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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

OLGA FIGUEROA-MANJANG, Plaintiff and Appellant, v. DANIEL BEHROOZAN et al., Defendants and Appellants.	B267942 (Los Angeles County Super. Ct. No. BC569054)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Reversed and remanded in part, affirmed in part.

Mancini & Associates, Marcus A. Mancini, Christopher M. Barnes, Tara J. Licata and Meghan E. George; Benedon & Serlin, Gerald M. Serlin and Judith E. Posner for Plaintiff and Appellant.

Yadegar, Minoofar & Soleymani, Navid Yadegar and Navid Soleymani for Defendants and Appellants.

INTRODUCTION

Plaintiff Olga Figueroa-Manjang appeals from a judgment of dismissal after the trial court sustained a demurrer by defendant Dr. Daniel Behroozan to her second amended complaint without leave to amend. Plaintiff originally alleged multiple claims for harassment, discrimination and retaliation by defendant, her former employer, in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.)[1] and the California Family Rights Act (CFRA) (§ 12945.2), as well as for wrongful termination in violation of public policy. On appeal, she challenges only the dismissal of the public policy claim.

Defendant cross-appeals, contending the trial court should have granted his motion for attorney fees as the prevailing party on demurrer. He argues that plaintiff's statutory claims were frivolous and pursued by plaintiff in bad faith, thus justifying an award of fees against her.

We conclude that plaintiff has sufficiently alleged facts to support a cause of action for wrongful termination in violation of public policy based on age discrimination under the FEHA. We therefore reverse the trial court's ruling on the demurrer and remand for further proceedings. We affirm the trial court's denial of fees to defendant.

FACTUAL AND PROCEDURAL HISTORY

A. *Complaint*

Plaintiff filed her initial complaint on January 9, 2015 against Behroozan as an individual, his dermatology office—

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

Dermatology Institute of Southern California, and his eponymous medical corporation.[2] The complaint asserted six causes of action against defendant: (1) harassment, discrimination, and retaliation in violation of the FEHA based on a mental disability; (2) violation of the CFRA; (3) harassment, discrimination, and retaliation in violation of the FEHA based on age; (4) harassment, discrimination, and retaliation in violation of the FEHA based on sex; (5) retaliation and wrongful constructive termination in violation of public policy; and (6) declaratory relief.

In her complaint, plaintiff alleged that she was employed by defendant as the "Office Director/Manager" from mid-2008 until January 2013. During that time, she alleged she was over the age of 40 and had the "perceived and/or mental disability(s) of [] anxiety, depression, associated conditions and others." Throughout her employment, she claimed defendant continuously "made sexual, sexist, ageist and derogatory comments to Plaintiff," including that "she was 'fat;' she was 'ugly;' 'you and I are the only ugly people in the office;' 'the only thing you are good for is billing;' and 'You are not beautiful enough to sell cosmetics, you are too old and fat to do what you are doing.'" Plaintiff also alleged defendant ordered her to "remain in her office and bill because she was 'not good looking enough.'" Plaintiff claimed she "would plead" with defendant to "cease the hurtful comments," but he did not. Defendant also made comments about "another employee, H. Doe, saying she was 'chubby' and 'not good looking enough,'" and later praising H. Doe for losing weight.

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[2] We refer to Behroozan and his corporations collectively as "defendant."

In September 2011, defendant hired "Monica Doe, a very attractive female in her 20s, as the 'Patient Relations/Cosmetic Coordinator.'" Plaintiff further alleged that defendant "was open and obvious in his treatment and favoritism" toward Monica Doe.

