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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JAMES MACDONALD, Plaintiff and Appellant, v. SHEREEN ARAZM, Defendant and Respondent.	B265659 Los Angeles County Super. Ct. No. BC516094

APPEAL from a judgment of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Affirmed in part; reversed in part and remanded.

James MacDonald, in pro. per., for Plaintiff and Appellant.

Klatte, Budensiek & Young-Agriesti, Ernest W. Klatte, III, Summer Young-Agriesti and Joseph G. Naddour for Defendant and Respondent.

INTRODUCTION

Plaintiff James MacDonald (plaintiff) appeals from the judgment of dismissal entered after the court granted defendant Shereen Arazm's motion for judgment on the pleadings. Plaintiff sued Arazm and a handful of other individuals, corporate entities, and trusts under the Fair Employment and Housing Act (Government Code section 12940 et seq.) asserting claims for workplace harassment, wrongful employment termination, and failure to take reasonable steps to prevent harassment. In addition, he asserted a claim for whistleblower retaliation under Labor Code section 1102.5.

Throughout the litigation, plaintiff consistently conceded Arazm was not his employer—a posture fatal to his claims against her for wrongful employment termination, failure to take reasonable steps to prevent harassment, and retaliation, which may only be properly asserted against an employer.[1] Indeed, the court sustained Arazm's demurrer to the causes of action for wrongful employment termination and failure to take reasonable steps to prevent harassment without leave to amend for that reason. But almost two years into the litigation—and immediately after Arazm filed her motion for judgment on the pleadings—plaintiff sought to withdraw his admission that Arazm was not his employer. The court denied the request and granted Arazm's motion for judgment on the pleadings.

Plaintiff contends the court erred in refusing his request to withdraw his admission that Arazm was not his employer. We

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[1] As we explain, Labor Code section 1102.5, subdivision (c), was amended and now authorizes claims against both employers and persons acting on an employer's behalf.

see no abuse of discretion, inasmuch as plaintiff's admission was not inadvertent or mistaken when made and was consistent with allegations in the complaint as well as discovery responses he made during the litigation. Further, because plaintiff's request came on the eve of trial, Arazm would have been prejudiced by plaintiff's reversal of position.

In addition, plaintiff asserts the court erred by granting Arazm's motion for judgment on the pleadings. Given that plaintiff admitted Arazm was not his employer, and only an employer can be liable for wrongful employment termination, failure to take reasonable steps to prevent harassment, and retaliation (under former Labor Code section 1102.5, subdivision (c)), we affirm the judgment in favor of Arazm on those causes of action.

As to the claim for harassment, we reverse the judgment. The court found plaintiff's harassment claim was barred by the statute of limitations after taking judicial notice of an excerpt from plaintiff's deposition testimony. The testimony should not have been considered in connection with a motion for judgment on the pleadings and, in any event, does not establish that plaintiff's claim is time-barred. Finally, we disagree with the court's conclusion that plaintiff failed to set forth sufficient facts to support his alter ego theory.

FACTS AND PROCEDURAL BACKGROUND[2]

1. The Parties

Plaintiff worked as a controller for three limited liability companies, defendants Dolce Group, Dolce Group Concepts, and Geisha House, from July 2006 to October 2011. He alleges defendants Shereen Arazm, Michael Malin, and Lonnie Moore were officers, directors and managing members of the three companies.[3] In addition, plaintiff alleges that Arazm was a supervisory employee. He also named 914 Trust and 603 Trust (organized for the benefit of Moore and Malin, respectively) as defendants. Arazm is the only defendant involved in the present appeal.

2. Plaintiff's Initial Allegations

Plaintiff filed the original complaint on July 23, 2013. The complaint asserted four causes of action against Arazm. Three of the claims alleged discrimination on the basis of plaintiff's sexual orientation: harassment (Gov. Code, § 12940, subd. (j)); wrongful employment termination (Gov. Code, § 12940, subd. (a)); and failure to take reasonable steps to prevent harassment (Gov. Code, § 12940, subd. (k)). The fourth cause of action was based on whistleblower retaliation (Lab. Code., § 1102.5, subd. (c)). The

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[2] Consistent with the standard of our review, we assume the truth of allegations stated in the operative complaint.

