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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

SYDELL KAMAU PETTIFORD, Plaintiff and Respondent, v. TELEZONE, et al., Defendants and Respondents.	B227791 (Los Angeles County Super. Ct. No. BC417463)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ernest M. Hiroshige, Judge. Affirmed.

Sydell Kamau Pettiford, in pro per., for Plaintiff and Appellant.

Jackson Lewis, Dean A. Rocco, Sherry L. Swieca and Kevin S. Saman for Defendants and Respondents Telezone, LLC and Irwin Naturals.

Smith & Myers and Thomas Myers for Defendant and Respondent Sha'ron Harris.

Appellant Sydell Kamau Pettiford appeals from the judgment based on the court's order of dismissal entered after the lower court granted respondents Telezone, LLC, Irwin Naturals and Sha'ron Harris' motions for summary judgment. Appellant's filed an action asserting claims for sexual harassment – hostile work environment, wrongful termination based on retaliation, intentional infliction of emotional distress and violation of Labor Code section 1102.5. Appellant, however, failed to file an opposition to respondents' motions, and the lower court granted the motions concluding that respondents' had met their burden to demonstrate that there was no triable issue as to any material fact and that respondents were entitled to a judgment as a matter of law. As we shall explain, the lower court correctly entered judgment for respondents. The uncontroverted evidence in the record shows that appellant was not subjected to severe and pervasive sexual harassment, that he was terminated for a violation of a company policy, that any emotional injury he suffered as a result of his termination or the incidents of alleged harassment was not outrageous and that appellant cannot show a violation of the Labor Code. Consequently, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The Parties

At the time of the events giving rise to appellant's complaint, he worked for Telezone, a company that operated a call center. Telezone's employees conducted telemarketing sales and customer service phone calls for various clients who sold dietary and health supplements. Respondent Irwin Naturals is a company that manufactures dietary and herbal supplements and was a client of Telezone. Telezone also provided customer service for several of Irwin Naturals products. Telezone was a separately-operated company from Irwin Naturals. Telezone also maintained its own files and records. Telezone's management team and supervisors directed the day-to-day business and work of its employees, including appellant. Telezone's management team and human resources personnel interviewed, hired, disciplined and terminated its employees. Telezone also paid its employees' wages out of its own bank accounts.

Telezone hired appellant in October of 2007 to work as an "Outbound Sales Specialist." In the spring of 2009, appellant's immediate supervisor was respondent Sha'ron Harris.

Incidents of Alleged Harassment

On or about May 7 and 8, 2009, appellant complained to Telezone's management that Harris once told him, "If I were not gay, I could see myself with a guy like you."[1] At his deposition, appellant testified that the statement made him feel "awkward," but that he also took the comment as a compliment because it "validates" him as a "great guy and wonderful father." Appellant also testified that he knew Harris was gay and never saw or heard Harris do or say anything that led him believe that she was attracted to men.

At the time he made the complaint about Harris' comment, appellant also informed Telezone's management that, on a separate prior occasion, Harris gave appellant a flyer/invitation for a private party she organized for her birthday. The flyer contained a picture of a semi-nude woman on the front. Based upon conversations with another co-worker who had attended other parties Harris had organized, appellant believed that there would be strippers at the party. Appellant was not upset or offended by the flyer, but rather by the possibility that the mother of his children and former girlfriend (who was a stripper) would perform at the party, which would cause appellant embarrassment. Other than inviting appellant to the party and giving him a flyer, nothing else occurred with Harris that was inappropriate. Appellant did not attend Harris' party.

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[1] Although in his deposition this comment was related as: "If I were not gay, I could see myself with a guy like you;" in appellant's letter to Telezone in which he reported the incident he described the comment thusly—he was having a conversation with Ms. Sharon Harris and during that conversation: "[S]he [Harris] states that you [appellant] know I have to say you even knowing that I am a gay and I guess you could say a virgin I have always wanted to be with a guy like you. The way that you conduct myself [sic] and tend to your children makes me think that I could be with a guy like you…"

Telezone investigated appellant's complaint. Harris admitted making the comment and giving appellant the flyer. Telezone removed appellant from Harris' supervision[2] and appellant was assigned to work for Rochelle McGrew.

Not long after appellant began reporting to McGrew, he complained to Telezone management that McGrew was hugging his coworkers. Appellant did not consider McGrew's conduct to be offensive or sexual in nature, but instead was upset because he thought it showed favoritism. Telezone investigated the complaint, counseled McGrew and reassigned appellant to report to a different supervisor.

Appellant's Termination

During the investigation of appellant's complaint, Harris volunteered information that appellant had been selling "bootlegged" copies of pornographic DVDs at work, at least some of which featured another Telezone employee. Telezone obtained copies of the DVDs that appellant had been selling, and two other Telezone employees confirmed that appellant had sold them the pornographic DVDs at work.