In late December 2012, defendant "informed Plaintiff that he wanted to manage his own office and was demoting her to Biller." Plaintiff alleges she suffered a panic attack "later that day" and went home. Plaintiff subsequently took a medical leave of absence through January 20, 2013. She claims she resigned the day after she returned from leave, but that defendant "created, or allowed to exist, such intolerable conditions such as age, sex and disability harassment, discrimination and retaliation, including Plaintiff's unwarranted, discriminatory and pretextual demotion, such that a reasonable person in Plaintiff's position would have not had any other option but to resign and/or be constructively terminated." She also alleged that defendant "treated better and/or kept and/or replaced Plaintiff with, employees with equal or lesser tenure and/or seniority than Plaintiff and/or hired another employee(s) to perform Plaintiff's duties, and who was non-disabled and/or substantially younger."

The complaint alleged plaintiff timely exhausted her administrative remedies for her FEHA claims by filing a discrimination complaint with the Department of Fair Employment and Housing (DFEH) on January 13, 2014 and receiving a right-to-sue notice issued the same day. These documents are attached as exhibits to the complaint.

B. *Demurrer and First Amended Complaint*

Defendant demurred to the complaint, arguing that plaintiff's FEHA claims were barred by the statute of limitations. Defendant contended that, contrary to the representations made

in her complaint and exhibits thereto, plaintiff originally filed DFEH complaints regarding her employment with defendant in February 2013 and the DFEH issued right-to-sue notices in December 2013. Defendant included copies of these documents and requested that the trial court take judicial notice of them. As such, plaintiff's civil complaint was untimely, as she filed it on January 9, 2015, more than a year after the issuance of the right-to-sue notices in December 2013. (§ 12965, subd. (b).)

Defendant also asserted that plaintiff's CFRA claim failed because defendant did not employ 50 or more employees, and thus was not subject to liability under that statute. (§ 12945.2, subd. (b).) Defendant pointed to plaintiff's DFEH complaints, in which she stated that defendant had only 10 employees.

In addition, defendant argued that plaintiff failed to plead facts supporting any claim for wrongful conduct based on any protected category. Among other reasons, defendant contended the alleged comments he made related to appearance and weight did not support plaintiff's disability, sex, or age claims, plaintiff failed to identify any adverse employment action based on her membership in a protected class, and plaintiff failed to adequately plead that she was subject to a constructive discharge.

Plaintiff filed a first amended complaint (FAC) on April 14, 2015, mooting defendant's demurrer. The FAC contained essentially identical allegations to the original complaint, but reorganized the FEHA claims into nine causes of action. Thus, plaintiff's first cause of action alleged disability discrimination under the FEHA, her second cause of action alleged harassment under FEHA based on her disabilities, and her third cause of action alleged retaliation under the FEHA related to her

disabilities. She similarly alleged three FEHA causes of action for discrimination, harassment, and retaliation, based on age and three FEHA causes of action based on sex; all with identical substantive allegations. The FAC also retained the CFRA claim and the claims for wrongful termination in violation of public policy and declaratory relief, resulting in 12 total causes of action.

Defendant again demurred, raising the same arguments previously made. In her opposition, plaintiff acknowledged that the statute of limitations barred her FEHA age-based claims; however, she argued she could pursue her remaining FEHA claims because she did not identify disability and sex as bases for her unfair treatment until her second round of DFEH complaints filed in January 2014. She also argued that her public policy claim was adequately pled and could proceed even if her FEHA claims were barred.

The trial court sustained the demurrer. In its tentative ruling, the court found that all nine FEHA claims were barred by the statute of limitations and therefore sustained the demurrer as to those claims without leave to amend. With respect to the CFRA claim, the court noted the documents indicating that defendant had fewer than 50 employees, but allowed plaintiff leave to amend if she could resolve that discrepancy. The court also sustained the demurrer to the public policy and declaratory relief claims with leave to amend, stating that "[i]n light of the previous rulings on the FEHA causes of action, these causes of action must fail for lack of a violation of public policy on which to base these causes of action."

