we conclude equitable tolling does not apply to the claims against Ramos as an individual, because equitable tolling “applies “[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.”” (*McDonald, supra*, 45 Cal.4th at p. 100.) If Ristow had filed an action against Ramos, in his personal/individual capacity, which was somehow defective within the 12-month filing deadline, then equitable tolling could apply. However, that is not the case before us. Ristow did not file an action naming Ramos until approximately 13 months had passed. Thus, we conclude the first two causes of action against Ramos, to the extent he is being sued in his personal/individual capacity, are time-barred.

2. *SUBSTANTIVE ALLEGATIONS*

We now turn to the substantive allegations in the FAC. Ristow contends the trial court erred by sustaining the demurrer to all her causes of action. Ristow’s FAC set forth four causes of action for (1) sexual harassment (§ 12940, subd. (j)); (2) failure to prevent harassment (§ 12940, subds. (j) & (k)); (3) retaliation (§ 12940, subd. (h)); and (4) assault and battery. The four causes of action were asserted against “all defendants.” We address each of the causes of action in turn.

“On review from an order sustaining a demurrer, ‘we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose. [Citations.]’ [Citation.]” (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors, supra*, 48

Cal.4th at p. 42.) We must confine ourselves to the four corners of the complaint, any attached exhibits, and matters judicially noticed. (*Barnett v. Fireman’s Fund Ins. Co.*, *supra*, 90 Cal.App.4th at p. 505.)

a) Sexual Harassment

Ristow’s first cause of action concerned an allegation of sexual harassment (§ 12940, subd. (j)). In the cause of action, Ristow alleges the harassment was “pervasive and severe” and that it created “a hostile or abusive work environment.”

“With respect to sexual harassment in the workplace (see Gov. Code, § 12940, subd. (j)(4)(C)), the prohibited conduct ranges from expressly or impliedly conditioning employment benefits on submission to, or tolerance of, unwelcome sexual advances to the creation of a work environment that is ‘hostile or abusive to employees because of their sex.’ [Citation.]” (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1042-1043 (*Hughes*).

Thus, California’s FEHA “‘recognize[s] two theories of liability for sexual harassment claims . . . “ . . . quid pro quo harassment, where a term of employment is conditioned upon submission to unwelcome sexual advances . . . [and] hostile work environment, where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment.”’ [Citations.]” (*Hughes*, *supra*, 46 Cal.4th at p. 1043.)

“In construing California’s FEHA, [our Supreme Court] has held that the hostile work environment form of sexual harassment is actionable only when the harassing behavior is *pervasive* or *severe*. [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.’ [Citation.] . . . [¶] . . . California employment discrimination laws have held that 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.’ [Citations.] A single harassing incident involving ‘physical violence or the threat thereof’ may qualify as being severe in the extreme. [Citations.]” (*Hughes, supra*, 46 Cal.4th at p. 1043.)

“Under California’s FEHA . . . the existence of a hostile work environment depends upon ‘the totality of the circumstances. [Citation.] . . . ‘[T]o be actionable, “a sexually objectionable environment must be both objectively and subjectively offensive”’ Therefore, ‘a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail . . . if a reasonable person . . . , considering all the circumstances, would not share the same perception.’ [Citation.]” (*Hughes, supra*, 46 Cal.4th at p. 1044.)

In Ristow’s sexual harassment cause of action, she asserts, “The defendants and each of them and/or their agents/employees sexually harassed [her] and/or failed to take immediate and appropriate corrective action. The harassment was sufficiently pervasive and severe as to alter conditions of employment and to create a hostile work environment.”

In Ristow's FAC, she alleges she engaged in a consensual sexual relationship with Ramos beginning in September 2003. The consensual sexual relationship ended sometime during 2005. Ristow asserts that in October 2005 Ramos grabbed and fondled her breast "without consent and made the statement[,] " I just want to touch and suck your nipples one last time.'" It is unclear if the relationship was over at this point, or if Ramos and Ristow were involved in a disagreement while the relationship continued to progress.

Ristow asserts approximately four years later, in May 2009, Ramos's and Ristow's relationship became public knowledge. Ristow was instructed by employees of the Office not to discuss the relationship. In July 2009, Ristow was reprimanded for violating the County's dress code.³ Ristow left work that same month, after being placed on medical leave due to stress. At the end of July 2009, "[T]wo investigators employed by the District Attorney's Office arrived at [Ristow's] private residence and approached her in an intimidating [manner] with their hands on their guns in order to deliver a letter to [Ristow]." It is unclear what information was contained in the letter. In October 2009, Ristow "returned to work only to find that her desk had been clean[ed] out and nameplate removed."

³ Ristow asserts she was issued a written reprimand in July 2010; however, given the timeline in the first amended complaint, we infer this is a typographical error, and she intended to write July 2009.

According to Ristow's FAC, there was an unwanted touching that possibly occurred during the course of a consensual sexual relationship, then four years later (1) she violated the dress code; (2) had a letter delivered to her in an intimidating fashion; (3) had the contents of her desk moved, along with her nameplate after she had been gone from work for three to four months. The problem with the allegations is that the last sexual incident occurred in October 2005—then there was a four-year gap in time wherein nothing worthy of complaint occurred, and finally non-sexual incidents occurred in 2009. Ristow's FAC does not reflect harassing conduct that was severe enough or sufficiently pervasive to alter the conditions of employment. Indeed, it appears from the FAC there was only one unwanted sexual incident, and after that incident Ristow continued working at the Office harassment-free for nearly four years.

The three more recent incidents do not appear sexual in nature. Ristow violated the dress code and was issued a written reprimand. Ristow asserts she was, in fact, in violation of the dress code, so it is unclear how this reprimand would be severe or extreme harassment. As to the letter incident, Ristow does not explain what was in the letter or how the incident could qualify as creating a sexually objectionable environment. Finally, as to the desk and nameplate incident, it is unclear how cleaning out Ristow's desk was a sexually offensive incident.