[3] The demise of the relationship between the three business partners and the ensuing litigation is chronicled in an opinion by Division Four of this court, *Malin v. Singer* (2013) 217 Cal.App.4th 1283.

complaint also alleged the limited liability companies were alter egos of the individual defendants, including Arazm.

Plaintiff generally alleged the defendants "made offensive and derogatory references and comments based on sexual orientation" in plaintiff's presence, creating a hostile work environment and ultimately forming the basis of his employment termination. As to the retaliation claim, plaintiff alleged defendant Moore asked him to falsify information to the Internal Revenue Service and, after he refused, Moore terminated his employment.

3. Arazm's Demurrer

Arazm demurred to the original complaint and asked the court to sustain the demurrer as to all causes of action without leave to amend. She argued the first cause of action for harassment failed to state a claim because it included only vague and ambiguous allegations about the defendants generally, rather than her in particular. Further, she contended the type of harassment identified in the complaint does not constitute actionable harassment as a matter of law because, as alleged, it was neither severe nor pervasive.

With respect to the second cause of action for wrongful termination, Arazm asserted the complaint failed to state a claim because the only allegations relating to plaintiff's employment termination indicated Moore, not Arazm, fired plaintiff. In addition, the complaint did not allege Arazm was involved in the decision to terminate plaintiff's employment.

Also, as to the claims for wrongful employment termination, failure to take reasonable steps to prevent harassment, and retaliation Arazm argued those claims failed as a matter of law because the pertinent statutes only impose

liability on an employer—and plaintiff did not allege she was his employer. Arazm also urged that plaintiff could not proceed with his retaliation claim because he failed to exhaust his administrative remedies before filing the suit.

Finally, Arazm asserted plaintiff's alter ego allegations were conclusory statements of law which were insufficient to justify maintaining her as a party to the action. Arazm filed a motion to strike the complaint on similar grounds.

In response to the demurrer, plaintiff conceded Arazm was not properly named as a defendant in the second and third causes of action due to the absence of an employer-employee relationship. And, in fact, the original complaint alleged Arazm "was a supervisory employee within the meaning of Government Code section 12926(r)." As to the first cause of action for harassment, plaintiff argued he was not required to exhaust administrative remedies before filing his retaliation suit. He also argued his allegations were sufficient to withstand Arazm's demurrer.

The court sustained the demurrer in part. As to the second and third causes of action, the court noted plaintiff did not oppose the demurrer and it therefore sustained the demurrer without leave to amend. However, with respect to the fourth cause of action for retaliation, the court overruled the demurrer based on its observation that Labor Code section 1102.5, subdivision (c), as was then in effect, applied to employers as well as "any person acting on behalf of the employer." In addition, the court agreed with plaintiff that administrative exhaustion was not required before filing a lawsuit alleging retaliation. With respect to the harassment claim, the court noted the complaint did not distinguish between the various defendants and therefore failed

to state a claim against Arazm, and sustained the demurrer with leave to amend. The court declared Arazm's motion to strike the alter ego allegations moot.

4. The Amended Complaint

In February 2014, plaintiff filed the operative first amended complaint which was nearly identical to the original complaint. The only substantive changes related to the first cause of action for harassment. Plaintiff expanded the general allegations about the use of derogatory comments and epithets to apply to "defendants, and each of them, including Arazm." He then added three additional paragraphs of allegations relating to specific conduct by Arazm, including her use of derogatory phrases to refer to other men in the office, and her tendency to share stories about her sexual life, and the sex lives of others in the office, with plaintiff. Plaintiff did not amend the complaint to remove Arazm from the second and third causes of action, as to which the court sustained her demurrer without leave to amend.

5. Arazm's Motion for Judgment on the Pleadings

In March 2015, Arazm filed a motion for judgment on the pleadings.

Arazm reminded the court of its ruling on her demurrer to the second and third causes of action for wrongful termination and failure to prevent harassment and requested judgment in her favor. In addition, Arazm noted plaintiff expressly admitted on October 21, 2013, that Arazm was not his employer. Specifically, Arazm served a request for admission asking: "Admit that Arazm did not employ YOU." Plaintiff responded: "Objection. Calls for a legal conclusion and/or expert opinion beyond the purview of the responding party. Without waiving the objections, the responding

party replies as follows: Admit." On that basis, Arazm asserted the court should grant judgment in her favor on each of the claims that required an employer-employee relationship.

