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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

GEORGINA HUSKEY, Plaintiff and Appellant, v. CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, Defendant and Respondent.	B271837 (Los Angeles County Super. Ct. No. BC571277)

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

Law Offices of R. Ross Jacinto, R. Ross Jacinto; Benedon & Serlin, Gerald M. Serlin, Melinda W. Ebelhar for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Chris A. Knudsen, Assistant Attorney General, Celine M. Cooper and Darren Glen Shaffer, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Georgina Huskey appeals from a summary judgment entered in favor of her former employer, respondent California Department of Social Services (Department). Huskey, a supervisor in the Department's north branch office in Los Angeles, filed suit alleging she was subjected to sexually harassing conduct by her subordinate, Dr. Emery Jakab, which was so severe and pervasive as to create a hostile work environment. Her first amended complaint sought damages for sexual harassment; failure to stop harassment; and failure to prevent harassment, discrimination and retaliation under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).[1] The trial court granted the Department's motion for summary judgment, ruling Huskey could not establish a sexual harassment claim as matter of law because her evidence was insufficient to establish Jakab's harassing conduct towards her was severe when viewed from the perspective of a reasonable person in her position. We agree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2011, Huskey was the supervisor of medical consultants for the Department's north branch office in Los Angeles, including Jakab, the alleged harasser. Ester Rojas was the branch chief of the Department and responsible for the safety of everyone at the branch. During this time, the Department had a written policy to prevent sexual harassment, which required supervisors and employees to attend sexual harassment prevention training every two years. Huskey attended sexual harassment prevention training every year and sought to make sure the employees under her supervision also attended training. Huskey knew how to document sexual harassment incidents.

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[1] All further statutory references are to the Government Code unless otherwise indicated.

According to Huskey, Jakab got along with men better than women in the office. She claims verbal harassment from Jakab towards her and others at the branch occurred at least twice a week. He yelled and was demanding towards the women but not to the men. He called women "idiots" and stated "they couldn't do their job" and "who are they to question his medical knowledge." He also referred to several women at the workplace as "bitches." As many as 10 times, Jakab asked Huskey to go to lunch. He persisted in these requests, even after Huskey told him, "What part of 'no' don't you understand?" Jakab once referred to Huskey in an e-mail as a "page girl"; on another occasion he touched her hair without her consent. He acted like she was his secretary, and he treated her like "a low life."

In March 2012, Huskey felt Jakab's conduct towards her "crossed the line" and was what she perceived to be "sexually" harassing. In that incident, Jakab made what Huskey considered to be an "inappropriate" and "offensive" comment to her about her hair,[2] and attempted to touch her hair and face, while sitting at eye level with his legs wide apart (manspreading) on a table about five feet from her cubicle. That same month, Huskey contacted the Department's equal employment opportunity (EEO) office and reported the incident. The Department's EEO office response to Huskey was that she should "toughen up." On at least two other occasions, Jakab came to Huskey's cubicle and was manspreading, even after she directed him not to. Huskey complained to Rojas a couple of times that Jakab's manspreading was sexual in nature and that it made her uncomfortable.

In February 2013, Jakab's conduct towards Huskey "crossed the line" a second time with what was she perceived to be "sexually" harassing conduct

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[2] Huskey claims that Jakab specifically stated to her: "You know Georgina [Huskey] you look so much better with your hair down like that. You should wear it more often."

when he attempted to hug her and hold her hand. Jakab came to her cubicle and spoke to her in a whisper and asked her to "come closer," while attempting to hold her hand. Huskey told Jakab, "No touching." Jakab also told her that he was in his "prime" and "[a]ll that really matters [was] that Nancy [his significant other] thinks so." Later in the day, after Huskey told Jakab "no touching," he said, "I know that this may be construed as 'sexual harassment' but I am going to ask for a hug from you anyway." He then approached her twice looking for a hug, saying, "Come on let me give you a hug." Huskey twice responded loudly, "No hugging, please."

On February 20, 2013, Huskey reported this incident to the Department's EEO office. The Department promptly began an investigation of Jakab's conduct.