In sum, there is a four-year time gap in Ristow's FAC that creates a problem. While there may have been unwanted sexual conduct in 2005, Ristow has failed to plead facts reflecting a work environment that qualifies as hostile or abusive to employees because of sexually objectionable incidents. Thus, we conclude the trial

court properly granted the demurrer as to the sexual harassment cause of action (§ 12940, subd. (j)).

Ristow concedes there is a four-year time gap in her FAC. However, Ristow argues that additional facts were alleged in exhibits attached to the FAC, which were then incorporated into the FAC by reference. An appellate court may consider exhibits when reviewing a ruling on a demurrer.⁴ (*Duncan v. McCaffrey Group, Inc.* (2011) 200 Cal.App.4th 346, 360.)

A portion of Exhibit A is a narrative. The narrative reflects that Ristow's and Ramos's relationship ended sometime in 2005. The narrative provides that Ramos, on "numerous occasions" attempted to continue the relationship, but that Ristow and Ramos "continued a distant working relationship" "[u]ntil the instant issue." The narrative asserts that, in May 2009, Ramos instructed Ristow not to discuss their relationship, due to the pending newspaper article. In June 2009, Ristow left three telephone messages on Ramos's cell phone, and Ramos responded by changing his telephone number.

Also in June 2009, Ristow was reprimanded for violating the County dress code. In June or July 2009, a senior investigator told Ristow that discussing the relationship could harm a case. Ristow left the office on medical leave on July 6, 2009. Ramos

⁴ There are a variety of exhibits attached to Ristow's pleading. Ristow does not explain which exhibits cover the four-year gap, or how the information in the exhibits might repair the faulty pleading. Ristow has provided this court only with a record citation. Nevertheless, we will attempt to determine Ristow's reasoning from the record citations.

publically denied having a relationship with Ristow. In October 2009, Ristow returned to work to find her desk cleaned out and her nameplate removed. The narrative then asserts, “A supervisor and another employee were required to observe claimant and helped claimant pack all of her property.” It is unclear where Ristow’s property was located when she packed it or why she packed it.

A portion of Exhibit D is a declaration by Ristow. In the declaration, Ristow recounts her consensual sexual encounters with Ramos in 2005. Ristow also declares that she engaged in 15 sexual telephone conversations with Ramos. It appears from the telephone records attached to the declaration that the conversations occurred in 2005. Ristow’s declaration then moves on to discussing how, in 2009, Ramos instructed her to lie about their relationship.

The exhibits cited by Ristow do not explain the four-year time gap. The exhibits also do not reflect a work environment that qualifies as hostile or abusive due to sexually objectionable incidents. The exhibits reflect that there was a consensual relationship. Ristow continued working with Ramos, but it was a “distant working relationship,” and there were no problems “[u]ntil the instant issue.” Ristow called Ramos multiple times, and he changed his telephone number. Given that the exhibits reflect Ristow worked with Ramos without incident for years following the end of their consensual relationship, we find Ristow’s reliance on the exhibits to be unpersuasive.

Next, Ristow asserts the cause of action should survive demurrer because she is relying on the continuing violation doctrine. Under the continuing violation doctrine, “an employer is liable for actions that take place outside the limitations period if th[o]se

actions are sufficiently linked to unlawful conduct that occurred within the limitations period.” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1056.)

Our Supreme Court has set forth a three factor test for determining if the continuing violation equitable exception applies to a case. The exception applies “if the employer’s unlawful actions are (1) sufficiently similar in kind—recognizing . . . that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate [a] disability, may take a number of different forms [citation]; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence. [Citation.]” (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823 (*Richards*).

We start with the first factor—similarity. Ristow alleged Ramos grabbed and fondled her breast once in 2005. Ristow also alleged that in 2009, she (1) was reprimanded by her supervisor for violating the dress code; (2) had two investigators deliver a letter to her home in a hostile manner; and (3) had her desk cleaned out and nameplate removed by an unknown party or parties. There is little to no similarity in the alleged incidents. Each incident involves different perpetrators. The 2005 incident was sexual, while the 2009 incidents were not sexual. There is little similarity between the incidents, thus, we conclude the similarity prong has not been satisfied.

Ristow asserts the incidents were similar because “the facts involve an employer-employee sexual relationship which eventually turned unpleasant. At the time the relationship soured, District Attorney Ramos began making unwanted advances towards Ristow, which Ristow refused.” Ristow does not provide this court with record

citations to find the alleged unwanted sexual advances. (Cal. Rules of Court, rule 8.204(a)(1)(C).) In our review of the pleading and exhibits we found a narrative that asserts Ramos repeatedly tried to continue the sexual relationship past 2005, but there are no details as to how Ramos expressed this desire. Further, the narrative reflects that Ramos and Ristow were able to continue a “distant working relationship” following the end of their sexual relationship. Thus, it is unclear to what exact allegations Ristow is referring, in her argument that there were similar incidents.

The next factor requires that the incidents occur with reasonable frequency. The FAC and the exhibits all suffer from a four-year time gap. There was an unwanted sexual incident in 2005, and then “a distant working relationship” for four years “[u]ntil the instant issue,” in 2009. In 2009 there were three incidents involving a dress code violation, a desk, and a letter—all of which were non-sexual. Given that years elapsed between the sexual conduct and the non-sexual conduct, Ristow has not pled that the incidents occurred with reasonable frequency such that the continuing violation doctrine should apply.

Ristow contends the incidents occurred with reasonable frequency and cites her exhibits to support her conclusion. Ristow does not provide analysis on this issue. (Cal. Rules of Court, rule 8.204(a)(1)(B).) We have discussed the exhibits *ante*. The exhibits do not fill in the four-year time gap. Thus, we find Ristow’s reference to the exhibits to be unpersuasive.

