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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

CYNTHIA FOREMAN, Plaintiff and Appellant, v. CITY OF LYNWOOD, Defendant and Appellant.	B278912 (Los Angeles County Super. Ct. No. BC584711)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Richard Rico, Judge. Affirmed.

Law Offices of Helena Sunny Wise, Helena Sunny Wise, for Plaintiff and Appellant.

Carico Johnson Toomey, Philip A. Toomey and William G. Benz; Leech Tishman Fuscaldo & Lampi, Philip A. Toomey and Eric J. Wu, for Defendant and Respondent.

INTRODUCTION

Plaintiff Cynthia Foreman (plaintiff) sued her employer, defendant City of Lynwood (the City), asserting claims for whistleblower retaliation under Labor Code section 1102.5 (section 1102.5) and various violations of the Fair Employment and Housing Act (FEHA)[1] based on wide-ranging allegations of mistreatment by the City and fellow City employees spanning more than five years. The trial court sustained the City's special and general demurrers to plaintiff's second amended complaint (SAC) without leave to amend, and she appealed from the ensuing judgment against her. We affirm.

APPLICABLE DEADLINES AND STATUTES OF LIMITATION

To provide context for the recitation of facts and discussion that follow, we briefly set forth several milestones and the statutes of limitation that apply to them. Plaintiff was hired by the City in 2007. She initiated this action on June 10, 2015. The operative SAC was filed April 15, 2016. The SAC included five causes of action for damages and injunctive relief: (1) Whistleblower Protection Act (Gov. Code, § 8547; Lab. Code, § 1102.5); (2) harassment and hostile work environment based on plaintiff's protesting discrimination against a coworker and defendant's "departure from the [City's] hiring and promotional practices"; (3) retaliation based on plaintiff's "race, protests and/or disabilities"; (4) discrimination based on plaintiff's being a "Caucasian, non-Hispanic" who was denied overtime and

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[1] Government Code section 12900 et seq.

promotional opportunities and subjected to disparate treatment; and (5) disability discrimination.[2]

Plaintiff filed a Government Claims Act claim on September 29, 2014.[3] It was formally rejected December 11, 2014. Presentation of a claim pursuant to the Government Claims Act is required before an employee may sue a public employer for violations of Labor Code section 1102.5. (Gov. Code, § 911.2.) With the presentation of plaintiff's claim on September 29, 2014, potentially actionable adverse employment actions under Labor Code section 1102.5 are those that occurred after March 29, 2014. Earlier alleged adverse employment actions that did not extend into the relevant time period are barred and cannot provide a basis for relief under Labor Code section 1102.5.[4]

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[2] Plaintiff alleged in paragraph 16 of the SAC that she "performed her job duties satisfactorily and without requesting or obtaining any accommodations." In paragraph 80 (e), she alleged she was "denied accommodations . . . afforded non-disabled employees, all while affording preferential treatment to non-disabled workers in these regards." In paragraph 81, however, plaintiff alleged she made "numerous requests . . . for accommodations, i.e., an air conditioned vehicle, team assistance if still assigned to Area 5, and cessation of harassment."

[3] Government Code sections 810 and 900 et seq.

[4] Plaintiff's contention that the Government Claims Act should give way to the Labor Code is not supported by any analysis or citation to authority. We consider it waived. (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1502.)

Plaintiff filed a FEHA complaint with the Department of Fair Employment and Housing (DFEH) on October 25, 2014, as to her claims for harassment and discrimination based on race and disability.[5] The right to sue letter issued the same day. The FEHA allegations are essentially subject to "two statutory deadlines: [Government Code] section 12960 and [Government Code] section 12965." (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1411 (*Acuna*).) The FEHA administrative complaint must be filed with DFEH within one year of the alleged wrongful conduct, although this period may be subject to equitable tolling. (*Id.* at pp. 1412-1413*;* Gov. Code, § 12960.) The statute of limitations to file a lawsuit after submission of a FEHA administrative complaint is one year from the date the right-to-sue notice is issued. (Gov. Code, § 12965, subd (d).)