During the hearing, plaintiff's counsel stated that they were "still investigating" whether defendant had 50 or more

employees in determining the viability of the CFRA claim. After the court indicated its tentative ruling dismissing the FEHA claims with prejudice, plaintiff's counsel pointed out that "we are still allowed to bring a wrongful term[ination] claim in violation of public policy even if the FEHA claims are dismissed." Defendant's counsel agreed that the statute of limitations would not bar the public policy claim, but continued, "the problem is they haven't alleged any facts supporting the other claims. . . . All they have in there are allegations about the weight and appearance which may be offensive, but they are not actionable." The court concurred, but indicated it would allow leave to amend the public policy claim. However, the court warned plaintiff that "if you cannot honestly allege facts, you're going to end up in the same place the next go-round." The court then adopted its tentative ruling, with some minor modifications.

C. *Second Amended Complaint*

Plaintiff filed her second amended complaint (SAC), maintaining only her claim for retaliation and wrongful constructive termination in violation of public policy and a second claim for declaratory relief. The substance of the allegations was unchanged from her prior two complaints.

Defendant demurred to the SAC, arguing that plaintiff had made no attempt to amend her complaint to address any of the substantive issues raised in the prior demurrers, and that it was clear plaintiff could not allege facts to sustain her causes of action.

The court issued a written tentative ruling sustaining the demurrer without leave to amend. In the tentative ruling, the trial court found it had "already rejected the viability of a

Tameny[3] public policy claim . . . in its June 18, 2015 ruling on the demurrer to the [FAC]. A wrongful termination in violation of public policy claim fails if it is based on the public policy set forth in a failed FEHA claim. *Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1420. Here, Plaintiff has not pled any new facts other than the same ones previously pled in the [FAC]. As such, there is no reason for this Court's ruling to be any different" as to the remaining two claims.

At the hearing, plaintiff's counsel argued that the public policy claim could proceed even where the FEHA claims were procedurally barred. Defendant's counsel did not dispute this point (defendant had not argued it in his moving papers), but noted defendant had repeatedly raised the argument in his demurrers that the wrongful termination claim did not state facts sufficient to state a cause of action. And although plaintiff was given leave to amend, "all they have done is replead the identical allegations." The court agreed "that we've done this before. There were no changes to the allegations. What we have here is a claim that the plaintiff essentially was harassed based on her physical appearance, not based on age, not based on physical disability, not based on any protected classification. . . . I just don't see anything else in this complaint that's going to get [plaintiff] past this stage of the proceedings." Plaintiff's counsel argued that comments regarding physical appearance are "very oftentimes attached to age." The court noted that the comments "clearly on their face" were not related to age or disability discrimination and that there were no allegations suggesting discrimination against any protected class.

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[3] *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167 (*Tameny*).

Accordingly, the court sustained defendant's demurrer to both causes of action without leave to amend.[4] The trial court entered judgment for defendant on October 6, 2015. Plaintiff timely appealed.

D. *Motion for Attorney Fees*

Following entry of judgment, defendant filed a motion for statutory attorney fees and costs pursuant to section 12965, subdivision (b). Defendant argued that plaintiff's FEHA claims were clearly time-barred and her CFRA claim was frivolous, based on her own admission regarding the number of defendant's employees. As such, defendant requested reimbursement of over $65,000 in fees and costs, the amount he claimed he spent litigating the case through the order sustaining the demurrer to the FAC.

The court denied the motion, adopting its tentative ruling as the final order. The court found the action "was not frivolous, unreasonable, objectively without foundation when brought, brought in bad faith, or that Plaintiff continued to litigate after it clearly became without foundation." The court noted that defendant could have waived the statute of limitations defense by failing to assert it, and that even after it was raised, "it was objectively reasonable" for plaintiff "to attempt to plead facts demonstrating why the statute of limitations did not operate to

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[4] It is unclear from the record whether the court adopted its written tentative ruling as a final order. The word "tentative" is crossed out and the order is stamped as filed on September 11, 2015. However, the court did not do so expressly on the record, and it also directed defendant to prepare the order and judgment. On October 6, 2015, the court signed and filed the proposed order submitted by defendant, sustaining the demurrer to the SAC without further explanation.

bar Plaintiff's claims." The court also noted that plaintiff ultimately dropped her FEHA and CFRA claims from the SAC. Defendant timely filed a cross-appeal from the order denying the motion for fees.