The third factor is lack of permanence. “Permanence” in the context of ongoing harassment “should properly be understood to mean the following: that an employer’s statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile.” (*Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th at p. 823.) Ristow asserts she met with a supervisor in August 2009 and lodged a sexual harassment complaint. Ristow’s allegations do not explain the outcome of that meeting. Thus, it cannot be determined if it would be clear to a reasonable employee that efforts to obtain reasonable accommodation would be futile.

Ristow argues, “[S]ufficient facts were pled to indicate that harassment and/or hostile environment [*sic*] that Ristow was subjected to would continue based on the representations of her employer.” Ristow cites the fact that she continued working at the Office from 2005 to 2009 as a fact supporting her conclusion. Contrary to Ristow’s position, the time period between 2005 to 2009 is when there supposedly was not harassment. The alleged harassment occurred in 2005 and 2009. Thus, it is unclear why a period *without* harassment would indicate to a reasonable employee that harassment would *continue* and attempts to end harassment would be futile.

In sum, Ristow has not set forth sufficient allegations to rely on the theory of a continuing violation. Thus, we are not persuaded by Ristow’s argument that her claim should survive demurrer because there was a continuing violation.

b) Failure to Prevent Harassment

Ristow's second cause of action sets forth a claim for failure to prevent harassment. (§ 12940, subs. (j) & (k).) Ristow does not raise a separate argument for this cause of action. Rather, Ristow combines the argument for the second cause of action into the argument for the first cause of action. (Cal. Rules of Court, rule 8.204(a)(1)(B) [separate points should be under separate headings].) Specifically, Ristow asserts, "The analysis is equally applicable to the second cause of action for Failure to Prevent Sexual Harassment as Ristow pled facts noting that Ristow's employer had knowledge of District Attorney Ramos' actions but failed to take affirmative steps in allowing the actions to continue. [¶] Accordingly, the first cause of action and second cause of action state facts sufficient to state a cause of action and are not barred by the statute of limitations under the continuing violation doctrine. As such, the Court erred in sustaining Respondents' Demurrers."

We have concluded the trial court did not err in sustaining defendants' demurrer on the first cause of action. Thus, we conclude the trial court did not err by sustaining defendants' demurrer on the second cause of action, since Ristow is relying on the same argument. To the extent Ristow intended to raise a different argument, we note that the paragraphs related to the second cause of action lack legal citations and record citations. (Cal. Rules of Court, rule 8.204(a)(1)(B) & (C).) The failure to provide such citations would waive any intended variation in the argument as it pertains to the second cause of action. (*Kumar v. Yu* (2011) 201 Cal.App.4th 1463, 1470 [record citations]; *Los*

Angeles Unified School Dist. v. Casasola (2010) 187 Cal.App.4th 189, 212 [legal citations].)

c) Retaliation

Ristow asserts the trial court erred by sustaining the demurrer as to the third cause of action for retaliation (§ 12940, subd. (h)). We disagree.

Section 12940, subdivision (h), provides it is an unlawful employment practice “For any employer . . . or person 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.”

Ristow’s FAC reflects that in August 2009 she “lodge[d] a complaint for sexual harassment, hostile work environment and work place [*sic*] retaliation with her employer, District Attorney’s Office.” In the narrative attached to the pleading, it is asserted Ristow lodged a complaint with the “Office of County Supervisor Neil Derry.” After the lodging of the complaint, Ristow returned to work in October 2009 and found her desk cleaned out and her nameplate removed. Ristow then packed up her belongings with the help of a supervisor and coworker. In Ristow’s third cause of action, she relies on a theory of constructive dismissal from her job.

“In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee’s resignation that a reasonable

employer would realize that a reasonable person in the employee’s position would be compelled to resign.’ [Citation.] To be ‘intolerable’ or ‘aggravated,’ the employee’s working conditions must be ‘sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee.’ [Citation.] ‘The essence of the test is whether, under all the circumstances, the working conditions are so unusually adverse that a reasonable employee in plaintiff’s position ““would have felt compelled to resign.””’ [Citation.]’ [Citation.]” (*Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 (*Steele*).

A fundamental flaw in Ristow’s argument related to the third cause of action is that she does not direct this court to an allegation where she asserts she resigned from the Office, and when she resigned. In the FAC and exhibits, we found allegations that Ristow left the office on short-term medical leave and that she packed her belongings, but it is unclear if Ristow has severed her employment. Ristow’s FAC only asserts, “[S]he has been unable to return to work.” Given that it is unclear when, or if, Ristow resigned from the Office, we cannot evaluate whether ““working conditions . . . were so intolerable or aggravated *at the time of the employee’s resignation* that a reasonable employer would realize that a reasonable person in the employee’s position would be compelled to resign.’ [Citation.]” (*Steele, supra*, 162 Cal.App.4th at p. 1253, italics added.)

Ristow asserts she set forth sufficient allegations to support the third cause of action. Ristow argues, “The retaliation culminated in removing Ristow’s items and nameplate from her office when she returned following her medical leave.” Noticeably, the retaliation did not culminate in Ristow’s compelled resignation. Given the lack of resignation allegations, we conclude the trial court did not err in sustaining defendants’ demurrers to the third cause of action, because the allegations do not support a theory of constructive discharge.