Telezone had previously warned appellant about selling illegally-copied DVDs at work. However, prior to the report from Harris, Telezone had not been aware that appellant was selling pornographic DVDs at work or that the DVDs featured a Telezone employee. During the investigation of the complaint about appellant, on May 18, 2009, Telezone suspended him from work. He was terminated on May 21, 2009. According to Telezone management, it had contemplated firing appellant prior to his making a complaint against Harris, and its decision to fire him was based upon evidence that appellant had sold illicit pornographic DVDs featuring a Telezone employee at the workplace in violation of company policies.

Appellant's Legal Action

In June 2009, appellant filed a complaint[3] of discrimination with the California Department of Fair Employment and Housing ("DFEH") alleging sexual harassment and

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[2] Telezone suspended Harris for distributing the flyer, and at the end of the investigation she was terminated.

wrongful termination against Telezone, Irwin Naturals and Harris. After the DFEH issued him a "right to sue" letter, appellant filed a civil action in the superior court. His complaint alleged causes of action against Telezone, Irwin Naturals and Harris for sexual harassment/hostile work place; and intentional infliction of emotional distress; and against Telezone and Irwin Naturals for wrongful termination and violation of Labor Code section 1102.5, subdivision (c). His claims centered on the three incidents he had reported to Telezone: Harris' comment, Harris' party flyer and McGrew hugging other employees. In his complaint, appellant also alleged that Harris had handed out flyers and invitations to parties she had organized to the staff on a regular basis, and during working hours she discussed the parties and the sex acts that occurred at them. He further alleged that he was terminated because he had complained about the harassment he had experienced at work.

On May 14, 2010, Telezone and Irwin Naturals filed a joint motion for summary judgment, along with their supporting documents, a separate statement of undisputed facts and other evidence including excerpts from appellant's deposition. Harris also filed a motion for summary judgment and supporting documents and evidence. Respondents argue that they were entitled to judgment as a matter of law because: (1) the alleged incidents were not sufficiently offensive, pervasive or based on appellant's gender; (2) Telezone had a legitimate reason to terminate appellant for reasons unrelated to his complaints about harassment; (3) the alleged conduct was not outrageous or shocking and that the emotional distress claims were barred by the worker's compensation laws; (4) that appellants could not show a violation of Labor Code section 1102.5; and (5) Irwin Naturals did not employ him and thus was not liable for appellant's claims in any event.

Appellant did not file any evidence or written opposition, nor did he file an ex parte request to continue the summary judgment hearing. Appellant appeared at the summary judgment hearing on July 28, 2010, and when the court inquired about why he

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[3] At the time appellant filed his complaint he was represented by counsel. His counsel subsequently withdrew and appellant has been representing himself.

had not filed an opposition to the motion, appellant said that he had an opposition but was unable to get it "typed up" and was "confused"; and so he failed to prepare written opposition. The court indicated that because appellant had failed to file a written opposition, he lacked standing to present an oral argument at the hearing. Appellant orally requested the opportunity to submit a belated written opposition, but the court denied the request because appellant did not submit a request or an ex parte application before the hearing. Thereafter, the court considered the merits of the motion, and concluded that respondents had carried their prima facie burden to show that there was no triable issue as to any material fact on appellant's causes of action and that they were entitled to a judgment as a matter of law.

The court entered judgment for respondents on August 11, 2010, and respondents served notice of entry of judgment on August 20, 2010.

On the date judgment was entered, August 11, 2010, appellant filed a motion for reconsideration of the order granting the motions for summary judgment. He filed a proof of service on August 23, 2010, stating that he served his motion by mail on August 20, 2010. Respondents filed an opposition to the motion for reconsideration on the grounds that it was not served timely and otherwise was procedurally and substantively defective. The trial court denied the motion on the procedural grounds but noted it would have failed substantively as well.

Appellant timely filed his notice of appeal from the judgment entered upon the order granting summary judgment.[4]

DISCUSSION

I. Summary Judgment Standard of Review

Summary judgment is appropriate where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a

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[4] Appellant did not appeal from the order denying his motion for reconsideration. Consequently, we do not address the merits of the court's order on the motion.