DISCUSSION

This appeal and cross-appeal involve three issues: (1) whether the trial court erred in sustaining defendant's demurrer to the claim for wrongful termination in violation of public policy; (2) whether the trial court abused its discretion in denying leave to amend that claim for a third time; and (3) whether the trial court erred in denying defendant's motion for attorney fees.

A. *Dismissal of wrongful termination claim*

1. *Standard of review*

A demurrer tests the legal sufficiency of factual allegations in a complaint. (*Title Ins. Co. v. Comerica Bank–California* (1994) 27 Cal.App.4th 800, 807.) We review de novo the dismissal of a civil action after a demurrer is sustained without leave to amend. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879 (*Cantu*).) In doing so, "we determine whether the complaint states facts sufficient to constitute a cause of action." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.'" (*Ibid.*) "Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid.*) We will affirm if any proper ground for sustaining the demurrer exists. (*Cantu, supra*, 4 Cal.App.4th at p. 880, fn. 10.)

On appeal, a plaintiff bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a

matter of law. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) To establish that a cause of action has been adequately pled, a plaintiff must demonstrate she has alleged "facts sufficient to establish every element of that cause of action. [Citation.]" (*Cantu, supra*, 4 Cal.App.4th at pp. 879-880.) If the complaint fails to plead, or if the defendant negates, any essential element of a particular cause of action, this court should affirm the sustaining of a demurrer. (*Ibid*.)

2. *Tortious discharge claims*

In California, an at-will employee may bring a tort action for wrongful discharge when an employer terminates him or her for a reason that violates fundamental public policy. (*Tameny, supra,* 27 Cal.3d at p. 176; *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 886 (*Stevenson*).) In order to state a cause of action against an employer for violation of public policy, a plaintiff must show that his or her claims are "tethered to fundamental policies" such as those "delineated in constitutional or statutory provisions." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095, overruled in part by *Green v. Ralee Engineering Co*. (1998) 19 Cal.4th 66, 80.)

The FEHA prohibits various forms of workplace discrimination and identifies the classes protected from that discrimination, including disability, sex, and age. (§§ 12940, 12941.) It is well settled that the FEHA's provisions prohibiting discrimination may provide the policy basis for a claim for wrongful discharge in violation of public policy. (*Stevenson, supra,* 16 Cal.4th at p. 886; *Gantt, supra*, 1 Cal.4th at p. 1095; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 70-71.) Thus, if plaintiff has adequately alleged a cause of action under the FEHA, she may

use that as the basis for her claim for wrongful termination in violation of public policy.

3. *Trial court's reasoning*

As an initial matter, plaintiff devotes much of her opening brief to her argument that the trial court improperly dismissed her public policy claim solely because it was premised on the time-barred FEHA claims. Defendant does not dispute that such a ruling would have been incorrect, but asserts that the trial court made no such ruling.

There is some confusion in the record as to the basis or bases for the trial court's dismissal of the public policy claim. Some references by the court during the demurrer hearings and in its written tentative rulings suggest the court was considering whether the public policy claim would fail because the underlying FEHA claims were time-barred. However, defendant focused his demurrer to the SAC entirely on the arguments regarding the substance of plaintiff's allegations and the court appeared to indicate agreement with that position.

Regardless, we are not bound by the trial court's stated reasons and must affirm the judgment if any ground offered in support of the demurrer was well taken. (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433.) As such, we turn to consideration of whether the SAC alleged sufficient facts to establish plaintiff's cause of action for constructive discharge in violation of public policy.