In addition to the constructive discharge theory, Ristow asserts the allegations show defendants altered the conditions of her employment. As set forth *ante*, the allegations reflect Ristow’s desk was cleaned out and her nameplate was removed while she was away from the office for several months. When Ristow returned, she packed up her belongings with the help of a coworker and supervisor. Thus, it appears from the pleading and exhibits that Ristow’s belongings were not thrown away—they were just moved from her desk. Ristow has not explained where her belongings went, if they were in a nicer office, in a trash bag, in a space equal to her prior office, et cetera. Thus, it cannot be deciphered from Ristow’s FAC how the moving of her belongings altered the conditions of her employment. Accordingly, to the extent Ristow was asserting a second theory of retaliation, we conclude the trial court did not err by sustaining defendants’ demurrers.

d) Assault and Battery

Ristow’s fourth cause of action sets forth a claim for assault and battery. Ristow asserted, “From the beginning of 2009, and continuing thereafter, Plaintiff was placed in

extreme apprehension and fear of her physical well-being by Defendant, District Attorney Ramos, including but not limited to the incidents set forth in the general allegations. [¶] Defendants, and each of them, knew, or should have known, of the assaults and batteries, but ratified the conduct, as described herein above” Given that Ristow’s allegations concern the 2009 time period, it appears the cause of action is focused on the investigators who delivered the letter to Ristow. Ristow also focuses on this incident in her opening brief.

““A battery is any intentional, unlawful and harmful contact by one person with the person of another”” (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1495.) “The elements of a civil battery are: “1. Defendant intentionally did an act which resulted in a harmful or offensive contact with the plaintiff’s person; [¶] 2. Plaintiff did not consent to the contact; [and] [¶] 3. The harmful or offensive contact caused injury, damage, loss or harm to the plaintiff.” [Citation.]’ [Citation.]” (*Ibid.*)

Ristow has not alleged she was unlawfully touched during the 2009 incidents. The unlawful touching allegation involved an incident in 2005. Thus, the allegations in Ristow’s FAC do not support a cause of action for battery, because Ristow has not alleged a harmful or offensive contact with her person within the 2009 time period. Accordingly, we conclude the trial court did not err by sustaining the demurrer as to Ristow’s battery cause of action.

We now turn to the assault portion of the cause of action as it pertains to the County. “Government Code section 945.4 provides that ‘no 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 in accordance with . . . [Government Code s]ection 910 . . . until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board’

[Government Code s]ection 910, in turn, requires that the claim state the ‘date, place, and other circumstances of the occurrence or transaction which gave rise to the claim asserted’ and provide ‘[a] general description of the . . . injury, damage or loss incurred so far as it may be known at the time of presentation of the claim.’” (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 445, fns. omitted (*Stockett*).)

“The purpose of these statutes is ‘to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation.’ [Citation.] Consequently, a claim need not contain the detail and specificity required of a pleading, but need only ‘fairly describe what [the] entity is alleged to have done.’ [Citations.]” (*Stockett, supra*, 34 Cal.4th at p. 446.)

Ristow’s FAC reflects that the two investigators delivered a letter to her and/or her house in a hostile manner on July 30, 2009. On a tort claim form dated December 29, 2009, Ristow wrote that the circumstances giving rise to her claim were “Sexual Harassment/Hostile work Environment/Retaliation.” As to who was responsible for the injury, Ristow wrote, “San Bernardino County District Attorney Michael A. Ramos, ~~select members of Bureau of Investigation.~~” (Strikethrough in original.) In the narrative attached to the form, Ristow did not mention the investigators coming to her

house.⁵ Given that Ristow’s tort claim form did not mention assault as a legal theory of liability or mention the facts giving rise to the alleged assault, Ristow’s cause of action for assault against the County is defective for failure to comply with the tort claim requirements. Thus, the trial court did not err by sustaining the County’s demurrer to the assault cause of action.

Next, we examine the demurrer ruling as it pertains to the assault cause of action against Ramos in his personal capacity. The Workers’ Compensation laws include broad exclusivity provisions, setting forth the rule that those laws will provide the sole remedies for many job related injuries. (See, e.g., Labor Code, § 3600.) Typically, when a coworker is injured by another coworker, the injured coworker may only seek compensation through the Workers’ Compensation scheme of laws. (Labor Code, § 3601, subd. (a).) However, the injured coworker can bring an action for damages directly against the coworker if the injured employee’s harm was “proximately caused by the willful and unprovoked physical act of aggression of the other employee.” (Labor Code, § 3601, subd. (a)(1).) An employer cannot be held liable for the damages awarded to the injured employee against the aggressor employee. (Labor Code, § 3601, subd. (b).)

⁵ The narrative includes the following information: “The County of San Bernardino contracted with the Santa Monica, California law firm of Curiale, Hirschfeld, and Kraemer to investigate claimant’s allegations. The now completed investigative report is incorporated in this claim by reference.” We are unable to find a copy of the investigative report attached to the government claim form and have not been provided with a citation to where we might find the report elsewhere in the record. Thus, we have not examined the investigative report.

Assault is defined as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (Pen. Code, § 240.) Assault is a general intent crime that “requires the willful commission of an act that by its nature will probably and directly result in injury to another (i.e., a battery).” (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1139.)

In the fourth cause of action, Ristow identifies Ramos as a County employee. In the “Parties” section of the FAC, Ristow identifies herself as a County employee. In the “General Allegations” section of the FAC, Ristow asserts, “On July 30, 2009, at the instruction of District Attorney Ramos, two investigators employed by the District Attorney’s Office arrived at Plaintiff’s private residence and approached her in an intimidating [manner] with their hands on their guns in order to deliver a letter to Plaintiff.” In the fourth cause of action, Ristow alleges, “From the beginning of 2009, and continuing thereafter, Plaintiff was placed in extreme apprehension and fear of her physical well-being by Defendant, District Attorney Ramos, including but not limited to the incidents set forth in the general allegations.” Ristow further alleged that as a result of the foregoing conduct she has suffered “depression, anxiety, [and] post traumatic stress disorder.”