judgment as a matter of law. . . ." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment meets this burden by presenting evidence demonstrating that one or more elements of the cause of action cannot be established or that there is a complete defense to the action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853–854.) Once the defendant makes this showing, the burden shifts to the plaintiff to show the existence of a triable issue of material fact as to that cause of action or defense. (Code Civ. Proc., § 437c, subd. (p)(2); see *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) To determine whether the parties have met their respective burdens, the appellant court considers "'all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence.'" (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) A plaintiff opposing summary judgment cannot rely upon the mere allegations or denials of its pleadings, but "shall set forth the specific facts" based on admissible evidence showing a triable issue exists. (Code Civ. Proc., § 437c, subd. (p)(2); *Borders Online v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179, 1188.) The opposition papers must include a separate statement responding to each of the material facts the moving party contends to be undisputed, and identifying any other material facts the opposing party contends are disputed. Each material fact must be followed by a reference to supporting evidence. (Code Civ. Proc., § 437c, subd. (b)(3); *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 114 ["Without a separate statement of undisputed facts with references to supporting evidence . . . it is impossible . . . to demonstrate the existence of disputed facts"].) When a moving party makes the required prima facie showing, failure to comply with this requirement may, in the court's discretion, constitute a sufficient ground for granting the motion. (See *Buehler v. Alpha Beta Co*. (1990) 224 Cal.App.3d 729, 734–735; *Oldcastle Precast, Inc. v. Lumbermens Mut. Cas. Co*. (2009) 170 Cal.App.4th 554, 568.) However, the court may not grant the motion unless it first determines that the moving party has met its initial burden of proof. (See *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1086 ["[U]nless the moving party has met its initial burden

of proof, the court does not have discretion under subdivision (b) of section 437c to grant summary judgment based on the opposing party's failure to file a proper separate statement."]; *Kulesa v. Castleberry* (1996) 47 Cal.App.4th 103, 106 [trial court must consider all of the papers submitted before exercising its discretion to grant a summary judgment based on the failure to file an adequate separate statement]; *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 746.)

When the facts are undisputed, the court may grant summary judgment on issues that otherwise could have been submitted to the jury because "[a]n issue of fact becomes one of law and loses its 'triable' character if the undisputed facts leave no room for a reasonable difference of opinion." (*Ostayan v. Serrano Reconveyance Co.* (2000) 77 Cal.App.4th 1411, 1418.) Thus, the defendant is entitled to summary judgment if the record establishes as a matter of law that none of plaintiffs' asserted causes of action can be maintained. (*Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 270.)

On appeal, this court reviews a trial court's grant of summary judgment de novo; we independently evaluate the correctness of the trial court's ruling, applying the same legal standard as the trial court. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th 826, 843-857.) "As a corollary of the de novo review standard, the appellate court may affirm a summary judgment on any correct legal theory, as long as the parties had an adequate opportunity to address the theory in the trial court. [Citation.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 1989) ¶ 8:168.5a, pp. 8-132 to 8-132.1 (rev. #1, 2011).)

Furthermore, because appellant failed to file an opposition to the summary judgment motions below, appellant is limited in this court to challenging the sufficiency of the evidence of respondents' prima facie case. (See *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17 [the question of whether an evidentiary showing was sufficient to support a judgment may be raised for the first time on appeal].) Appellant waived any right to introduce new evidence in opposition to the summary judgment motions, i.e., to show the existence of a triable issue of fact. It is now too late to offer

evidence in opposition to the motions and any right to do so has been waived. (See *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 30 ["The general rule is that 'this court will consider only the facts before the trial court at the time it ruled on the motion' for summary judgment"].) With these principles in mind we turn to the merits.

Appellant argues that the lower court erred in granting the motions for summary judgment because triable issues of fact remained as to all of his causes of action. [5] As we shall explain, we disagree.

II. Appellant and Irwin Naturals do not have the Requisite Employment Relationship to Support Appellant's Claims.

Appellant cannot maintain his claims against Irwin Naturals because he has failed to refute respondents' uncontroverted evidence that he was not employed by Irwin Naturals, and thus cannot seek redress against it for his alleged employment-related injuries or his termination.

Two corporations may be treated as a single employer for purposes of liability under title VII of the federal 1964 Civil Rights Act (42 U.S.C. § 2000e et seq.). (*Morgan v. Safeway Stores, Inc.* (9th Cir. 1989) 884 F.2d 1211, 1213.)[6] An employee who seeks

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[5] We note that in this court appellant does not complain that the lower court erred in failing to allow him to submit an oral opposition to the summary judgment motions or to continue the hearing of the motions for summary judgment. His failure to do so constitutes a waiver of these issues on appeal. (*Lewinter v. Genmar Industries, Inc.* (1994) 26 Cal.App.4th 1214, 1224 [Failure to request a continuance to conduct further discovery before the court rules on the motion waives the right to further discovery]; see *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [issue not raised on appeal may be deemed waived]; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 ["[a]lthough . . . review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in [appellant's] brief"].)