With respect to the first cause of action for harassment, Arazm argued plaintiff's new allegations were vague and still applied to all the defendants generally. She also asserted the claim was barred by the statute of limitations. Specifically, Arazm noted plaintiff brought his administrative complaint on July 20, 2012, and therefore only harassment occurring one year prior to that date was actionable. Arazm further asserted plaintiff could not allege any harassment occurred during the limitations period because, according to his deposition testimony, plaintiff had not seen Arazm in the office after May 2011.

As to the retaliation claim, Arazm noted that the current version of Labor Code section 1102.5, subdivision (c), imposes liability on both employers and their agents. However, former Labor Code section 1102.5, which was in force at the time of the actions in question, applied only to employers. Arazm argued the court's demurrer ruling on this cause of action was incorrect because it applied the amended version of the statute retroactively.

Finally, Arazm again asserted plaintiff's alter ego allegations were insufficient to support liability.

6. Plaintiff's Motion to Withdraw Admission and Opposition to the Motion for Judgment on the Pleadings

Approximately one week after Arazm filed her motion for judgment on the pleadings, plaintiff filed a motion seeking to withdraw his admission that Arazm was not his employer. Citing Code of Civil Procedure sections 2033.300 and 473, plaintiff

argued the court could, in its discretion, allow him to withdraw his admission because it was the product of "mistake, inadvertence, or excusable neglect." He contended further that the admission did not reflect the truth in light of other evidence discovered.

Arazm opposed the motion. She argued plaintiff could not show his admission was inadvertently made inasmuch as plaintiff's other actions—particularly his concession that Arazm was not his employer in response to Arazm's demurrer—were consistent with the admission. Moreover, the court sustained her demurrer without leave to amend as to two of plaintiff's causes of action on that basis. Further, she argued, allowing plaintiff to withdraw the admission a year-and-a-half after it was made, and shortly before trial, would be highly prejudicial.

Meanwhile, plaintiff[4] opposed Arazm's motion for judgment on the pleadings predicated in part upon his request to withdraw his admission. In the alternative, he argued his claim for harassment was not barred by the statute of limitations because the limitations period was tolled while plaintiff pursued "internal administrative remedies." He also urged that his alter ego allegations were sufficient—and could be strengthened to include additional facts pertaining to undercapitalization, comingling of personal and business assets including bank accounts and office space, and failure to observe corporate formalities. Plaintiff included a declaration in which he stated that, as the controller for the company defendants, he had personal knowledge of these additional facts supporting his alter ego theory.

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[4] Although plaintiff initially had retained counsel, he represented himself from this point in the proceedings forward.

7. Judgment and Appeal

On May 12, 2015, the court denied plaintiff's motion for relief from his discovery admission, granted Arazm's motion for judgment on the pleadings without leave to amend, and dismissed Arazm from the case. The court ruled that plaintiff failed to show his admission was mistaken or inadvertent and, in any event, withdrawal of the admission on the eve of trial would be extremely prejudicial to Arazm.

Arazm gave notice of the judgment of dismissal on May 28, 2015. Plaintiff filed a timely notice of appeal on July 24, 2015.

CONTENTIONS

Plaintiff asserts the court abused its discretion by denying his request to withdraw his admission that Arazm was not his employer and further erred by granting Arazm's motion for judgment on the pleadings.

DISCUSSION

1. Plaintiff's appellate briefs are deficient.

There are fundamental rules and principles of appellate practice which govern the types of issues and arguments that may be raised on appeal, the form in which such arguments should be made, and the manner in which the facts should be stated. As will become evident, plaintiff's presentation of this case on appeal is inadequate in a number of ways.

The most fundamental rule of appellate review is that the judgment or order challenged on appeal is presumed to be correct, and "it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "All intendments and presumptions are indulged to support it on

matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Failure to provide an adequate record requires that the issue be resolved against the appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; see *Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362.)