Ristow’s assault cause of action against Ramos in his personal capacity is faulty for two reasons. First, as explained *ante*, Ristow has not clearly pled that she is suing Ramos in his private/individual capacity. Thus, it is unclear if Ramos is a party to this lawsuit in his private capacity. (Code Civ. Proc., § 367 [action must include the name of the real party in interest]; Gov. Code, § 951 [plaintiff must allege particular facts

showing individual liability of a public local officer[.]) In the FAC, Ristow asserts “that at all times relevant hereto” Ramos was acting “pursuant to [his] authority as [an] official[] of [his] respective county agenc[y].” In other words, Ristow asserts Ramos was acting in his official capacity at the time the assault occurred. Thus, Ristow’s cause of action is deficient for (a) failing to identify in what capacity she is suing Ramos (Code Civ. Proc., § 367); and (b) failing to allege with particularity why Ramos might be liable for assault in his individual capacity (Gov. Code, § 951).

Second, Ristow does not assert an act of physical aggression by Ramos. At most, Ristow asserts Ramos conspired to have her assaulted. Ristow’s assault cause of action against Ramos can only be exempt from the Workers’ Compensation scheme of laws if Ristow’s injury was proximately caused by Ramos’s “willful and unprovoked physical act of aggression.” (Labor Code, § 3601, subd. (a)(1).) Ristow has pled only that Ramos instructed others to be physically aggressive towards Ristow. Given the allegations, it does not appear that Ristow’s cause of action against Ramos is exempt from the Workers’ Compensation laws. Accordingly, the trial court did not err by sustaining the demurrer as it pertains to the assault cause of action against Ramos in a private capacity.

In Ristow’s opening brief, she contends, “an *employer* may be held liable for the threatened physical assault of his employees if the action is ratified by the employer. [Citation.]” (Italics added.) Ristow alleges the investigators’ act of coming to her house “with their hands on their guns was done specifically at the direction of Defendant District Attorney Ramos and was ratified by District Attorney Ramos.” It

appears from Ristow’s opening brief that she is relying on the Workers’ Compensation law related to suing an *employer* as opposed to a coemployee.

In regard to suing an employer directly for an assault, the injured employee may do so only in certain enumerated circumstances. One of the circumstances occurs “[w]here the employee’s injury or death is proximately caused by a willful physical assault by the employer.” (Labor Code, § 3602, subd. (b)(1).) “Assaults by a coemployee are not . . . mentioned in section 3602, subdivision (b)(1). In contrast, such assaults are the express subject of section 3601, subdivision (a)(1).” (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1487.) Nevertheless, courts have recognized an exception—holding “that an employer can be held civilly liable as a joint participant in assaultive conduct committed by its employee pursuant to the doctrine of ratification.” (*Id.* at pp. 1489-1490.) Thus, if an employer ratifies an employee’s tortious conduct, then the employer can become liable for the tort as a joint participant. (*Ibid.*)

While Ristow’s FAC seemingly attempts to set forth a cause of action for assault by Ramos—a fellow employee of the County—her opening brief asserts the demurrer was improperly sustained because Ramos is an *employer* who ratified the investigators’ conduct. Ristow does not explain the incongruity between the coemployee theory in the FAC and the employer theory being argued in her brief. Further, Ristow’s opening brief does not explain how Ramos would be liable in his private capacity for an act done as an *employer*. We are not inclined to act as cocounsel on appeal, providing explanations for Ristow’s various contradictory assertions. (*Doe v. Lincoln Unified School Dist.*

(2010) 187 Cal.App.4th 1286, 1293.) Accordingly, we find Ristow's argument to be unpersuasive due to the muddled nature of the argument.

C. LEAVE TO AMEND

1. *PROCEDURAL HISTORY*

Ristow attached a proposed second amended complaint (SAC) to her motion for reconsideration of the demurrer ruling. In the SAC, Ristow alleged her consensual relationship with Ramos ended in February 2005. Ristow also alleged that a variety of additional incidents occurred between herself and Ramos from 2005 through 2008. Ristow's SAC included four pages of allegations covering the 2005 to 2008 time period. Ristow set forth approximately eight different incidents from June 2005 through December 2005; approximately eight incidents in 2006; three incidents in 2007; and two incidents in 2008.

The following are a few of the additional incidents set forth the in the SAC. First, Ristow alleged that on December 10, 2005, while at the Office's Christmas party, Ramos kissed Ristow's cheek, bought her drinks, and told Ristow that he "missed her breasts." Second, on July 6, 2006, at the annual Bureau of Investigation's picnic, Ramos kissed Ristow's cheek and told her to call him. Later that day, Ramos called Ristow and told her that he "missed [her] breasts and that he wanted to see her again." Third, on May 31, 2007, while at a retirement reception, Ramos "hugged and kissed" Ristow. Ramos "stared at [Ristow's] breasts and commented on how good [Ristow's] breasts looked." Fourth, on December 8, 2007, at the Office's Christmas party, Ramos gave Ristow a hug and a kiss on the cheek. Ramos whispered to Ristow that "her

breasts gave him an erection.” Ramos bought Ristow drinks and invited her to see his new office. Fifth, on December 6, 2008, at the Office’s Christmas party, Ramos gave Ristow a hug and a kiss on the cheek, he bought Ristow drinks, and invited her to see his office.

In a declaration attached to the motion for reconsideration, Ristow’s counsel, James Reiss (Reiss), wrote that he prepared the original complaint filed on August 9, 2010, as well as the FAC filed on December 15, 2010. Reiss conceded there was a time gap in the complaints, but asserted the contact during the 2005 to 2009 time period could be inferred, despite facts related to that time period not being specifically pled. During the case, Reiss informed Ristow that facts related to contact during the 2005 to 2009 time period were critical to winning the case. On March 1, 2011, Reiss spoke to Ristow. Ristow informed Reiss she had located a lost calendar, and she “immediately provided [Reiss] with the detailed information pertaining to the contact” from 2005 to 2009.⁶

At a hearing on May 5, 2011, Reiss argued the SAC “close[d] the gap on the issue of the continuing violation doctrine.” Reiss explained Ristow discovered a calendar with “detailed dates” on it. Reiss argued Ristow should be allowed to file the SAC, and the trial court should not be “so draconian and end this case.”