Plaintiff's lawsuit was filed within one year of October 25, 2014 issuance of the DFEH right-to-sue notice. Accordingly, potentially actionable adverse employment actions and abusive working conditions under FEHA are those that occurred and existed after October 25, 2013. However, based on the doctrine of equitable tolling triggered by plaintiff's 2010-2011 internal complaints that were still being investigated in 2013, we will also

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[5] In every iteration of her complaint, plaintiff alleged in the second cause of action that she filed the FEHA retaliation claims with DFEH on October 25, 2011. The superior court did not comment on the discrepancy until the SAC was filed, when it based its ruling in part on the statute of limitations. On appeal, plaintiff insists the 2011 date was a typographical error and her FEHA complaint for all causes of action was submitted October 25, 2014. We accept this representation for the purposes of the appeal.

consider potentially actionable adverse employment actions and abusive working conditions occurring as early as the Fall of 2012, when plaintiff alleged she first suffered "substantial and material changes to [her] employment."

PROCEDURAL BACKGROUND

Named defendants in the original June 10, 2015 complaint were the City and two of plaintiff's supervisors, Rita Manibusan and Jonathan Colin. All defendants filed demurrers and motions to strike. The superior court issued a comprehensive tentative ruling that became the decision. The City's demurrer to one cause of action was sustained without leave to amend and the demurrers to the remaining causes of action were sustained with leave to amend. The superior court explained many of the allegations were barred by the applicable statutes of limitation and were vague, uncertain, and failed to state a cause of action. The motions to strike were deemed moot.

The first amended complaint was filed January 6, 2016. It included all the original causes of action, even the one the superior court sustained without leave to amend. Again, the superior court issued a comprehensive tentative ruling that became the decision. Again, the superior court determined the complaint was uncertain and failed to state a cause of action. Leave to amend was granted as to the City, but the demurrer was sustained without leave to amend as to the individual defendants.[6]

The operative pleading, the SAC, was filed April 15, 2016. It added factual allegations concerning events and conduct that

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[6] Plaintiff does not challenge this ruling or the ensuing judgment in favor of the individual defendants.

occurred after the original complaint was filed.[7] For the third time, the superior court provided counsel with a thorough explanation. On this occasion, however, the superior court sustained the demurrer without leave to amend. Judgment in favor of the City followed.

Plaintiff timely appealed.[8] With the filing of her opening brief, plaintiff also filed a request for judicial notice of documents from the court files of three superior court civil actions and one federal district court lawsuit, all involving other parties. We denied the request by order dated July 3, 2017. (Cal. Rules of Court, rule 8.252(a)(2).)

FACTUAL BACKGROUND

Plaintiff was the "sole white Caucasian non-Hispanic female Code Enforcement Officer" in the City assigned to the

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[7] Facts material to a case that occur after the filing of a complaint may be raised only by a supplemental complaint, which requires permission of the trial court. (Civ. Proc. Code, § 464; *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 215.) Plaintiff never sought leave to supplement her complaint. For the purpose of determining whether plaintiff has stated a cause of action under any theory, we do not consider facts alleged in the SAC that occurred after the June 10 filing of the original complaint (e.g., SAC, ¶¶35, 36, and portions of 69).

Nor do we consider the statements by counsel at oral argument concerning conduct that apparently began after judgment was entered in the trial court, e.g., the requirement that code enforcement officers wear heavy or Kevlar vests.

[8] The record does not contain a reporter's transcript of the hearing on the demurrer to the SAC. At our request, the parties briefed whether the record on appeal was nevertheless adequate.

development services department (DSD). According to the SAC, the alleged harassment and discrimination perpetrated by supervisors Manibusan and Colin and adverse employment actions began well before October 25, 2013.[9]

Application of the "continuing violations," "stray remarks" and "cat's paw" doctrines aside,[10] it is not necessary to explore

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[9] For example, in 2010, plaintiff complained to her supervisors that they were discriminating against an African-American coworker; (2) plaintiff reported one supervisor to human resources and asked for an investigation into the mishandling of monies collected by City employees when they recycled shopping carts; and (3) when plaintiff returned from a medical leave in 2011, she was assigned vehicles without working air conditioning or lifts and her field time increased.