[6] Because California's Fair Employment and Housing Act (FEHA) (Gov. Code., § 12900 et seq.) has the same nature and purpose as the federal law, California courts frequently look to federal case law for guidance in interpreting the FEHA. (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1316-1317.)

to hold a parent corporation liable for the acts or omissions of its subsidiary on the theory that the two corporate entities constitute a single employer has a heavy burden to meet under both California and federal law. Corporate entities are presumed to have separate existences, and the corporate form will be disregarded only when the ends of justice require this result. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 30 [alter ego liability]; *Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1212 [same].) In particular, there is a strong presumption that a parent company is not the employer of its subsidiary's employees. (*Frank v. U.S. West, Inc.* (10th Cir. 1993) 3 F.3d 1357, 1362.)

The federal courts have developed a test, derived from federal labor case law, to determine whether two corporations should be considered a single employer for title VII purposes. Commonly called the "integrated enterprise" test, it has four factors: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control. (*Schweitzer v. Advanced Telemarketing Corp.* (5th Cir. 1997) 104 F.3d 761, 764; *Morgan v. Safeway Stores, Inc*., *supra*, 884 F.2d at p. 1213; *Baker v. Stuart Broadcasting Co.* (8th Cir. 1977) 560 F.2d 389, 391-392.) This test is designed to further Congress's intent that title VII be construed liberally, including its definition of the term "employer." (*Baker v. Stuart Broadcasting Co.*, *supra,* 560 F.2d at pp. 391-392.)

Under this test, common ownership or control alone is never enough to establish parent liability. (*Frank v. U.S. West, Inc.*, *supra*, 3 F.3d at p. 1364.) Although courts consider the four factors together, they often deem centralized control of labor relations the most important. (*Schweitzer v. Advanced Telemarketing Corp*., *supra*, 104 F.3d at p. 764; *Trevino v. Celanese Corp.* (5th Cir. 1983) 701 F.2d 397, 404; see *Frank v. U.S. West, Inc.*, *supra*, 3 F.3d at p. 1363.) "The critical question is, '[w]hat entity made the final decisions regarding employment matters related to the person claiming discrimination?' [Citation.] A parent's broad general policy statements regarding employment matters are not enough to satisfy this prong. [Citation.] To satisfy the

control prong, a parent must control the day-to-day employment decisions of the subsidiary. [Citations.]" (*Frank v. U.S. West, Inc*., *supra*, 3 F.3d at p. 1363.)

To make a sufficient showing of "interrelation of operations" on summary judgment, the plaintiff must do more than merely show that officers of the subsidiary report to the parent corporation or that the parent benefits from the subsidiary's work. Since these facts exist in every parent-subsidiary situation, such a showing would create a triable issue of material fact in every case. What the plaintiff must show, rather, is that the parent has exercised control "to a degree that exceeds the control normally exercised by a parent corporation." (*Frank v. U.S. West, Inc*., *supra*, 3 F.3d at p. 1362.)

In this case, considering all the evidence adduced on summary judgment there is no triable issue of fact under the integrated enterprise test.

First and most important, there was no evidence that Irwin Naturals exercised day-to-day control over Telezone's employment decisions in general or that it exercised any control over Telezone's decisions with respect to appellant. Telezone's showing that it maintains control over its employment decisions is undisputed.

Appellant was hired by Telezone. Telezone presented uncontroverted evidence that it was a separately-operated company from Irwin Naturals. Telezone also maintained its own files, records and its management team and supervisors that directed the day-to-day business and work of its employees, including appellant. Telezone's management team and human resources personnel interviewed, hired, disciplined and terminated its employees, including appellant. Telezone also paid its employees' wages out of its own accounts. Although Telezone shared some common ownership with Irwin Natural and the companies had a professional services arrangement, those facts fail to establish any involvement of Irwin Naturals in Telezone's employment decisions. The mere fact of common ownership, which Telezone has never denied, is insufficient without more. (*Frank v. U.S. West, Inc*., *supra*, 3 F.3d at p. 1364.)

Appellant can point to no evidence that the operations of Irwin Naturals and Telezone were "interrelated"-i.e., that Irwin Naturals exercised greater control over Telezone's operations than that which a parent corporation would normally exercise over

its subsidiary. (*Frank v. U.S. West, Inc., supra,* 3 F.3d at p. 1363.) He did not show, for instance, that Irwin Naturals kept Telezone's books, issued its paychecks, or paid its bills. Nor did he show that the two operations had shared employees (in the sense that any employee of one might be reassigned to the other), headquarters, or office space. Although appellant claimed that his health plan records stated "Irwin Naturals" on them, he did not know whether Telezone or Irwin Naturals paid for the premiums. Even if Irwin Naturals paid those premiums that fact alone is insufficient to create a triable issue of fact as to the interrelation of operations of the two corporations. (See *Sobelman v. Commerce Bancshares, Inc.* (E.D.Mo. 1977) 444 F.Supp. 84, 85.) As already indicated, there is nothing to undermine respondents' evidence that showed that two corporations did not have any degree of common management. Other than appellant's bare assertion that "Klee Irwin speaks on behalf of Telezone" he offered no evidence that anyone served as a manager of both corporations.