In addition, the parties must provide citations to the appellate record directing the court to the supporting evidence for each factual assertion contained in that party's briefs. When an opening brief fails to make appropriate references to the record in connection with points urged on appeal, the appellate court may treat those points as waived or forfeited. (See, e.g., *Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 384; *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 779–801 [several contentions on appeal "forfeited" because appellant failed to provide a single record citation demonstrating it raised those contentions at trial].) Further, the parties must support their arguments by citing relevant legal authority. (See, e.g., *Landry v. Berryessa Union School Dist*. (1995) 39 Cal.App.4th 691, 699–700 (*Landry*) [issue not supported by pertinent or cognizable legal argument may be deemed abandoned].)

An appellant has the burden not only to show error but prejudice from that error. (Cal. Const., art. VI, § 13.) If an appellant fails to satisfy that burden, his argument will be rejected on appeal. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.) "[W]e cannot presume prejudice and will not reverse the judgment in the absence of an affirmative showing there was a miscarriage of justice. [Citations.] Nor will this court act as counsel for appellant by furnishing a legal

argument as to how the trial court's ruling was prejudicial. [Citation.]" (*Ibid*.) And it is well established that " '[w]hen a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys [citations].' [Citations.]" (*Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1056.)

Large portions of plaintiff's briefs fail to comply with these basic principles of appellate practice. We disregard factual assertions unsupported by citations to the appellate record as well as arguments unsupported by relevant legal authority, and address plaintiff's remaining arguments.

2. The court did not abuse its discretion in denying plaintiff's request to withdraw his admission that Arazm was not his employer.

Plaintiff contends the court erred in failing to set aside his admission that Arazm was not his employer. The court did not err.

Under Code of Civil Procedure section 2033.010, a party may request that another litigant "admit the genuineness of specified documents, or the truth of specified matters of fact, opinion relating to fact, or application of law to fact. A request for admission may relate to a matter that is in controversy between the parties." " 'Matters that are admitted or deemed admitted through [request for admissions] discovery devices are conclusively established in the litigation and are not subject to being contested through contradictory evidence.' " (*Stover v. Bruntz* (2017) 12 Cal.App.5th 19, 30–31, brackets in original; Code Civ. Proc., § 2033.410.)

While the discovery statutes do include a mechanism for withdrawing a deemed admission, a party may withdraw such an

admission only on leave of court granted after notice to all parties. (Code Civ. Proc., § 2033.300, subds. (a) & (b).) Further, the court may permit withdrawal of an admission only if the admission was the result of mistake, inadvertence, or excusable neglect and the opposing party will not be substantially prejudiced. (*Ibid*.; see also *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1418.)

Here, in response to a request for admission from Arazm, plaintiff admitted Arazm was not his employer. He argues on appeal, as he did below, that his admission was inadvertent because he misunderstood the legal definition of "employer" when he answered Arazm's request. Plaintiff provides no legal authority to support his apparent contention that a mistake of law, or ignorance of the law, justifies the withdrawal of an admission. Accordingly, we could disregard this point without further discussion. (See, e.g., *Landry, supra*, 39 Cal.App.4th at pp. 699–700 [issue not supported by pertinent or cognizable legal argument may be deemed abandoned].) In any event, we agree with the court's conclusion that plaintiff's admission was not mistaken or inadvertent. Plaintiff took the position that Arazm was not his employer multiple times during the litigation, most notably in his complaint, which alleges Arazm was a "supervisory employee," and in his opposition to Arazm's demurrer, in which plaintiff conceded Arazm was not a proper party to his second and third causes of action because she was not his employer.

As to the second issue, whether Arazm would have been prejudiced by the withdrawal of the discovery response, plaintiff fails to address that issue on appeal. Ordinarily, courts treat an appellant's failure to raise an issue in his briefs as forfeiting that challenge. (See, e.g., *Tiernan v. Trustees of Cal. State University*

& Colleges (1982) 33 Cal.3d 211, 216, fn. 4 [issue not raised on appeal deemed forfeited or waived]; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177–1178 ["[g]enerally, appellants forfeit or abandon contentions of error regarding the dismissal of a cause of action by failing to raise or address the contentions in their briefs on appeal"]; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 ["[c]ourts will ordinarily treat the appellant's failure to raise an issue in his or her opening brief as a waiver of that challenge"].) And in light of our conclusion that plaintiff's admission was not mistaken or inadvertent, we see no need to address prejudice.