In 2012, plaintiff complained to the City Council about being passed over for a promotion, although the position she hoped to fill was eliminated. In July 2013, her territory was changed to "Area 5," "a gang and drug infested area" where a co-worker had previously been "attacked by residents, transients, gang associates and homeless people . . . ." Following the transfer, plaintiff "was also confronted by angry residents, transients, gang associates and homeless people," confrontations that she reported to human resources "on a regular basis."

During the Summer of 2013, plaintiff's "managerial duties in the office were taken away completely . . . and given to other employees . . . ." During a portion of the Summer of 2013, however, plaintiff was on a medical leave. Plaintiff also learned during that time that certain contractors doing business in the City were providing Manibusan and Colin with free Dodgers tickets "in exchange for leniency and in some cases complete waiver of City [c]odes and [p]ermitting [f]ees . . . ."

[10] As it turns out, the statute of limitations issues are straightforward. The critical questions in this appeal are

plaintiff's 2010 and 2011 allegations, as plaintiff herself has alleged that "[b]latantly substantial and material changes to [her] employment did not fully develop . . . until [she], now competing for promotion to the position of Building and Safety Manager, complained to Human Resources (HR) of an overt departure in the Summer and Fall of 2012 by her DSD Managers from the [City's] promotional practices designed to provide equal employment opportunities. [Plaintiff] was then issued a Written Disciplinary Memo by DSD Managers, on or about October 11, 2012 which purported to address the very same promotional issues which [plaintiff] had raised with HR and HR had in turn brought to the attention of the [City Council]."

In terms of events that occurred in 2012, plaintiff complained she was denied two specific promotional opportunities. In the Summer of 2013, she was transferred to Area 5. After October 25, 2013 (one year before the FEHA complaint was filed with DFEH) and March 29, 2014 (six months before the claim was filed under the Government Code), plaintiff continued to complain about the Area 5 assignment. She also raised a number of new issues. In November 2013, plaintiff was told the City would conduct an investigation into each of her allegations, "including her disclosures about the failure to uniformly enforce [building codes and fee schedules], the receipt of gratuities from contractors benefiting from waivers, as well as [plaintiff's] claims of race and disability discrimination" and retaliation. Plaintiff also complained to Manibusan she needed access to a restroom during her shift due to her "medical condition" because she had no such access in Area 5.

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whether and when plaintiff was subjected to adverse employment actions or abusive working environments.

On December 6, 2013,[11] plaintiff met with a City investigator and was repeatedly assured she would be reassigned to Area 4. But when the promised reassignment again was not forthcoming, she made oral and written complaints in December 2013 and January, February, March, April and June 2014.

On an unspecified date, Colin "suddenly appear[ed] in [plaintiff's] work area" and made remarks about "'a heavy set girl.'" Plaintiff immediately reported the remarks to the HR director as "she had regained more than 80 pounds because of the stress she was experiencing in [the City]." Plaintiff detailed for the head of HR "what [Colin] and [Manibusan] had been doing, dating back to the recycling issues, the discriminatory promotional practices, and their failure to enforce the [b]uilding [c]odes in a uniform fashion." The HR director advised plaintiff that her complaints "would be placed in abeyance and referred to [outside investigators] . . . ." Plaintiff "dutifully awaited" the findings of the investigators while continuing to work in Area 5, "without [the] benefit of team assistance let alone a properly functioning vehicle, all while her health continued to suffer."

In April 2014, Colin and Manibusan "elected to toy further" with plaintiff by giving her a truck with air conditioning to drive in Area 5, only to have Manibusan take the truck away "within days." By this action, plaintiff was require "to operate a vehicle in severe disrepair in inclement weather, to [her] continuing physical and emotional detriment, causing [her] to regain more than 80 pounds she had shed and kept off for a number of years."