In light of the foregoing, appellant's claims against Irwin Naturals fail as a matter of law, and the court properly granted Irwin Natural's motion for summary judgment.

III. Sexual Harassment Cause of Action

Courts have recognized two forms of sex-based workplace harassment under the FEHA (Gov.Code, § 12940, subd. (j)(1)) and Title VII (42 U.S.C. § 2000e et seq.): One is a demand for sexual favors in return for a job benefit; this is known as "quid pro quo harassment." (*Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 752. *Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 160 (*Sheffield*), citing *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57.) The other is sexually harassing conduct that, although not resulting in the loss of or denial of any job benefit, is so "severe or pervasive" as to create a hostile work environment. (*Sheffield, supra,* 109 Cal.App.4th at pp. 160-161.)

Here appellant claims he was subject to a hostile work environment, rather than quid pro quo harassment. In *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 278 (*Lyle*), the California Supreme Court reviewed a hostile work environment sexual harassment case and explained, "[a]ccording to regulations

interpreting and implementing the FEHA, the prohibition against discrimination in employment because of sex is intended to guarantee that members of both sexes will enjoy equal employment benefits. (Cal.Code Regs., tit. 2, § 7290.6, subd. (b).)" (*Ibid*.) "[T]o prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. As the high court explained, a workplace may give rise to liability when it is permeated with discriminatory [sex-based] intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment[.]" (*Lyle*, *supra*, 38 Cal.4th at pp. 278-279.)

Under both federal Title VII and the FEHA, a hostile work environment sexual harassment claim requires a plaintiff employee to show he or she was subjected to sexual advances, conduct, or comments that were "(1) unwelcome [citation]; (2) because of sex [citation]; and (3) sufficiently severe or pervasive to alter the conditions of her [or his] employment and create an abusive work environment [citations]." In addition, the plaintiff must establish the offending conduct was imputable to her employer." (*Lyle*, *supra*, 38 Cal.4th at p. 279.) "To plead a cause of action for [hostile work environment] sexual harassment, it is only necessary to show that gender is a substantial factor in the discrimination," and that if the plaintiff had been a member of the opposite sex he or she would not have been treated in the same manner. Accordingly, it is the disparate treatment of an employee on the basis of sex – not the mere discussion of sex or use of vulgar language-that is the essence of a sexual harassment claim. (*Id*. at p. 280, internal quotation marks and citations omitted.)

"Whether the sexual conduct complained of is sufficiently *pervasive* to create a hostile or offensive work environment must be determined from the totality of the circumstances. . . ," and "[t]he factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of

the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609, 610 (*Fisher*).) "With respect to the pervasiveness of harassment, courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature. [Citations.] That is, when the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions." (*Lyle*, *supra*, 38 Cal.4th at pp. 283-284.)

When the *severity* of harassment is at issue """[t]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."""" (*Lyle*, *supra*, 38 Cal.4th at p. 283.) Our Supreme Court has observed that although a single incident of severe harassment may be sufficient to establish liability by an employer for sexual harassment, a review of the cases they cite reveals that such a single incident must be severe in the extreme and generally must include either physical violence or the threat thereof. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1043; see *Brooks v. City of San Mateo* (2000) 229 F.3d 917, 921 [affirming a summary judgment in favor of the defendant where the alleged harassment consisted of the plaintiff's supervisor forcing his hand under her sweater and bra to fondle her bare breast]; *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 877-878 [dictum: a single incident of forcible rape might be sufficiently severe to create a hostile working environment]; *Department of Corrections v. State Personnel Bd.* (1997) 59 Cal.App.4th 131, 134, 156 [hostile work environment liability may exist for a single incident of rape, but no such liability attached for single

incident in which corrections officer used profane language and shook a female Hispanic fellow officer by her collar to emphasize his point]; *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1042 [plaintiff permitted to proceed on hostile work environment harassment claim based on allegations he was drugged and gang-raped]; *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903 [summary judgment in favor of defendant reversed where the plaintiff's hostile work environment claim was based on a rape]; *Vance v. Southern Pacific Tel. and Tel. Co.* (11th Cir. 1989) 863 F.2d 1503, 1510, abrogated on other grounds by *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 20 [actionable race-based harassment included two incidents where a noose was hung over African American employee's work station]; *King v. Board of Regents of Univ. of Wis. System* (7th Cir. 1990) 898 F.2d 533, 537 ["Although a single act can be enough [citation] generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident"].)