3. The court improperly dismissed Arazm from the case.

Although the court's ruling on Arazm's motion for judgment on the pleadings was largely correct, we conclude the court erred by granting the motion for judgment on the pleadings as to plaintiff's claim for harassment on the basis of sexual orientation and as to Arazm's potential liability under an alter ego theory.

3.1. Standard of Review

"The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer: We treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of fact or law contained therein." (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.) We will not, however, credit the allegations in the complaint where they are contradicted by facts that either are subject to judicial notice or are evident from exhibits attached to the pleading. (*Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1300 (*Hill*).) We review de novo whether a cause of action has been stated as a matter of law.

(*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We do not review the validity of the trial court's reasoning and therefore will affirm its ruling if it was correct on any theory. (*Hill, supra*, at p. 1300.)

"[I]t is an abuse of discretion to grant a motion for judgment on the pleadings without leave to amend ' "if there is any reasonable possibility that the plaintiff can state a good cause of action." ' " (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 260.) The appellant bears the burden of showing abuse of discretion and carries that burden by showing how the complaint can be amended to state a cause of action. (*Ibid*.)

3.2. The court properly granted the motion for judgment on the pleadings to the extent plaintiff's claims require an employee-employer relationship.

We have held the court did not abuse its discretion in denying plaintiff's motion to withdraw his admission that Arazm was his employer. Accordingly, we now consider the impact of that admission in the context of Arazm's motion for judgment on the pleadings. Of the four causes of action included in the operative complaint, three require the existence of an employee-employer relationship between the plaintiff and defendant. We consider them in turn.

3.2.1. The court properly took judicial notice of plaintiff's admission that Arazm was not his employer.

Before ruling on Arazm's motion for judgment on the pleadings, the court took judicial notice of plaintiff's admission

that Arazm was not his employer. It is unclear whether plaintiff meant to challenge that portion of the court's ruling here. We address the point briefly because the court's judgment in favor of Arazm rests in large part upon the court's decision to take judicial notice of plaintiff's admission.

It is well settled that in ruling upon a demurrer or a motion for judgment on the pleadings, "the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.] The courts, however, will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed. [Citations.] Thus, a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless. In this regard the court passing upon the question of the demurrer may look to affidavits filed on behalf of plaintiff, and the plaintiff's answers to interrogatories [citation], as well as to the plaintiff's response to request for admissions. [Citations.]" (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604 (*Del E. Webb Corp.*) [cited with approval in *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 83].)

Here, as already explained, Arazm asked plaintiff to admit that she was not his employer at all pertinent times. He asserted several objections to the request but nevertheless admitted that she was not his employer. In light of the unambiguous nature of the admission, we see no error in the court's decision to take judicial notice of it.

3.2.2. The court previously, and correctly, sustained Arazm's demurrer without leave to amend as to plaintiff's claims for wrongful employment termination and failure to take reasonable steps to prevent harassment.

As we have noted, the court sustained without leave to amend Arazm's demurrer to the second and third causes of action for wrongful employment termination and failure to take reasonable steps to prevent harassment. Primarily, the court based that ruling on plaintiff's concession that Arazm was not a proper defendant as to those causes of action because she was not his employer. With respect to these two causes of action, we see no error in the court's demurrer ruling or in its subsequent and consistent ruling on Arazm's motion for judgment on the pleadings.

California's Fair Employment and Housing Act (FEHA) prohibits employment discrimination on the basis of, among other things, sex or sexual orientation. (Gov. Code, § 12940, subd. (a).) Here, in his second cause of action, plaintiff alleged he was discriminated against and ultimately his employment was terminated because he is a gay man. Arazm asserted below, as she does here, that she is not a proper defendant on these claims because she was not plaintiff's employer. We agree.

By its own terms, Government Code section 12940, subdivision (a), only prohibits discrimination by "an employer." Interpreting this provision, our Supreme Court has held that individual supervisory employees who do not qualify as "employers" within the meaning of Government Code section 12926, subdivision (d), may not be sued under FEHA for alleged discriminatory acts. (See *Reno v. Baird* (1998) 18 Cal.4th 640,

644 ["FEHA, however, prohibits only 'an employer' from engaging in improper discrimination"]; *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1160.) Plaintiff's admission that Arazm was not his employer and his allegation in the operative complaint that Arazm was a "supervisory employee" are therefore fatal to his claim for workplace discrimination against Arazm.