In October 2013, the Department completed its investigation of the February incident and concluded that Jakab "on more than one occasion, made inappropriate comments to [Huskey] and attempted to touch her inappropriately. . . . It is more likely than not that his repeated attempts to have physical contact with [Huskey], even though he was advised not to touch her, was done for the purpose of harassing [Huskey]."

In December 2013, the Department initiated action to terminate Jakab's employment; in February 2014, Jakab signed a letter of resignation with the effective date of December 18, 2013.

On February 7, 2014, Huskey filed an administrative complaint with the Department of Fair Employment and Housing (DFEH), alleging sexual harassment and failure to stop/prevent harassment. That same date, she received a "right-to-sue" letter from the DFEH. On December 31, 2014, Huskey retired from the Department.

On February 3, 2015, Huskey filed a complaint against the Department and others in the Los Angeles Superior Court. In lieu of responding to the demurrer to the complaint, Huskey filed a first amended complaint alleging causes of action for: (1) unlawful sex/gender harassment in violation of FEHA against defendant employer (sexual harassment), (2) failure to take immediate appropriate action to stop unlawful harassment (failure to stop harassment) and (3) failure to do everything reasonably necessary to prevent discrimination, harassment and retaliation from occurring in violation of FEHA (failure to prevent harassment). Huskey sought damages for "work-place harassment and disruption by [Jakab]" which she alleged "had become a daily occurrence."

On September 25, 2015, the Department filed a motion for summary judgment, arguing (1) Huskey "cannot prove that Jakab's alleged conduct [was] based on gender and objectively severe and pervasive as a matter of law"; (2) the March 2012 incident was time-barred and should not be considered by the trial court; and (3) Huskey's third cause of action for failure to prevent harassment failed because "there [was] no evidence that Huskey suffered an adverse employment action."

On January 11, 2016, the trial court granted the Department's motion for summary judgment, ruling that although "a reasonable factfinder could conclude that [Jakab's] conduct towards [Huskey] was taken because of sex," there was insufficient evidence to support "severe conduct when viewed from the perspective of a reasonable person in [Huskey's] position and considering all the circumstances." Because Huskey failed to establish an underlying sexual harassment claim, it ruled Huskey's claims that the Department failed to stop harassment and failed to prevent harassment of her also failed. The trial court also ruled Huskey's third cause of action for failure to prevent

harassment failed as a matter of law because Huskey could not establish "the prima facie element of adverse employment action for either discrimination or retaliation."[3] The trial court did not rule on whether the March 2012 incident was time-barred except to state "consideration of the March 2012 incident [did] not change [its] analysis." It also sustained certain of the Department's evidentiary objections to Huskey's evidence.

On February 23, 2016, the trial court entered judgment in favor of the Department and the action against it was dismissed.

Huskey filed a timely notice of appeal.

CONTENTIONS[4]

Huskey contends the trial court erred by sustaining the Department's objections to evidence of Jakab's harassment of other woman which she argues was relevant in determining whether her work environment was permeated by "severe" or "pervasive" harassment. She also contends that whether Jakab's conduct constituted sexual harassment was a jury question because "[w]hen all of the evidence is examined together[] a triable issue of fact exists as to whether its accumulated effect was sufficient to prove a hostile work environment."

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[3] Between January 2011 and December 2014, the Department did not demote Huskey, suspend her, reduce her salary, issue her a memo of counseling or instruction, or initiate an adverse action against her.

[4] Huskey does not present any arguments concerning her second and third causes of action and therefore we consider any challenge to the trial court's rulings on these claims to be waived. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."].)

The Department contends the two incidents of sexual harassment of Huskey, coupled with the "other circumstances," such as Jakab's lunch invitations and the one-time "page girl" comment, were "sporadic and isolated objectively minor incidents" that fell short of a hostile work environment. It also contends Jakab's yelling at Huskey, which occurred at least two times a week, was not a result of her gender, but "in response to [Huskey's] performance of her duties as [Jakab's] supervisor[,] which does not constitute actionable conduct."

DISCUSSION

I. Standard of Review

Summary judgment is granted if "there is no triable issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1037.) Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate. In order to obtain a summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action . . . . [T]he defendant need not himself conclusively negate any such element . . . ." (*Id.* at p. 853.)