Furthermore, "[t]o be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' [Citations.] That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle*, *supra*, 38 Cal.4th at p. 284.) "[A] hostile work environment sexual harassment claim is not established where a supervisor or co-worker simply uses crude or inappropriate language in front of employees or draws a vulgar picture, without directing sexual innuendos or gender-related language toward a plaintiff or toward women in general." (*Id.* at p. 282.) "FEHA's prohibitions are not a 'civility code' and are not designed to rid the workplace of vulgarity. [Citations.] To be actionable, the conduct must be extreme, but there is no requirement that the employee endure sexual harassment

until his or her psychological well-being is so spent that the employee requires psychiatric assistance." (*Sheffield, supra*, 109 Cal.App.4th at pp. 161-162.)

Finally, a plaintiff may be a victim of sexually harassing conduct, even though it is not directed at him or her and instead is aimed at others in the workplace, but the absence of direct harassment affects the showing the plaintiff must make. "[S]exual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. (See *Gleason v. Mesirow Financial Inc.* (7th Cir.1997) 118 F.3d 1134, 1144 ['the impact of "second-hand harassment" is obviously not as great as the impact of harassment directed at the plaintiff']; *Black v. Zaring Homes, Inc*. (6th Cir.1997) 104 F.3d 822, 826 [fact that most comments were not directed at the plaintiff weakened her harassment claim]; [citation].) A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.'" (*Lyle, supra*, 38 Cal.4th at p. 28) With these principles in mind, we turn to the circumstances of this case.

Here appellant claims that the lower court erred in granting summary judgment because issues of fact remain as to whether the conduct he alleged constitutes sexual harassment. We disagree. The uncontroverted evidence presented in support of the respondents' motions demonstrates otherwise. Appellant pled that Harris had handed out flyers and invitations to parties she had organized on a regular basis in the work place, and that during working hours she and other co-workers discussed the parties and the sex acts that occurred at them. However, during his deposition appellant could identify only one situation in which he was given an invitation to one of Harris' parties and only one instance in which Harris made a comment to appellant remarking that if she were not gay she would be interested in a person like him. These are the only instances of alleged harassment that appellant could identify with any particularity directed at him; and he conceded that he was not offended by either of them. The comment made him feel

awkward, yet he took it as a compliment. The invitation to the party concerned him not because of its sexual nature, but instead because he feared that the mother of his children might be at the party which would embarrass him. These isolated instances of alleged harassment are not sufficiently severe or pervasive enough to support a claim for sexual harassment.[7]

Likewise the other incident presented in this case was not directed at appellant. It involved appellant's supervisor hugging co-workers. As with the other incidents asserted, appellant was not offended by the hugging incidents, but complained about them because he thought they showed favoritism. As upsetting as these incidents may have been to appellant, he has brought forward no analogous authority in which similarly sporadic comments and conduct gave rise to an actionable sexual harassment claim. While we do not condone appellant's supervisors' behavior, appellant failed to present evidence of acts sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. The lower court properly concluded that respondents carried their prima facie burden to prove that appellant's sexual harassment claim failed as a matter of law.[8]

III. Wrongful Termination Based on Retaliation

Appellant alleged that he was terminated because he complained about workplace harassment on violation of the FEHA (Gov. Code) and Labor Code section 1102.5. As

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[7] We reach this conclusion even if were we to view the Harris'comment--as appellant maintains--to include the reference to Harris' virginity. Even assuming the comment is as appellant described it in his letter of complaint to Telezone, it is an isolated remark which, standing alone, is not sufficient to support an actionable claim of sexual harassment.

[8] In reaching this conclusion we reject appellant's claim that the lower court's order violated Evidence Code section 783, providing the procedures to be used when evidence of a plaintiff's sexual conduct is used to attack the plaintiff's credibility in civil actions. Appellant fails to explain or support his reference to Evidence Code section 783, and in any event any reliance upon this section is misplaced because respondents did not use evidence of appellant's sexual conduct to attack his credibility in connection with their motions for summary judgment.

we shall explain, Telezone has demonstrated that no triable issue of fact remains as to this claim and it is entitled to judgment as a matter of law.

A. FEHA Retaliation Claim

"Under the FEHA, it is unlawful '[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [the FEHA] or because the person has filed a complaint . . . under this [Act].' (Gov. Code, § 12940, subd. (h); *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453 (*Akers*); see *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1036.)

A plaintiff may prove retaliation by circumstantial evidence. To do so, the plaintiff is required to first establish a prima facie case of retaliation. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384 (*Patten*); see also *Akers, supra*, 95 Cal.App.4th at p. 1453.) To establish a prima facie case of retaliation "a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten, supra*, 134 Cal.App.4th at p. 1384.) Once established, the defendant must counter with evidence of a legitimate, nonretaliatory explanation for its acts. If the employer meets its burden to offer a legitimate, nondiscriminatory reason for the adverse employment action, the burden then shifts back to the plaintiff to prove the employer's proffered reasons for termination are pretextual. (See *Morgan v. Regents of the University of California* (2000) 88 Cal.App.4th 52, 68.) "'[T]he plaintiff may establish pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."'" (*Id.* at p. 68.)