4. *Plaintiff's claim for constructive discharge in violation of public policy*

As noted above, plaintiff's remaining claim alleged that she was wrongfully discharged by defendant in violation of the FEHA's prohibitions against discrimination and retaliation based

on her disabilities, age, and/or sex. We examine each potential basis for this claim in turn.

a. *Disability Discrimination*

In order to state a claim for disability discrimination claim under the FEHA, a plaintiff must allege the following elements of a prima facie case: (1) she suffered from a disability of which her employer was aware; (2) she was capable of performing the essential functions of her position; and (3) she was subjected to an adverse employment action because of her disability. (See *Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1378.) Defendant asserts that plaintiff failed to allege facts showing that the alleged adverse employment actions (her demotion or constructive discharge) were taken because of her disabilities. We agree.[5]

The SAC contains no allegations connecting defendant's purported mistreatment of plaintiff to any actual or perceived disability. None of the disparaging comments allegedly made by defendant to or concerning plaintiff involved a disability. Nor does plaintiff allege she was demoted because of any disability; indeed, she claims she suffered a panic attack *after* the demotion. Plaintiff further alleges that she successfully took a medical leave, and then resigned. Although she contends her resignation was effectively a constructive discharge because of the intolerable working conditions created by defendant, those conditions again relate only to plaintiff's allegations regarding sex and age. She also does not contend that defendant failed to accommodate her

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[5] Defendant also argues that plaintiff failed to adequately allege that she suffered from a covered disability or that her resignation was in effect a constructive discharge. We need not reach these issues.

disability in any way. As such, plaintiff has alleged no facts to establish her claim for wrongful termination in violation of the FEHA policy prohibiting disability discrimination.

b. *Sex Discrimination*

In order to state a sex discrimination claim under the FEHA, a plaintiff must allege the following elements of a prima facie case: (1) she was a member of a protected class; (2) she was performing competently in the position she held; (3) she suffered an adverse employment action, such as a termination or demotion; and (4) some other circumstances suggest discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).) With respect to the fourth element, plaintiff contends she alleged adequate facts demonstrating defendant's discriminatory motive based on his derogatory comments about her. Although she identifies no comments expressly tied to her sex, plaintiff contends that the comments related to her weight and appearance were sufficiently gender-related that they reflected defendant's discriminatory intent. Defendant counters that weight and appearance are not automatically gender-based and were not made in a context here that would indicate stereotypical attitudes toward women.

While an employer's remarks regarding an employee's appearance may not always constitute evidence of sex discrimination, the distinction turns on whether the remarks reflect gender-based stereotypes or show the employer's differential treatment between male and female employees. (See, e.g., *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043-1044 (*Yanowitz).)* Thus, for example, "an appearance standard that imposes more stringent appearance requirements on employees of one sex than on employees of the other sex

constitutes unlawful sexual discrimination unless such differential treatment can be justified as a bona fide occupational qualification." (*Ibid*. [collecting cases].) The other cases cited by plaintiff similarly reflect gender-based comments. (See *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 233 [identifying remarks based on sex stereotypes, including that plaintiff could improve her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry"]; *Lewis v. Heartland Inns of America LLC* (8th Cir. 2010) 591 F.3d 1033, 1041 [discriminatory comments included supervisor's complaints that plaintiff lacked the "Midwestern girl look" and was "tomboyish"]; *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 119 [defendant's use of the word "bitch" was not gender-neutral but was "a derogatory epithet directed against women"].)

On the other hand, defendant cites cases in which courts found an employer's comments about an employee's appearance were not sufficiently linked to gender to support a discrimination claim. (See *Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 282 [noting that "the term 'bitch' is not so sex-specific and derogatory that its mere use necessarily constitutes harassment because of sex"]; *Kriss v. Sprint Communications Co., Ltd. Partnership* (8th Cir. 1995) 58 F.3d 1276, 1281 [comments that a female employee was "ugly," that another was a "bitch," and stating that he wanted to recruit a sales representative because she was "attractive" were "rude," but "do not furnish much proof of gender discrimination"].)