FEHA also prohibits workplace harassment on the basis of sex or sexual orientation and subjects employers to liability for the failure to take all reasonable steps to prevent unlawful harassment from occurring. (Gov. Code, § 12940, subd. (k).) Plaintiff alleged in his third cause of action that he was harassed in the workplace because he is a gay man and that defendants failed to take reasonable steps to prevent that harassment. Government Code section 12940, subdivision (k), applies to "an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment … ." Arazm, as a supervisory employee who is not plaintiff's employer, cannot be sued personally under this subdivision. (See, e.g., *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1326 ["[A] supervisory employee owes no duty to his or her subordinates to prevent sexual harassment in the workplace. That is a duty owed only by the employer"]; *Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [stressing that "[a]n *employer* is required to 'take all reasonable steps to prevent harassment from occurring,' and the failure to do so is itself unlawful," emphasis added].)

3.2.3. Under former Labor Code section 1102.5, only an employer may be held liable for retaliation.

Although plaintiff does not challenge the judgment in favor of Arazm on his fourth cause of action for retaliation under Labor Code section 1102.5, subdivision (c), we address the issue briefly because the court initially found (in its ruling on Arazm's demurrer) that the claim was viable, but later ruled (in connection with the motion for judgment on the pleadings) that it was not. We agree the claim is barred under former Labor Code section 1102.5 (Stats. 2003, ch. 484, § 2).

To establish a prima facie case of retaliation, a plaintiff must show (1) he engaged in a protected activity, (2) he was subject to an adverse employment action, and (3) there is a causal link between the two. (See, e.g., *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384.) With respect to the second element, the current version of Labor Code section 1102.5, subdivision (c), prohibits retaliation by "[a]n employer, or any person acting on behalf of the employer." Applying this version of the statute, the court overruled Arazm's demurrer, notwithstanding plaintiff's concession that Aram was not his employer, because the statute does not preclude liability against Arazm: As a "supervisory employee," Arazm could be individually liable for retaliation against plaintiff.

Arazm explained in her motion for judgment on the pleadings, as she does on appeal, why the court's demurrer ruling was erroneous. Although the current version of Labor Code section 1102.5, subdivision (c), imposes liability on "[a]n employer, or any person acting on behalf of the employer," the version of the statute in effect at the time of the alleged

retaliation, which occurred between 2006 and 2011, only applied to employers.[5] We agree with Arazm's analysis.

Generally, statutes operate prospectively unless the Legislature plainly indicates that it intends for a particular statute to operate retroactively. (See *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209 [noting "in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application"]; *People v. Brown* (2012) 54 Cal.4th 314, 319.) We see no indication in either the text of the bill (Sen. Bill No. 496 (2013-2014 Reg. Sess.)) or in the legislative history that the Legislature intended that the amended statute apply retroactively. Accordingly, plaintiff's cause of action for retaliation against Arazm fails as a matter of law.

3.3. The court erred in dismissing plaintiff's claim for harassment against Arazm.

Plaintiff also contends the court erred by dismissing his first cause of action for harassment against Arazm. We agree.

Government Code section 12940, subdivision (j)(1), makes it an unlawful employment practice to harass an employee because of sex or sexual orientation. This prohibition is not limited to employers; it also makes employees such as Arazm

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[5] The former version of section 1102.5, subdivision (c), provided: "An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." (Stats. 2003, ch. 484, § 2, amended by Stats. 2013, ch. 781, § 4.1.)

personally liable for harassment. (Gov. Code, § 12940, subd. (j)(3).) However, a plaintiff suing for violations of FEHA ordinarily cannot recover for acts occurring more than one year before the filing of the complaint with the Department of Fair Housing and Employment. (Gov. Code, § 12960, subd. (d); *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1400.)