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11 Plaintiff claimed that by December 2013, she "was clearly *non gratis* with" Colin and Manibusan. No factual allegations support or explain this statement.

In early June 2014, Manibusan, and later Colin, were placed on administrative leave. Nevertheless, the "harassment and hostile work environment" continued. In early July 2014, however, plaintiff was reassigned to Area 4 and provided with "a dependable truck . . . ."

In January 2015, following the relocation of code enforcement officers to city hall, the new head of DSD "withheld keys from [plaintiff] to the women's bathroom for several weeks, even though" keys had been furnished to other women working in the department. As a result, plaintiff "was belittled when having to seek out keys [to the bathroom] because the stress was causing [her] to experience a need to urinate more."

In March 2015, the DSD director "started openly laughing in the presence of [plaintiff] and another female employee at [s]taff [m]eetings, [including making a comment] about a female's hot flashes if a woman was seated between two men." Plaintiff and the other employee complained to HR, causing plaintiff to then be accused of "performance shortcomings." Plaintiff was also denied "training and leadership opportunities extended to her male Hispanic colleagues" and her work schedule was changed, causing her "to lose her regular days off."

DISCUSSION

A. Standard of Review

As this case was resolved on demurrer, we accept as true all well-pleaded factual allegations. (*Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 101.) We do not, however, accept as true plaintiff's "contentions, deductions, or conclusions of fact or law." (*Lin v. Coronado* (2014) 232 Cal.App.4th 696, 700-701.)

Our review is de novo. We independently determine whether the operative pleading states a cause of action as a matter of law.[12] We give "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439.)

The SAC is not a model pleading. Instead of setting forth the elements for each cause of action and the factual allegations to support them, plaintiff included irrelevant information,[13] adopted a shotgun pleading format,[14] and in a number of

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[12] The City's brief discusses the special demurrer and uncertainty at some length. A special demurrer for uncertainty "is directed to a defect of form rather than of substance." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 8.) Many of the allegations the City characterized as uncertain are properly viewed as insufficient to state a cause of action and are, for that reason, subject to a general demurrer.

[13] For example, plaintiff complains her supervisors, Manibusan and Colin "were resisting salary increases for all Code Enforcement Officers," but that statement is not connected to any allegations in the lawsuit. Plaintiff discusses a January 2013 dispute between the city manager and city council concerning "administrative staffing decisions," but makes no attempt to connect this to any allegations in the lawsuit.

[14] "Shotgun pleadings are pleadings that overwhelm defendants with an unclear mass of allegations and make it difficult or impossible for defendants to make informed responses to the plaintiff's allegations. They are unacceptable." (*Sollberger v. Wachovia Securities, LLC* (C.D. Cal. June 30, 2010, No. SACV 09-0766 AG) 2010 U.S. Dist. LEXIS 66233 at *11-12.)

instances relied on conclusions rather than factual allegations.[15] With each demurrer, the trial court pointed out deficiencies, including as to the statutes of limitation issues, but the SAC was peppered with five years of allegations detailing a litany of events and acts with virtually no effort to specify the facts that supported each cause of action.

B. Causes of Action -- Elements and Sufficiency of the Allegations

1. First Cause of Action: Whistleblower Retaliation in Violation of Section 1102.5

The elements for a retaliation cause of action based on a plaintiff's status as a whistleblower in violation of section 1102.5 are: (1) plaintiff's having "engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) . . . a causal link between the two." (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384 (*Patten*).) "An employee engages in protected activity when she discloses to a governmental agency '"reasonably based suspicions" of illegal activity.'" (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138.)

Plaintiff's whistleblowing activities occurred in 2010 through 2012. As discussed below, however, we conclude that none of the City's alleged actions constituted an adverse employment action for purposes of stating a retaliation claim

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[15] Plaintiff concluded she lost overtime opportunities, but alleged no facts to support the conclusion. She concluded she "was denied training and leadership opportunities extended to her male Hispanic colleagues," but again alleged no supporting facts.

under section 1105.2. Accordingly, this cause of action failed as a matter of law.