The trial court denied the motion for reconsideration because it was untimely, in that it was brought after the entry of judgment—divesting the trial court of jurisdiction.

⁶ As set forth *ante*, the hearing on the demurrer to the FAC took place on March 3, 2011.

Nevertheless, the trial court concluded that if the motion had been timely, it would have denied the motion. The trial court reasoned, “[Ristow] has failed to show that her failure to present the new facts to the court occurred despite her diligence given that counsel had possession of these facts on March 1, 2011—two days before the hearing and the facts were those that were presumably within plaintiff’s personal knowledge before that date.”

2. *DISCUSSION*

a) Contention

Ristow contends the trial court erred by denying her leave to amend her FAC, following the sustaining of defendants’ demurrers. We disagree.

b) Procedural Posture

At the outset, we want to clarify the procedural posture of the leave to amend issue. At the initial hearing, on March 3, 2011, Ristow did not provide the trial court with details of how she planned to amend the FAC. Bachman stated only, “There are facts to be included to complete that gap in time.” Bachman stated she “would rather not state them in open Court until they are on the pleading paper”—referring to the additional facts. When the additional facts were presented in an attachment to a motion for reconsideration, the trial court denied Ristow the opportunity to amend because she failed to comply with the requirements of a motion for reconsideration. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1198 [Party must explain in a motion for reconsideration why the new facts could not have been discovered with reasonable diligence prior to the original ruling.]) In other words, the trial court was

not given the opportunity to decide whether the proposed amendments created a sufficiently pled cause of action.

Further, in Ristow’s opening brief, she does not raise an issue related to the ruling on the motion for reconsideration. Rather, Ristow is asserting the trial court erred in initially denying her leave to amend. Given this procedural posture we treat the proposed amendments, found in the SAC, as though they are being proposed for the first time on appeal. (Code Civ. Proc., § 472c, subd. (a); *People ex. Rel. Brown v. Powerex Corp.* (2007) 153 Cal.App.4th 93, 112.) We approach the issue in this manner in order to simplify the discussion, and not complicate matters with references to the motion for reconsideration, which is not relevant to the issue on appeal.

c) Standard of Review

A trial court’s denial of leave to amend is reviewed for an abuse of discretion. “The appellant bears the burden of proving the trial court abused its discretion by demonstrating how [she] could amend the complaint to state a cause of action. [Citation.]” (*Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 228.) The trial court abuses its discretion in denying a plaintiff leave to amend if there is a reasonable possibility the defects can be cured by amendment. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

d) Sexual Harassment

The first cause of action in the SAC is sexual harassment, and it is asserted against all defendants. (§ 12940, subd. (j).)

(1) *Ramos*

As set forth *ante*, the demurrer was properly granted as to Ramos in his personal capacity, as to the first and second causes of action, because Ristow failed to file a timely DFEH complaint against Ramos, which means the two causes of action are time-barred.

The proposed amendments do not cure the untimely DFEH complaint. Attached to the SAC is a DFEH complaint. The DFEH complaint names Ramos and the filing date is August 6, 2010. Further, the DFEH complaint reflects that under penalty of perjury, Ristow swore the most recent incident of discrimination occurred on July 7, 2009—approximately 13 months prior to the DFEH complaint being filed. Thus, the SAC suffers from the same problem as the FAC—the procedural requirements for a DFEH complaint were not followed. Thus, we conclude the trial court did not abuse its discretion by denying Ristow leave to amend the first and second causes of action as they pertain to Ramos in his individual capacity.

(2) *The County*

As set forth *ante*, the demurrer was properly granted on the first cause of action as to the County because there was a four-year time gap in the FAC, which created a deficiency in the pleading.

Ristow's timely administrative complaint was filed on July 2, 2010. The incidents that occurred after July 2, 2009, include (1) being reprimanded for an admitted dress code violation; (2) having investigators deliver a letter in a hostile manner; and (3) returning to work to find her desk emptied and nameplate removed. Thus, the SAC

suffers from a similar issue as the FAC—there is not any sexual conduct that occurred within the statute of limitations. (Gov. Code, § 12960, subd. (d) [one-year limit].)

Thus, Ristow’s cause of action for sexual harassment would seemingly fail due to the lack of sexual harassment allegations within the applicable time period. However, Ristow’s SAC appears to seek application of the continuing violation doctrine, due to the timeline of allegations stretching over a period of years.

As explained *ante*, “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.’ [Citation.]” (*Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319, 325-326.) The three-prong test for determining the applicability of the doctrine is: (1) are the unlawful acts sufficiently similar in kind; (2) have the acts occurred with reasonably frequency; and (3) have the acts not acquired a degree of permanence. (*Id.* at p. 326.)

The SAC has not repaired the problems with the FAC. As far as similarity of acts, the acts within the time period were committed by a variety of people and were non-sexual, whereas the acts beyond the statute of limitations were sexual and were perpetrated by Ramos. Thus, the unlawful acts were not similar in kind—either in the nature of the acts or the perpetrator of the acts. In regard to frequency, the SAC reflects no incidents occurred between December 13, 2007, and December 6, 2008. After an incident on December 8, 2008, the next incident occurred in late May 2009, when the relationship became public knowledge and Ramos asked Ristow to lie about their relationship. Given that there was approximately a one-year gap in incidents between

December 2007 and December 2008, and then almost a six-month time gap between December 2008 and May 2009, Ristow has not pled that the unlawful acts occurred with reasonable frequency, such that the violations occurring within the statutory time period were connected to those occurring beyond the statute of limitations. The lengthy break between incidents does not reflect acts occurring with reasonable frequency; to the contrary, the proposed amendments reflect infrequent acts during the late 2007 to 2009 time period.