In her motion for judgment on the pleadings, Arazm asserted plaintiff failed to allege with particularity that any harassment occurred within the one-year limitations period. Specifically, she noted plaintiff filed his complaint with the Department of Fair Employment and Housing on July 20, 2012 and therefore could only recover for harassment that occurred on or after July 20, 2011. Relying on plaintiff's deposition testimony, in which plaintiff agreed he had not seen Arazm in the office after May 2011, Arazm argued plaintiff could not prove any harassment occurred on or after July 20, 2011. In response, plaintiff argued the limitations period was tolled during the time he pursued internal complaints. It appears the court took judicial notice of plaintiff's deposition testimony and granted the motion for judgment on the pleadings because plaintiff failed to include any allegations relating to the internal complaint process in the operative complaint.

On appeal, Arazm asserts three arguments in support of the court's ruling in her favor. First, she argues, as she did below, that plaintiff did not specify in the complaint that Arazm's alleged harassment occurred during the one year limitations period—i.e., on or after July 20, 2011. She explains plaintiff "cannot allege Arazm harassed him on July 20, 2011 or after because he admitted that the last time he saw Arazm was *May*

2011—at least two months prior to the relevant time period." According to Arazm, plaintiff's claim is therefore plainly time-barred.

Arazm's analysis relies upon an excerpt from plaintiff's deposition testimony: "Q: When is the last occasion that you observed Ms. Arazm in the Dolce companies' offices? A: That was in May when she came into my office. That's the last time I saw her. Q: In May 2011? A: Yes." Although as we have said, a court considering a demurrer or motion for judgment on the pleadings may take judicial notice of certain discovery responses that directly conflict with the complaint, taking judicial notice of deposition excerpts is another matter. "The court will take judicial notice of records such as admissions, answers to interrogatories, affidavits, and the like, when considering a demurrer, only where they contain statements of the plaintiff or his agent which are inconsistent with the allegations of the pleading before the court. The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of affidavits, declarations, depositions, and other such material which was filed on behalf of the adverse party and which purports to contradict the allegations and contentions of the plaintiff. [Citation.]" (*Del E. Webb Corp.*, *supra*, 123 Cal.App.3d at pp. 604–605.)

There is some difference of opinion regarding the propriety of taking judicial notice of deposition testimony in the context of a demurrer. (Compare *Silguero v Creteguard, Inc.* (2010) 187 Cal.App.4th 60, 65 [denying request for judicial notice of deposition testimony on review of demurrer ruling] and *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375, fn. 1 [declining request for judicial notice but stating "we are not

prepared to say that a court on a demurrer can never accept the truth of statements in a deposition"].) We need not address that question here, however, because even assuming the testimony is a proper subject of judicial notice, it does not conclusively establish that plaintiff's claim is time-barred. In the cited portion of the deposition, plaintiff stated only that he never saw Arazm *in the office*—a fact that would not preclude a finding that harassment occurred by some other means, such as through emails, telephone calls, video conferences or correspondence, or in some location other than the corporate office.

Arazm's second argument is that plaintiff failed to specify Arazm's involvement in the harassment he alleges. We disagree. The complaint alleges, for example: "Defendants, and each of them, including Arazm, regularly and continuously made offensive and derogatory references, comments and epithets which ridiculed and demeaned homosexuality in Plaintiff's presence. Such references and comments include by way of example and not by way of limitation: 'Faggot,' 'Fag,' 'Fucking Fag,' 'Homo,' and 'Cock Sucker,' and 'None of you fags can ever do anything right.' "

We also reject Arazm's third and final argument that plaintiff does not allege Arazm harassed him *because of* his sexual orientation. (See *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 280 [emphasizing the essence of a sexual harassment claim is disparate treatment *on the basis of sex*, not mere discussion of sex or use of vulgar language].) Given the nature of the terms allegedly used by Arazm, it is reasonable to infer the harassment in this case, if it occurred, was related to the fact that plaintiff is a gay man. (See *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 589–590

[holding use of similar epithets constituted sexual orientation harassment].)

3.4. Alter Ego

Although plaintiff's admission that Arazm was not his employer precludes direct liability for most of plaintiff's claims, Arazm may still be held personally liable for the acts of the corporate defendants based on an alter ego theory.