Here, taking plaintiff's allegations as true, defendant's comments that she was "fat," "ugly" and "not beautiful enough," while crude and distasteful, were not linked to her sex or any

differential treatment between male and female employees. Indeed, defendant criticized his own appearance along with plaintiff's. These comments do not suggest that defendant treated plaintiff differently because she was a woman or did not conform to gender stereotypes. And plaintiff alleges no other facts to bolster her sex discrimination claim.

c. *Age Discrimination*

As with sex discrimination, plaintiff's claim for age discrimination under the FEHA must allege facts supporting the elements of a prima facie case: (1) she was over the age of 40; (2) she was performing competently in her position; (3) she suffered an adverse employment action; and (4) some other circumstances give rise to an inference of unlawful discrimination. (*Guz, supra*, 24 Cal.4th at p. 355; *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1003; *Sandell v. Taylor–Listug, Inc.* (2010) 188 Cal.App.4th 297, 309.)

Defendant contends the SAC does not sufficiently allege the fourth element because it identifies only a single comment he made regarding plaintiff's age and establishes no causal link between that comment and her demotion or purported constructive discharge. This argument reads the allegations of the complaint too narrowly and fails to treat plaintiff's factual allegations as admitted, as we must on demurrer. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

Read as a whole, plaintiff's complaint alleges that defendant "continuously" made discriminatory remarks throughout her employment, including statements linking her age to her job performance, such as that she was "too old" to perform her job duties other than billing. She further alleges that defendant made these statements "at least through

December 2012," the same month in which he demoted her to biller. Defendant refused her repeated requests to cease making these comments. As a result of defendant's conduct and her demotion, plaintiff alleges she suffered a panic attack, went on medical leave, and resigned immediately following the end of her leave. For the purposes of a demurrer, these allegations are sufficient to support an inference that plaintiff suffered an adverse employment action based on defendant's discriminatory conduct.

Defendant's cases, most of which arise in the summary judgment context, are inapposite. For example, in *Trop v. Sony Pictures Entertainment Inc.* (2005) 129 Cal.App.4th 1133, 1144, the court affirmed summary judgment for the employer. As evidence of discrimination, the plaintiff relied heavily on a negative comment made by her supervisor regarding pregnancy. (*Id.* at 1148.) But the court noted that the statement "was made in a casual conversation at a Christmas party" and was "unrelated to Trop's work performance." (*Ibid.*) As such, the comment did not constitute direct evidence of discrimination. (*Id.* at p. 1149; see also *DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 549 [summary judgment]; *Hersant v. Department of Social Services, supra,* 57 Cal.App.4th at pp. 1006, 1009 [finding plaintiff "successfully complied with the nononerous requirement he present a prima facie case of age discrimination" but affirming summary judgment because plaintiff failed to present evidence of pretext].) Here, by contrast, plaintiff alleged that defendant made repeated statements regarding her age in the context of her job performance, including through the same month in which he demoted her. We therefore disagree with defendant's claim that "there is nothing in the SAC

suggesting that Plaintiff suffered an adverse employment action *because of* her age."

We similarly reject defendant's contention that plaintiff failed to allege facts sufficient to establish a constructive discharge. Defendant asserts that plaintiff's alleged working conditions were "not sufficiently intolerable" to constitute a constructive discharge; once again, this argument incorrectly assumes that defendant made only a single comment related to age and did so many months before plaintiff's demotion and resignation. Moreover, defendant offers no authority supporting a finding that, for purposes of a demurrer, working conditions such as those alleged here were not intolerable as a matter of law. Instead, defendant's cases analyze evidence supporting allegations such as these in the context of summary judgment opinions. (See *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238 [summary judgment]; *Wagner v. Sanders Assocs., Inc.* (C.D. Cal. 1986) 638 F.Supp. 742 [same].)