"'On appeal from the granting of a motion for summary judgment, we examine the record de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. [Citation.]'" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274 (*Lyle*).) We do not consider evidence to which objections have been made and sustained. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

II. The Trial Court's Evidentiary Rulings Were Proper

Huskey challenges the trial court's rulings excluding evidence regarding Jakab's conduct towards others, also called "me too" evidence. Her arguments concern statements made about Jakab's conduct towards three female physicians, Dr. Resnick, Dr. Mallare, and Dr. Talcherkar, all of whom worked around Jakab at some time. Although Huskey did not personally witness the incidents, she contends her knowledge of the conduct is relevant in determining whether she was subjected to a hostile work environment and should have been considered by the trial court.

Our Supreme Court has yet to decide whether evidentiary objections to a summary judgment motion are to be reviewed de novo or for abuse of discretion. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 ["we need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo"].) We conclude under either theory the trial court properly sustained the Department's evidentiary objections to Huskey's evidence. (*Philip Chang & Sons Associates v. La Casa Novato* (1986) 177 Cal.App.3d 159, 173 ["If the exclusion is proper upon any theory of law applicable to the instant case, the exclusion must be sustained regardless

of the particular considerations which may have motivated the trial court to its decision."].)

We will address each of Huskey's arguments in turn.

A. Statements Regarding Dr. Resnick (Evidentiary Objection No. 11)

Huskey submitted into evidence her testimony that prior to her supervising Jakab, Rojas told her that Jakab had pushed Dr. Resnick, a female, who worked with Jakab at a different office at the time of that incident, as follows: "In the many, many conversations that Esther [Rojas] and I had, she told me that there was an incident with Dr. Jakab. He had worked for L.A. West when he first came into the department. And he was observed by the branch chief and someone else, Dr. Jakab, getting into a verbal argument with another female M—doctor, Dr. Resnick. And he had actually physically pushed her. They were in process of doing an adverse action on him under the zero tolerance, and he went out on medical leave."

Huskey contends the trial court should have allowed such evidence because it was "relevant to prove hostile work environment, as well as to show the Department had notice of Jakab's misconduct before it made Huskey his supervisor."

Although "[e]vidence of harassment of others, and [ ] plaintiff's awareness of that harassment" is relevant to prove a hostile work environment, "mere workplace gossip is not a substitute for proof." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 521 (*Beyda*). Here, Huskey's testimony regarding an alleged incident involving Dr. Resnick and Jakab was mere speculation. (*Horn v. Cushman & Wakefield W., Inc.* (1999) 72 Cal.App.4th 798, 807 ["[A]n issue of fact can only be created by a conflict of evidence. It is not created by speculation or conjecture."].) As the

Department points out, Rojas did not personally observe the incident, and she described it as occurring at a different location at an undetermined time in the past, but prior to Huskey's supervision of Jakab. Huskey also testified that when she asked Dr. Resnick about it, the doctor could not recall the incident, and Huskey never saw any documentation of any adverse action taken against Jakab relating to Dr. Resnick. Given the distant, uncertain and speculative nature of the incident, we conclude the proffered evidence was irrelevant and properly excluded by the trial court.

B. Statements Regarding Dr. Mallare (Evidentiary Objection Nos. 15, 16, and 24)

Huskey submitted into evidence her testimony that Dr. Mallare, a female, told her she was "terrified" of Jakab. Huskey also submitted Rojas's testimony that Dr. Mallare told Rojas "she didn't like being near Jakab" and that Dr. Mallare may have said "she did not want to be alone with [Jakab]."

Huskey contends "evidence that other women working with Jakab conveyed to [her] that they were afraid of him [was] relevant to prove [her] subjective claims that she was employed in a hostile work environment for women and lends objective credence to her claims that the harassment was pervasive."