Telezone concedes that appellant suffered an adverse employment action—he was terminated; that he was engaged in a protected activity—he complained to his employer about the sexual harassment; and that the termination came not long after appellant complained about Harris' conduct, which suggests the causal link. Such circumstances satisfy appellant's prima facie burden. However, Telezone brought forward evidence of a

legitimate, nonretaliatory explanation for its acts – appellant was fired for distributing pornographic DVDs at work. Telezone also presented evidence that appellant had previously been counseled about unauthorized distribution of DVDs months before his termination.

Nonetheless, appellant produced no evidence indicating Telezone's proffered explanation was false. In this court appellant continues to reference the fact that he was fired close in time to his complaint, arguing that it raises a dispute as to Telezone's true motivation. Not so. Because the employee's burden of establishing a prima facie case of retaliation is fairly minimal, the temporal proximity between an employee's protected activity and a subsequent termination may satisfy the causation requirement at the first step of the burden-shifting process. (*See Smith v. Allen Health Systems, Inc*. (8th Cir.2002) 302 F.3d 827, 832-833; *Morgan v. Regents of University of California, supra*, 88 Cal.App.4th at p. 69.) But temporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination. (See *Smith v. Allen Health Systems, Inc., supra*, 302 F.3d at pp. 833-834; *Annett v. University of Kansas* (10th Cir. 2004) 371 F.3d 1233,1241; *Sprenger v. Federal Home Loan Bank of Des Moines* (8th Cir.2001) 253 F.3d 1106, 1113-1114.) This is especially so where the employer raised questions about the employee's performance before the employee complained, and the subsequent termination was based on those performance issues. (See *Smith v. Allen Health Systems, Inc., supra*, 302 F.3d at p. 834; *Strong v. University Healthcare System, L.L.C.* (5th Cir.2007) 482 F.3d 802, 808; *Arraleh v. County of Ramsey* (8th Cir.2006) 461 F.3d 967, 977-978; *Smith v. Ashland, Inc.* (8th Cir.2001) 250 F.3d 1167, 1173-1174.) It follows that temporal proximity, by itself, does not support a finding of pretext here. "Standing alone against Defendant's strongly supported legitimate reason for terminating [Plaintiff], temporal proximity does not amount to more than a scintilla of evidence of [discrimination]." (*Padron v. BellSouth Telecommunications, Inc.* (S.D.Fla.2002) 196 F.Supp.2d 1250, 1257, affd. mem. (11th Cir.2003) 62 Fed.Appx. 317.)

This is not to say that temporal proximity is never relevant in the final step of the retaliation test. In the classic situation where temporal proximity is a factor, an employee has worked for the same employer for several years, has a good or excellent performance record, and then, after engaging in some type of protected activity is suddenly accused of serious performance problems, subjected to derogatory comments about the protected activity, and terminated. In those circumstances, temporal proximity, together with the other evidence, may be sufficient to establish pretext. (See, e.g., *Shirley v. Chrysler First, Inc.* (5th Cir.1992) 970 F.2d 39, 42-44; *Moss v. Bluecross, Blue Shield of Kansas, Inc.* (D.Kan.2008) 534 F.Supp.2d 1190, 1202-1204.) But that is not this case.

B. Labor Code Section 1102.5

Also in connection with his wrongful termination cause of action, appellant alleged that his termination violated Labor Code section 1102.5.[9] Under Labor Code section 1102.5, subdivision (b), an employer may not 'retaliate against an employee for disclosing information to a government . . . agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute. . . .'" (*Akers v. County of San Diego*, *supra*, 95 Cal.App.4th at p. 1453; see *Yanowitz v. L'Oreal USA, Inc*., *supra*, 36 Cal.4th at p. 1036.) An employee engages in protected activity as "whistle blower" (under Labor Code 1102.5) when she discloses to a governmental

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[9] Labor Code section 1102.5 provides: "(a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

"(b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

"(c) 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."

agency "'reasonably based suspicions' of illegal activity." (*Green v. Ralee Engineering Co*. (1998) 19 Cal.4th 66, 86-87.) Telezone contends appellant cannot establish a prima facie case of retaliation under Labor Code section 1102.5, subdivision (b) because he has neither pled nor is there any evidence to indicate that appellant was retaliated against for complaining to any *government entity* about any of the alleged harassment or violation of the law. Telezone is correct. Appellant has no evidence that he was a "whistle blower" who was terminated because he reported illegal conduct to the authorities. Appellant complained only to his employer.