Thus, plaintiff has sufficiently alleged facts to state a cause of action for wrongful termination based on age discrimination, harassment, and/or retaliation.[6]

B. *Denial of leave to amend*

Plaintiff also alleges error in the trial court's decision to dismiss her claims without leave to amend. This contention is largely moot given our reinstatement of plaintiff's wrongful termination claim based on age discrimination. However, to the

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[6] Plaintiff's second cause of action for declaratory relief is entirely dependent upon her wrongful termination claim. Defendant provides no separate basis to justify its dismissal; we therefore reverse the trial court's order as to that cause of action as well.

extent plaintiff asserts she should be able to amend her allegations related to disability and sex, we conclude the trial court did not err in denying leave to amend.

When a demurrer is sustained without leave to amend, the plaintiff bears the burden of proving there is a reasonable possibility that amendment would cure the defect. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) "To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.]" (*Rakestraw v. California Physicians' Service, supra,* 81 Cal.App.4th at p. 43.) Rather, plaintiff must "clearly and specifically" set forth "the legal basis for amendment, i.e., the elements of the cause of action and authority for it," as well as "factual allegations that sufficiently state all required elements of that cause of action." (*Ibid.* [citations omitted].) These allegations "must be factual and specific, not vague or conclusionary. [Citation.]" (*Id.* at p. 44.)

Plaintiff contends that the trial court sustained the demurrer to her wrongful termination claim in the FAC based on "an incorrect legal theory," namely, that her claim failed because it was tethered to the time-barred FEHA claims. As such, plaintiff asserts that she "had no reason" to amend the substance of her wrongful termination allegations when she filed her SAC. While there may have been some confusion as to whether or not the trial court held that plaintiff's public policy claim failed because the FEHA claims were barred, it is clear from the record that the parties and the court addressed the substance of plaintiff's allegations extensively and repeatedly. Both parties argued the issue in their demurrer papers and at oral argument.

Moreover, during the hearing on the demurrer to the FAC, the court expressly warned plaintiff that failure to buttress her allegations would cause plaintiff to "end up in the same place the next go-round."[7] Despite this warning, plaintiff failed to add a single substantive allegation to her SAC, nor has she specified how she would amend her complaint to address the issues raised by defendant and the court. As such, she has not carried her burden to establish a reasonable possibility that amendment could save her allegations regarding disability or sex as bases for her wrongful termination claim.

C. *Request for fees*

Defendant contends he is entitled to recover attorney fees and costs incurred in litigating this case through the dismissal of plaintiff's FEHA and CFRA claims from her FAC. He argues that plaintiff's FEHA and CFRA claims were groundless and that plaintiff's decision to continue to pursue them after he had repeatedly pointed out their defects should subject her to payment of reasonable fees and costs. The trial court disagreed, and we find no abuse of discretion in that determination.

In actions filed pursuant to the FEHA, "the court, in its discretion, may award to the prevailing party, . . . reasonable attorney's fees and costs." (§12965, subd. (b); *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 101 (*Williams*).) A court may award fees and costs to a prevailing defendant in a FEHA action only in the rare case where it finds "the action was objectively without foundation when brought, or

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[7] Indeed, if the court had believed that her public policy claim was procedurally barred along with her FEHA claims, it is unclear why it would have granted plaintiff leave to amend this claim in her SAC.

the plaintiff continued to litigate after it clearly became so. [Citation.]" (*Id*. at p. 115; see also *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 874 ["Any other standard would have the disastrous effect of closing the courtroom door to plaintiffs who have meritorious claims but who dare not risk the financial ruin caused by an award of attorney fees if they ultimately do not succeed."].) We review a trial court's order concerning a request for costs and fees on a FEHA claim for an abuse of discretion. (See *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387.)

Defendant argues he is entitled to attorney fees and costs as the prevailing party on plaintiff's FEHA claims because those claims were clearly time-barred. He cites to cases allowing such fees in other contexts, such as sanctions for time-barred claims under Rule 11 of the Federal Rules of Civil Procedure (see *Mir v. Little Co. of Mary Hosp*. (9th Cir. 1988) 844 F.2d 646, 653), or sanctions under Code of Civil Procedure section 128.7 for claims barred by res judicata (see *Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 191).