2. Second Cause of Action for Harassment and/or Hostile Work Environment in Violation of FEHA

The elements for a FEHA harassment and/or hostile work environment are described in *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 (*Fisher*): "(1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome . . . harassment; (3) the harassment complained of was based on [plaintiff's belonging to a protected group]; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior."

To constitute an actionable hostile work environment, the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" (*Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 67; *Fisher, supra,* 214 Cal.App.3d at p. 608.) Courts look to the "totality of the circumstances" [to determine whether the harassment is sufficiently pervasive;] [¶] [acts that are] occasional, isolated, sporadic, or trivial" are not actionable. (*Fisher, supra,* 214 Cal.App.3d at p. 610.)

The SAC alleges plaintiff was subjected to harassment and a hostile work environment as a result of whistleblowing. Specifically, plaintiff alleged her supervisors bore her "animus because [she] protested their discriminatory practices against [an African-American coworker in 2010], as well as their departure from the [City's] hiring and promotional practices commencing in

the Summer of 2011 and up through and including April 2014." Plaintiff reiterated in the same paragraph that her supervisors "bore animus against [her] because of these protests, as well as because of [her] whistleblowing activities that also exposed wrongdoing on their parts."

This cause of action failed as a matter of law because "whistleblower" is not a protected class under FEHA. FEHA prohibits discrimination based on "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status." (Gov. Code, § 12940, subd. (a).) The SAC alleged the harassment and hostile work environment existed because she was a whistleblower, not because of her race, gender, or physical or mental disabilities. The complaints in the second cause of action were not actionable as a matter of law under FEHA.

3. Third Cause of Action for Retaliation in Violation of FEHA

To establish a prima facie case of retaliation under FEHA, "'a plaintiff must show (1) he or she engaged in a "protected activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action.'" (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 244 (*Moore*).) Being a whistleblower does protect an employee from retaliation under FEHA if the employee has "blown the whistle" on a discriminatory employer practice forbidden by FEHA, e.g., discrimination based on "race, religious creed, color, national

origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status." (Gov. Code, § 12940, subd. (a).)

As the *Moore* court held, "section 12940, subdivision (h) makes it unlawful for an employer 'to discharge, expel, or otherwise discriminate against any person because *the person has opposed any practices forbidden under this part* or because *the person has filed a complaint, testified, or assisted in any proceeding under this part*.'" (*Moore, supra,* 248 Cal.App.4th at p. 244.)

With one exception, plaintiff's whistleblowing activities involved alleged corruption by her supervisors and the City's failure to abide by its personnel promotion policies. On that basis, this cause of action failed as a matter of law.

To the extent this cause of action was based on plaintiff's 2010 complaint of racial discrimination against a coworker, this cause of action still failed. Plaintiff has not alleged a causal link between the racial discrimination complaint and the alleged adverse employment actions three years later. Moreover, as discussed below, none of the City's alleged actions constituted an adverse employment action for purposes of stating a FEHA retaliation claim.

4. Fourth Cause of Action for Racial Discrimination in Violation of FEHA

A claim of racial discrimination under FEHA is a "'disparate treatment'" claim. (*McCaskey v. California State Automobile Assn.* (2010) 189 Cal.App.4th 947, 979 (*McCaskey*).) The elements of a disparate treatment claim are "'(1) the

employee's membership in a classification protected by the statute; (2) discriminatory animus on the part of the employer toward members of that classification; (3) an action by the employer adverse to the employee's interests; (4) a causal link between the discriminatory animus and the adverse action; (5) damage to the employee; and (6) a causal link between the adverse action and the damage.'" (*Ibid.*)

Plaintiff's allegations of racial discrimination because she is Caucasian were conclusory and not supported by any facts. That deficiency notwithstanding, none of the City's alleged actions constituted an adverse employment action for purposes of stating a FEHA retaliation claim, as discussed below.