We agree that a person can be affected by harassing conduct in a workplace by knowledge of that harassment (*Beyda*, *supra*, 65 Cal.App.4th at p. 521); however, here, the fact that Dr. Mallare told Huskey that she was "terrified" of Jakab, without more, does not establish an action reflecting harassment on the basis of gender, and therefore such evidence is irrelevant to her sexual harassment claim. (*Lyle*, *supra*, 38 Cal.4th at p. 291 [plaintiff's "vagueness about . . . the circumstances surrounding the incidents did not aid in showing that use of epithets contributed to an objectively abusive or

hostile work environment"]; see also *Brennan v. Townsend & O'Leary Enterprises, Inc.* (2011) 199 Cal.App.4th 1336, 1355 [defendant's display of the word "'bitch'" on a hat a Christmas party "alone, without more, fails to reflect an action demonstrating harassment on the basis of gender"].) The trial court did not err by excluding this evidence.

The trial court also properly excluded the statements made by Dr. Mallare to Rojas about Jakab for the additional reason there is no indication Huskey knew of the statements during her employment. (*Beyda, supra,* 65 Cal.App.4th at p. 521 [excluding sexual harassment evidence of others because there was no "indication in the offer of proof that [plaintiff] knew of them during her employment"].)

C. Statements Regarding Dr. Talcherkar (Evidentiary Objection Nos. 14 and 25)

Huskey submitted into evidence her testimony that Dr. Talcherkar, a female, told her she "was intimidated by [Jakab]" and "the way he looks." She also submitted into evidence Rojas's testimony that Dr. Talcherkar complained to her that Jakab had "intimidating" behavior.

Huskey's proffered evidence regarding statements made by Dr. Talcherkar about Jakab were properly excluded for the same reasons the trial court properly excluded statements made by Dr. Mallare about Jakab. Huskey fails to provide any context (e.g., time or other circumstances) surrounding the statements. As explained above, the fact that Dr. Talcherkar was "intimidated" by Jakab, without more, does not establish an action reflecting harassment *on the basis of gender*. (*Lyle*, *supra*, 38 Cal.4th at p. 291; *Brennan v. Townsend & O'Leary Enterprises, Inc.*, *supra*, 199 Cal.App.4th at p. 1355.) And Huskey offers no evidence that Rojas advised

Huskey about Dr. Talcherkar's statements about Jakab. (*Beyda*, *supra*, 65 Cal.App.4th at p. 521.)

III. The Trial Court Did Not Err in Granting Summary Judgment in Favor of the Department on Huskey's Sexual Harassment Claim

FEHA makes it an unlawful employment practice for an employer, "because of . . . sex[][or] gender, . . . to harass an employee." (§ 12940, subd. (j)(1).) Sexual harassment under FEHA falls into two distinct categories: quid pro quo harassment and hostile work environment. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 141.) Quid pro quo harassment is ""where a term of employment is conditioned upon submission to unwelcome sexual advances,"" while a hostile work environment is ""where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment."" (*Ibid.*) Huskey's allegations against the Department pertain only to sexual harassment creating a hostile work environment.

In order to state a sexual harassment claim based on a hostile work environment, a plaintiff must show "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 employment and create an abusive work environment [citations]." (*Lyle, supra,* 38 Cal.4th at p. 279.)[5] "While the FEHA prohibits harassing conduct

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[5] The Department contends we should apply a different standard when evaluating a sexual harassment claim filed by a "supervisor" based on the conduct of an employee she supervises. Relying on *Lyles v. District of Columbia* (D.D.C. 2014) 17 F.Supp.3d 59, 70, it argues that an employer "should not be liable for a subordinate's harassment against a supervisor where the supervisor had the ability to stop the harassment and failed to do so." We decline to address the Department's argument because it involves a new issue raised for the first time on appeal. (*Panoplies v. Madders* (1956) 47

that creates a work environment that is hostile or abusive on the basis of sex, it does not outlaw sexually coarse and vulgar language or conduct that merely offends." (*Id.* at p. 295.)

Here, the trial court ruled Huskey met the first element of her sexual harassment claim by showing Jakab's conduct towards her was taken because of sex. The parties do not challenge this finding. Rather, the issue presented for our review is whether Jakab's conduct towards Huskey was sufficiently severe or pervasive to constitute a hostile work environment.