However, *Hon v. Marshall* (1997) 53 Cal.App.4th 470, 473 (*Hon*), a case neither party cited in their briefs, squarely considers the propriety of attorney fees for time-barred FEHA claims. In *Hon*, the trial court granted summary judgment for defendant employers, concluding that plaintiff's FEHA claim was barred by her failure to exhaust her administrative remedies, as she admitted she had never filed a discrimination complaint with the DFEH. Defendants moved for fees and the trial court awarded them $12,000 for defense of the FEHA claim. (*Id*. at p. 474.) The Court of Appeal, as a question of first impression,

considered "whether a defendant who is granted summary judgment because of such a jurisdictional defect qualifies as a 'prevailing party' entitled to an attorney fee award under section 12965." (*Id*. at p. 472.) Reviewing federal civil rights cases, the *Hon* court noted "a disinclination on the part of the lower federal courts to award a defendant attorney fees where the plaintiff's action has been dismissed for failing to comply with the jurisdictional prerequisites of a Title VII action, . . ." (*Id*. at pp. 475–476 [citations omitted].) In particular, the appellate court noted the reasoning of *Sellers v. Local 1598, Dist. Council 88* (E.D.Pa.1985) 614 F.Supp. 141, 144: "'[W]hen a complaint is dismissed for lack of jurisdiction, the defendant cannot be a "prevailing party." Defendant has not "prevailed" over the plaintiff on any issue central to the merits of the litigation. It is impermissible for the court to engage in post hoc analysis of the facts. [Citation.] This is what would occur were we to now begin to sift and weigh the "facts" surrounding these . . . claims. They were not before the court and it would be an abuse of discretion to place them before it now.'" (*Hon, supra*, 53 Cal.App.4th at p. 477.) Accordingly, the *Hon* court concluded that the trial court erred in awarding attorney fees to the defendant where the FEHA claim was dismissed for failure to exhaust administrative remedies. (*Id*. at p. 478.)[8]

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[8] The *Hon* court noted that a defendant in such circumstances could still seek sanctions, including reasonable attorney fees, for frivolous or bad faith litigation by a plaintiff pursuant to Code of Civil Procedure section 128.5. (*Hon, supra*, 53 Cal.App.4th at p. 478.) Defendant here filed a motion seeking sanctions pursuant to section 128.5 after plaintiff filed her SAC. The motion was denied; defendant does not challenge that ruling on appeal.

Similarly, here, plaintiff's FEHA claims were dismissed as barred by the statute of limitations. The court did not reach the merits of those claims. Moreover, to the extent the court did assess the merits in the context of plaintiff's remaining public policy claim, the court did not find (and defendant does not contend) that claim was frivolous or pursued in bad faith. Further, while defendant argues that plaintiff brought and then maintained her FEHA and CFRA claims in bad faith, the trial court expressly found otherwise. Under these circumstances, the trial court did not abuse its discretion in finding this was not the rare case in which defendant was a prevailing party on the FEHA claims.[9]

[9] We requested that the parties address *Hon* at oral argument. Defendant argued *Hon* was distinguishable, instead urging the court to follow *Linsley v. Twentieth Century Fox Film Corp*. (1999) 75 Cal.App.4th 762. In *Linsley*, the court affirmed an award of attorney fees where the plaintiff signed a pre-lawsuit release of all employment claims but continued to litigate his discrimination claim through summary judgment, even after his counsel was advised of the release. (*Id*. at p. 770.) We are not persuaded the record here similarly supports an award of fees, much less an abuse of discretion by the trial court in reaching the opposite conclusion.

DISPOSITION

We reverse the judgment of dismissal and remand for further proceedings. We affirm the order denying defendant's motion for fees. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.