5. Fifth Cause of Action for Disability Discrimination in Violation of FEHA

It is an unlawful employment practice under FEHA to discriminate against any person because of a physical or mental disability.[16] (§ 12940, subd. (a).) A prima facie case for discrimination "on grounds of physical disability under the FEHA requires plaintiff to show: (1) [s]he suffers from a disability; (2) [s]he is otherwise qualified to do [her] job; and, (3) [s]he was

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16 Plaintiff made allegations concerning "events and the aggravation of [her] preexisting disabilities." In January 2011, plaintiff began "seeing mental health professional in addition to her various physicians for stress and he physical manifestations of same, with the obvious symptoms diagnosed at various times as *the possible onset* of breast and colorectal cancer, cervical stenosis, cardiovascular problems, recurring sebaceous cysts, and mastitis." Plaintiff also claimed to have been diagnosed with "a life-threatening illness *believed to be* cancerous necessitating . . . disfiguring surgery . . . ." (Italics added.)

subjected to adverse employment action because of [her] disability." (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.) "[T]he touchstone of a qualifying handicap or disability is an actual or perceived physiological disorder which affects a major body system and limits the individual's ability to participate in one or more major life activities." (*Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1061.)

Plaintiff did not allege she was limited in her ability to perform "one or more major life activities." To the contrary, she alleged that at all times she "performed her job duties satisfactorily and without requesting or obtaining any accommodations." Absent such necessary allegations, plaintiff failed at the outset to allege a qualifying disability upon which a viable claim for disability discrimination could be based. In any event, as with the other causes of action, plaintiff failed to allege any conduct by the City that constituted an adverse employment action for purposes of stating a FEHA disability discrimination claim.

6. Failure to Engage in a Good Faith Interactive Process[17]

The elements of a cause of action under FEHA for failure to engage in a timely, good faith interactive process are (1) the plaintiff has a disability covered by the FEHA and known to the defendant; (2) the plaintiff requested that the defendant make a

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[17] In addition to challenging the trial court's ruling sustaining without leave to amend the City's demurrer to all the causes of action in the SAC, plaintiff challenges the trial court's earlier ruling sustaining without leave to amend the City's demurrer to the interactive process claim in the original complaint.

reasonable accommodation for his disability so that he would be able to perform the essential job requirements of the job being sought; (3) the plaintiff was willing to participate in an interactive process to determine whether a reasonable accommodation could be made so that he could perform the essential job requirements; (4) the defendant failed to participate in a timely good faith interactive process to determine whether reasonable accommodation could be made. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61-62; CACI 2546 (2009 ed.).)

As discussed above, plaintiff failed to adequately allege she suffered from a disability as that term is defined under FEHA. Absent such a qualifying disability, the City could not have been under a duty to engage in an interactive process with plaintiff designed to reach a reasonable accommodation for her particular needs as a result of a specific disability.

Even assuming plaintiff adequately alleged a qualifying disability, she failed to allege she requested a reasonable accommodation *based on that disability* or that the City refused to engage in good faith discussions with her in an effort to achieve such an accommodation.[18] The absence of such allegations rendered her interactive process claim fatally defective and subject to demurrer.

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[18] See, e.g., paragraph 80 (e), where plaintiff alleged she was "denied accommodations . . . afforded non-disabled employees," not that she requested an accommodation based on a disability she suffered.

C. Adverse Employment Actions/Abusive Working Environments

As noted, the viability of each cause of action depends on factual allegations plaintiff was subjected (within the applicable limitations period) either to adverse employment actions causally linked to plaintiff's engaging in protected activity and being a member of a protected class (*Patten, supra,* 134 Cal.App.4th at p. 1384) or to conduct "severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462 (*Miller*)).

The "materiality" test to determine whether an employer's conduct constitutes an adverse employment action is the same under Labor Code section 1102.5 and FEHA. (*Patten, supra*, 134 Cal.App.4th at pp. 1387-1388.) In *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028 (*Yanowitz*), the Supreme Court explained employees are protected against "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or co-employees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment . . . , the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination." (*Id.* at pp. 1054-1055; see also *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357 ["'adverse employment action' consists of discrimination

regarding compensation, terms, conditions, or privileges of employment *and* disparate treatment in employment, specifically requiring people to work in a discriminatorily hostile or abusive environment"] (*Malais*).)