" 'Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citations.]' [Citation.] '[T]he corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require.' [Citation.] Before a corporation's obligations can be recognized as those of a particular person, the requisite unity of interest and inequitable result must be shown. [Citation.] These factors comprise the elements that must be present for liability as an alter ego." (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 411 (*Leek*).)

In this case, the court concluded plaintiff failed to allege his alter ego theory with sufficient particularity. The court erred.

With respect to the first element, unity of interest, relevant factors include commingling of personal and corporate funds and assets, diversion of corporate assets or funds to personal use, treatment of corporate assets as personal assets, sole ownership of the corporation by one individual, absence of corporate assets, gross undercapitalization, and disregard of corporate formalities. (*Leek, supra*, 194 Cal.App.4th at pp. 417–418.) " 'No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied.' [Citation.]" (*Shaoxing County Huayue Import &*

Export v. Bhaumik (2011) 191 Cal.App.4th 1189, 1198 (*Shaoxing*).) Here, the operative complaint alleges Arazm and the other individual defendants, "dominated, influenced and controlled" the corporate defendants and their business, property and affairs. In addition, plaintiff alleges a unity of interest between the individual and corporate defendants and that the corporate defendants were "mere shell[s]" used by the individual defendants to conduct their personal business affairs. Arazm responds that these allegations are legal conclusions, not facts. We disagree, inasmuch as other courts have held that virtually identical allegations are sufficient at the pleading stage. (See *First Western Bank & Trust Co. v. Bookasta* (1968) 267 Cal.App.2d 910, 915–916; see also *Shaoxing, supra*, 191 Cal.App.4th at pp. 1193–1194, 1198.) Further, plaintiffs are "required to allege only 'ultimate rather than evidentiary facts.' " (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 236 [finding similar alter ego allegations sufficient to survive demurrer].)

Moreover, even if the operative complaint is deficient as currently composed, plaintiff's opposition to the motion for judgment on the pleadings demonstrated that the complaint could be amended to state additional facts regarding the alter ego theory. Specifically, plaintiff asserted he had personal knowledge of facts sufficient to establish that Arazm comingled her personal assets with corporate assets, used corporate office space, attorneys and employees for personal business affairs, and failed to observe any corporate formalities.

As to the second element of his alter ego theory, plaintiff alleges that recognizing the separate existence of the corporate defendants would sanction fraud and promote injustice. In

addition, plaintiff asserted in his opposition to the motion for judgment on the pleadings that Arazm looted the bank accounts of the corporate defendants, leaving those entities without funds to pay its creditors and to satisfy any judgment plaintiff might receive in this case. At a minimum, the court abused its discretion by not allowing plaintiff to amend his complaint to include these additional allegations, which are more than sufficient to state an alter ego theory of liability against Arazm.

To provide guidance to the court on remand, we note that the essence of the alter ego doctrine is not that the individual *becomes* the corporation; rather, the individual *is liable* for the actions of the corporation. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300–301.) " 'An alter ego defendant has no separate primary liability to the plaintiff. Rather, plaintiff's claim against the alter ego defendant is identical with that claimed by plaintiff against the already-named defendant. [¶] A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice. [Citations.]' [Citation.]" (*Shaoxing, supra,* 191 Cal.App.4th at p. 1198.*)*

In short, plaintiff pled sufficient facts to hold Arazm liable for the obligations of the corporate defendants—including any judgment subsequently entered in his favor in the present case.

DISPOSITION

The judgment of dismissal is reversed and the cause is remanded to the superior court with directions to vacate its order granting Arazm's motion for judgment on the pleadings without leave to amend. The court shall enter a new order granting the motion for judgment on the pleadings without leave to amend only as to the second, third, and fourth causes of action for wrongful employment termination (Gov. Code, § 12940, subd. (a)), failure to take reasonable steps to prevent harassment (Gov. Code, § 12940, subd. (k)), and whistleblower retaliation (Lab. Code., § 1102.5, subd. (c)), as to Arazm individually. The court shall deny the motion for judgment on the pleadings as to the first cause of action for harassment (Gov. Code, § 12940, subd. (j)). The court shall also deny the motion for judgment on the pleadings to the extent the causes of action are based on alter ego liability. The court is instructed to conduct further proceedings consistent with this opinion. In the interest of justice, no costs are awarded.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.