In view of the foregoing, we conclude that the lower court properly granted summary judgment for Telezone on appellant's retaliation claim.

IV. Intentional Infliction of Emotional Distress:

A cause of action for intentional infliction of emotional distress exists when there is "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Potter v. Firestone Tire & Rubber Co*. (1993) 6 Cal.4th 965, 1001; see *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) A defendant's conduct is "outrageous" when it is so extreme as to exceed all bounds of that usually tolerated in a civilized community. (*Potter*, *supra*, 6 Cal.4th at p. 1001.) And the defendant's conduct must be """intended to inflict injury or engaged in with the realization that injury will result."""" (*Ibid*.)

Liability for intentional infliction of emotional distress "'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' (Rest.2d Torts, § 46, com. d.)" (*Molko v. Holy Spirit Assn*. (1988) 46 Cal.3d 1092, 1122, overruled on another ground in *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th 826, 853, fn. 19; see *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 809 [anonymous e-mails graphically threatening physical harm insufficient]; see *Kiseskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, 229-230 [threats of harm or death to plaintiff and his family for failure to sign new union agreement

sufficiently "outrageous"].) If properly pled, a claim of sexual harassment can establish "the outrageous behavior element of a cause of action for intentional infliction of emotional distress." (*Fisher v. San Pedro Peninsula Hospital, supra,* 214 Cal.App.3d at p. 618.) With respect to the requirement that the plaintiff show severe emotional distress, the courts have set a high bar. "Severe emotional distress means '"emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it."'" (*Potter v. Firestone Tire & Rubber Co., supra,* 6 Cal.4th at p. 1004.)

Viewing all of the evidence in the record, appellant has failed to establish two of the three elements of a cause of action for intentional infliction of emotional distress: either extreme or outrageous conduct by respondents, or that he suffered severe or extreme emotional distress. Harris' comment, the party invitation and the hugging incidents fall far short of conduct that is so "outrageous" that it '"'exceed[s] all bounds of that usually tolerated in a civilized community."'" (*Potter v. Firestone Tire & Rubber Co., supra,* 6 Cal.4th at p. 1001.) In addition, appellant's assertions that he has suffered severe anguish, humiliation, embarrassment, nervousness, tension, anxiety and depression, and grief as a result of respondents' conduct do not comprise '"'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it."'" (*Id.* at p. 1004.)[10]

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10 To the extent appellant claims emotional distress from his termination, his claim is barred because we concluded that appellant was terminated for violating a company policy (by distributing the pornographic DVDs) and he failed to raise a triable issue of fact that this was a pretext for retaliation for reporting sexual harassment. Under such circumstances, Telezone's conduct in terminating appellant was not outrageous nor was it unlawful discrimination that would take this case out of the exclusivity of workers' compensation as a remedy for emotional distress occurring in normal employment relations. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 19–20 [The California Supreme Court has held that "injuries arising from termination of employment ordinarily arise out of and occur in the course of the employment" and are thus generally subject to the exclusive remedy provisions of the Workers' Compensation Act].)

In sum, appellant has failed to demonstrate that there is any triable issue of material fact as to appellant's emotional distress claim. The court's order on this issue was proper.

V. Labor Code Section 1102.5, Subdivision (c)

Appellant alleged a separate cause of action asserting that respondents violated Labor Code section 1102.5, subdivision (c), which provides that: "[a]n 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." An employee who alleges that he or she was terminated in retaliation for refusing to engage in unlawful conduct states a valid cause of action for wrongful termination of employment in violation of public policy. The following cases are illustrative: *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 178, [sales representative's refusal to participate in illegal price-fixing scheme]; *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1180 [in-house counsel's refusal to violate professional rules of conduct for attorneys]; *Petermann v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 396* (1959) 174 Cal.App.2d 184 [refusal of union business agent to lie to legislative committee]; *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 510, 513 [forced resignation based on refusal to violate regulations of Bureau of Alcohol, Tobacco and Firearms]; *Blom v. N.G.K. Spark Plugs* (U.S.A.) (1992) 3 Cal.App.4th 382, 388 [refusal to engage in unlawful employment discrimination].

Here other than claiming that he worked in an environment in which he was subjected to sexual harassment and was terminated after reporting it, appellant has not identified any evidence supporting a claim that he was retaliated against because he "refused to participate in an activity that would result in a violation" of state or federal law. Labor Code section 1102.5, subdivision (c) affords him no protection. (See *Pugh v. See's Candies* (1981) 116 Cal.App.3d 311, 322 [employee's claim dismissed, in part, where he presented no evidence of refusing to participate in unlawful union negotiations].)

In view of all of the foregoing, we conclude that the lower court properly granted respondents summary judgment on appellant's claims.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**