Finally, permanence means ““an employer’s statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile.” [Citation.]” (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, fn. 25.) The SAC reflects Ristow “lodged a complaint for sexual harassment, hostile work environment[,] and work place [*sic*] retaliation against” the Office sometime in August 2009. In August 2009, when Ramos learned of Ristow’s complaint, he accused Ristow of lying and denied the accusations. It is unclear from the SAC what happened with Ristow’s August complaint. It is unclear if the Office responded to Ristow’s complaint by stating it would make efforts to help Ristow, or if after lodging the complaint it became clear further efforts to stop any harassment would be futile.

Moreover, the permanence issue is troublesome due to the nearly one-year gap in incidents between December 2007 and December 2008. While Ristow never complained about the alleged harassment until 2009, it appears there was a period of finality wherein permanence was acquired. During that one-year gap, Ristow did not

suffer any harassment, thus, Ristow was reasonably accommodated at work and efforts to maintain a reasonable work environment were successful. In sum, Ristow's proposed amendments to the allegations do not sufficiently plead the permanence prong. Accordingly, the proposed amendments do not repair the faulty pleading of the continuing violation doctrine. The trial court did not abuse its discretion by denying leave to amend as to the first cause of action.

Ristow asserts the trial court's ruling was an abuse of discretion because Ristow's proposed amendments "fill in the gap in time between the years 2005 and 2009." We do not find Ristow's argument to be persuasive because the SAC contains a one-year gap from December 2007 to December 2008. While Ristow has filled in the gap from 2005 to late 2007, she has not sufficiently filled the gap between December 2007 and December 2008.

Next, Ristow asserts Ramos's "behavior was quite frequent and relentless during the time period from 2005 to 2009." Ristow does not provide facts or analysis to support this conclusion, but cites to the "General Allegations" section of her SAC. As set forth *ante*, the proposed amendments do not reflect frequent or relentless sexual advances, given the one-year time gap and the six-month time gap. Thus, we find Ristow's argument to be unpersuasive.

e) Failure to Prevent Harassment

Ristow's second cause of action is for failing to prevent harassment. (§ 12940, subs. (j) & (k).) Ristow does not raise a separate argument for this cause of action. Rather, Ristow combines the argument for the second cause of action into the argument

for the first cause of action. (Cal. Rules of Court, rule 8.204(a)(1)(B) [separate points should be under separate headings].) We have concluded the trial court did not err in denying Ristow leave to amend the first cause of action. Thus, we conclude the trial court did not err by denying Ristow leave to amend the second cause of action, since Ristow is relying on the same argument.

f) Retaliation

Ristow asserts the trial court erred by denying her leave to amend the third cause of action for retaliation. (§ 12940, subd. (h).) We disagree.

As explained *ante*, the trial court properly sustained the demurrer as to the third cause of action because the cause of action was based on a theory of constructive dismissal, but Ristow did not set forth allegations that she ceased working for the County. (*Steele, supra*, 162 Cal.App.4th at p. 1253 [conditions so adverse the employee felt compelled to resign].)

In the SAC, Ristow again alleges that she was “constructively discharged” from her job. Ristow’s SAC suffers from the same problem as the FAC—Ristow asserts only that she has “been unable to return to work.”

“In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee’s resignation that a reasonable employer would realize that a reasonable person in the employee’s position would be compelled to resign.’ [Citation.]” (*Steele, supra*, 162 Cal.App.4th at p. 1253.)

Since Ristow is relying on a theory of constructive discharge, she needs to allege facts related to when she resigned. Ristow has not alleged a resignation, only a failure to return to work. It appears from the SAC that Ristow may still be on medical leave from the County or on another type of employment leave. Thus, the trial court did not err in denying Ristow leave to amend, because Ristow’s proposed amendments would not have repaired the third cause of action.

Ristow asserts the trial court erred by denying her leave to amend the third cause of action because the amendments “clarify that Ristow’s retaliation claim was based on Ristow’s complaint of sexual harassment to her employer, Ristow’s admission and acknowledgement regarding the sexual relationship to a local newspaper, and her refusal to lie about the relationship, despite requests by Defendant, District Attorney Ramos and the County to do so.”

Ristow does not explain how the amendments work to provide clarification of her cause of action, or any other analysis to support her conclusion. Thus, it is unclear exactly what argument Ristow is asserting. Nevertheless, to the extent Ristow is asserting her third cause of action is based on something other than constructive

discharge, we find the argument to be unpersuasive. In Ristow's SAC, she uses "constructively discharged" twice in describing the retaliation claim. Thus, despite Ristow's conclusion in her opening brief, the proposed amendments reflect that the third cause of action is a retaliation claim based on constructive discharge.

g) Assault and Battery

Ristow's fourth cause of action sets forth a claim for assault and battery. As explained *ante*, Ristow's battery claim failed because she did not allege contact with her person within the applicable statute of limitations. Ristow's assault claim against the County failed due to not alleging (1) the legal theory of assault, or (2) facts related to the investigators' alleged assault, on the claim form filed with the County. Ristow's claim for assault against Ramos in his individual/personal capacity failed because (1) the FAC does not reflect Ristow is suing Ramos in his private/individual capacity; and (2) Ristow did not assert an act of physical aggression by Ramos, which would exempt the cause of action from the Workers' Compensation system of laws.

First, as to the battery claim, the proposed amendments to the fourth cause of action still limit the action to incidents occurring "from the beginning of 2009" onward. Thus, none of the alleged sexual touching is part of the fourth cause of action, because it occurred before 2009. The proposed amendments do not reflect an unwanted touching during 2009 or thereafter. Accordingly, the amendments would not cure the problem with the battery cause of action—the lack of touching. Thus, we conclude the trial court did not err by denying Ristow leave to amend the battery allegation.