"'[T]he existence of a hostile work environment depends upon "the totality of the circumstances." [Citation.]' [Citation.] "'[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." [Citation.]'" (*Fuentes v. AutoZone, Inc.* (2011) 200 Cal.App.4th 1221, 1227.) "'[W]hile an employee need not prove tangible job detriment to establish a sexual harassment claim, the absence of such detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment.' [Citation.]" (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610.) "The requirement that the conduct be sufficiently severe or pervasive to create a working environment a reasonable person would find hostile or abusive is a crucial limitation that prevents sexual harassment law from being expanded into a 'general civility code.'" (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367,

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Cal.2d 337, 340 ["It is the general rule that a party to an action may not, for the first time on appeal, change the theory of the cause of action."].)

1377, quoting from *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81.)

Huskey contends her sexual harassment claim should have been considered by a jury because when the evidence is examined together, including "Jakab's frequent and continuous verbal harassment, his dismissive insolence, and challenges to Huskey's authority; the discrete incidents directed to Huskey; and the incidents directed to other women in the same workplace, along with the fear expressed by those other women," it was "sufficient to prove a hostile work environment." We disagree.

First, we decline to consider the March 2012 incident because it is time-barred. A party claiming discrimination or harassment in violation of FEHA must file an administrative complaint with the DFEH within one year of the date that the alleged discriminatory or harassing conduct occurred. (§ 12960, subd. (d).) Huskey filed her administrative complaint with the DFEH on February 7, 2014, which was nearly two years after the March 2012 incident. Although a complaint may still be timely if the harassment continues into the limitations period—i.e., making applicable the "continuing violation" doctrine, the doctrine is inapplicable to this case.

Our Supreme Court has recognized that an employer's unlawful actions are not actionable if they have "acquired a degree of 'permanence' so that employees are on notice that further efforts at informal conciliation with the employer to obtain accommodation or end harassment would be futile." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802.) Here, after reporting the March 2012 incident to her supervisors, Huskey was advised to "toughen up." Thus, Huskey was on notice that the Department was not going to remedy that circumstance; thus, a reasonable person would have believed that any further efforts would be futile.

Second, Jakab's acts of harassment towards Huskey fall short of a "pattern of continuous, pervasive harassment" necessary to establish a hostile working environment under FEHA. (*Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, 382; *Lyle*, *supra*, 38 Cal.4th at p. 284 ["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"].) In addition to the February 2013 incident, Huskey claims that Jakab's conduct towards her was sexual in nature when: (1) Jakab asked her out to lunch as many as 10 times; (2) on at least two separate other occasions, he came to Huskey's cubicle and was manspreading, even after she directed him not to; and (3) on one occasion he touched her hair without her consent. These incidents, however, were isolated and sporadic, occurring over a two-year period, and therefore do not rise to the level of actionable conduct for a sexual harassment claim. (*Lyle*, *supra*, 38 Cal.4th at p. 283 ["[A]n employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial."]; *Mokler v. County of Orange, supra,* 157 Cal.App.4th at p. 144 [three incidents over five-week period, involving no physical threats, where harasser asked plaintiff about her marital status, where she lived, and put his arm around her, insufficient to support hostile work environmental claim].)

Instead, the bulk of the conduct which Huskey complained about was in response to Huskey's performance of her duties as Jakab's supervisor, or directed at women in general. This conduct included: (1) calling women "idiots" and stating "they couldn't do their job" and "who are they to question his medical knowledge"; (2) referring to women in the workplace as

"bitches";[6] (3) yelling at least twice a week and being demanding toward Huskey and not toward men in the office; (4) referring to Huskey as a "page girl" in one e-mail; (5) acting like Huskey was his secretary; and (6) treating her like "a low life." Taken as a whole, the conduct summarized above was rude, inappropriate and offensive behavior, but was not sexual in nature, and therefore fails to support a sexual harassment claim as a matter of law. (*Haberman v. Cengage Learning, Inc., supra*, 180 Cal.App.4th at pp. 381-382 [employee entitled to summary judgment where most of the conduct the plaintiff complained of was not conduct based on sex or of a sexual nature].)

Accordingly, the trial court did not err in granting summary judgment in favor of the Department as to Huskey's sexual harassment claim.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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[6] "[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." (*Lyle*, *supra*, 38 Cal.4th at p. 284.)

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