Second, we address the government claim form and the assault allegation against the County. The government claim form attached to the SAC appears to be identical to the claim form attached to the FAC. The claim form attached to the SAC requests information concerning the “[c]ircumstances giving rise to the claim.” Ristow responded, “[O]n July 7th, 2009 I left work on Stress leave Short term disability due to Sexual Harassment/Hostile work Environment/Retaliation.” In regard to who caused the injury, Ristow wrote, “San Bernardino County District Attorney Michael A. Ramos, ~~select members of Bureau of Investigation.~~” (Strikethrough in original.)

On a secondary claim form, which Ristow appears to have created (as opposed to the government form), Ristow writes that she is seeking damages for (1) negligence, (2) constructive discharge, (3) intentional infliction of emotional distress, (4) personal injury, (5) defamation of character, (6) slander, (7) hostile work environment, (8) sexual harassment, and (9) workplace retaliation. In the narrative attached to the secondary claim form, Ristow provides a variety of facts, but does not mention the investigators coming to her house.

As explained *ante*, a government claim form must “provide the public entity [with] sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation. [Citation.] Consequently, a claim need not contain the detail and specificity required of a pleading, but need only ‘fairly describe what [the] entity is alleged to have done.’ [Citations.]” (*Stockett, supra*, 34 Cal.4th at p. 446.)

The claim forms do not mention assault or any facts related to an assault in 2009. It appears the government claim form initially mentioned that investigators might be involved in causing an injury to Ristow, but then the reference to the investigators was crossed out. Since the claim forms do not mention assault as a potential cause of action and do not present any facts related to the investigators coming to Ristow's house, we conclude the trial court did not err by denying Ristow leave to amend, because Ristow has not shown that the tort claim requirement was satisfied. (§ 954.4.)

Next, we address the fourth cause of action as the assault portion of the action is directed toward Ramos in his private capacity. In the SAC, Ristow again fails to identify in what capacity she is suing Ramos. (Code Civ. Proc., § 367 [action must include the name of the real party in interest]; Gov. Code, § 951 [plaintiff must allege particular facts showing individual liability of a public local officer].)

Additionally, in the fourth cause of action, Ristow describes Ramos as a fellow employee of the County. However, the proposed amendments do not specify an act of physical aggression by Ramos, such that the claim should be exempt from the Workers' Compensation system of laws. (Labor Code, § 3601, subd. (a)(1) ["willful and unprovoked physical act of aggression"].) Ristow has pled only that Ramos instructed others to be physically aggressive towards Ristow. The proposed amendments do not show how Ristow's claim is exempt from the Workers' Compensation system. Thus, we conclude the trial court did not err by denying Ristow leave to amend because Ristow has not shown how she can amend her complaint to allege (1) particular facts

establishing Ramos’s individual liability (Gov. Code, § 951); and (2) how her cause of action is exempt from Workers’ Compensation laws (Labor Code, § 3601, subd. (a)(1)).

Ristow contends she should have been granted leave to amend her fourth cause of action because “additional facts could be pled to cure the defects and overcome the worker’s compensation exclusivity clause. In fact, Ristow pled additional facts indicating not only that an assault occurred but also that said assault was at the direction of and ratified by both Ristow’s employer, the County of San Bernardino and District Attorney Ramos.” Ristow does not provide analysis to explain how the proposed amendments satisfy the employer and/or coemployee exceptions to the Workers’ Compensation laws. Due to the ambiguity and lack of analysis, we cannot determine exactly which laws Ristow is claiming to have sufficiently pled with her proposed amendments. Given the vagueness of Ristow’s position, we find her argument to be unpersuasive.

D. EX PARTE COMMUNICATION

Ristow contends the trial court erred by engaging in improper ex parte communication during the hearing on defendants’ demurrers. Ristow’s discussion of the issue is devoid of legal citations. (Cal. Rules of Court, rule 8.204(a)(1)(B).) Ristow’s discussion of the issue consists of a timeline of the events, and a conclusion that she suffered prejudice. As a result of not citing legal authority, Ristow has forfeited the ex parte communication issue on appeal. (*Los Angeles Unified School Dist. v. Casasola, supra*, 187 Cal.App.4th at p. 212; *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Despite the forfeiture, for the sake of thoroughness, we will address the prejudice aspect of the contention. As set forth *ante*, the trial court began the hearing on the demurrer while Ristow's counsel was not in the courtroom. When the trial court believed it might not follow its tentative opinion and deny Ristow leave to amend, it stopped the hearing and waited for Ristow's counsel to arrive. When Ristow's attorney arrived, she argued for leave to amend.

We infer Ristow is accusing the trial court of violating California Code of Judicial Ethics Canon 3B(7), which requires a judge to “accord to every person who has a legal interest in a proceeding, or that person’s lawyer, [a] full right to be heard according to law,” and forbids a judge from initiating, permitting, or considering *ex parte* communications dealing with substantive issues. (Cal. Code Jud. Ethics, canon 3B(7)(d).) We further infer Ristow is asserting the trial court was not impartial as a result of the *ex parte* communication.

Due to the foregoing inferences, we apply the following prejudice rule: “‘Where the average person could well entertain doubt whether the trial judge was impartial, appellate courts are not required to speculate whether the bias was actual or merely apparent, or whether the result would have been the same if the evidence had been impartially considered and the matter dispassionately decided [citation], but should reverse the judgment and remand the matter to a different judge for a new trial on all issues.’ [Citation.]” (*Haluck v. Ricoh Electronics* (2007) 151 Cal.App.4th 994, 1009.)

Given that the trial court stopped the *ex parte* communication upon thinking that it might be persuaded to change its tentative ruling, it appears the trial court was trying

to remain impartial and not allow itself to be swayed by the ex parte communication. Further, the trial court gave Ristow's attorney an opportunity to argue on behalf of Ristow once the hearing resumed, which would eliminate the doubt an average person might have about the trial court favoring Ramos and the County. In other words, we conclude Ristow did not suffer prejudice because it is unlikely the average person would entertain doubt about the trial judge's impartiality under the circumstances of this case.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.