Yanowitz added: "Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion" is actionable. (*Yanowitz, supra,* 36 Cal.4th at p. 1054-1055; see also *Malais, supra,* 150 Cal.App.4th at p. 357 ["Not every change in the conditions of employment, however, constitutes an adverse employment action"]; *McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 386-387 (*McRae*) ["workplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action. If every minor change in working conditions or trivial action were a materially adverse action then any action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. The plaintiff must show the employer's . . . actions had a detrimental and substantial effect on the plaintiff's employment" (internal quotations and citations omitted)]; *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455 ["to be actionable, the retaliation must result in a substantial adverse change in the terms and conditions of the plaintiff's employment. A change

that is merely contrary to the employee's interests or not to the employee's liking is insufficient . . . . Absent this threshold showing, courts will be thrust into the role of personnel officers, becoming entangled in every conceivable form of employee job dissatisfaction"].)

Courts evaluate "[t]he working environment . . . in light of the totality of the circumstances: '[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.'" (*Miller, supra,* 36 Cal.4th at p. 462.)

A retaliatory motive on the part of the employer and a "causal link" between the employee's protected activity and the adverse employment action may be proven "'by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' [Citation.] 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision."'" (*Fisher, supra,* 214 Cal.App.3d at p. 615 (*Fisher*).)

Based on the timing of plaintiff's Government Claims Act claim and the DFEH complaint, we are concerned in this litigation with adverse employment actions and abusive work conditions existing after March 29, 2014, for the alleged section

1102.5 violation, and beginning in the Fall of 2012 for the alleged FEHA violations.

As noted earlier, plaintiff concedes there were no "material changes to [her] employment, however, until . . . the Summer and Fall of 2012." In 2012, plaintiff complained she was not promoted to the position of building and safety manager. Any employer action in this regard was not as a matter of law an adverse employment action because the building and safety manager position was eliminated in 2012 and not filled by anyone. Plaintiff also faulted the City for filling the code enforcement manager position in September 2013 with another individual, but plaintiff does not allege she applied for or met the qualifications for that position.[19]

Giving the SAC a broad reading, plaintiff alleges the following conduct constituted adverse employment actions or abusive working environments within the period of the statutes of limitations: She was transferred to Area 5 in July 25, 2013, and remained in that assignment until July 3, 2014; she was not provided "team assistance" while assigned to Area 5; she was given substandard vehicles while assigned in Area 5; on one occasion in 2013 or 2014, Colin made a remark about a "heavy set girl"—this after plaintiff "had regained more than 80 pounds because of the stress she was experiencing in [the City]"; in April 2014, Colin gave plaintiff a truck with air conditioning, but

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[19] According to the SAC, the person chosen, Marissa Cordova, was the DSD special project manager when she was given the code enforcement manager position. Plaintiff never alleged she had any manager experience, but had occasionally taken on office responsibilities "that a supervisor would also be expected to handle."

Manibusan took it away days later; in January 2015 her department head gave other code enforcement officers a city hall restroom key, but not her; in March 2015, the department head made a comment about female employees and hot flashes; she was denied training and leadership opportunities in May 2015; and her regularly scheduled off days were changed.

Plaintiff's allegation concerning a change in her off-days schedule is not supported by facts suggesting an adverse effect on her employment; it is not actionable as a matter of law. (*McRae, supra,* 142 Cal.App.4th at pp. 386-387.)

The allegation plaintiff was denied training and leadership opportunities in May 2015 is conclusory and unsupported by factual allegations. It is insufficient as a matter of law to constitute an adverse employment action or abusive working environment.

The two statements concerning a woman's weight and hot flashes were insensitive and inexcusable; but as a matter of law—and whether viewed individually or together—they did not constitute adverse employment actions within the applicable statute of limitations that were causally linked to plaintiff's engaging in protected activity or being a member of a protected class. (*Patten, supra,* 134 Cal.App.4th at p. 1384.) Nor were they "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." (*Fisher, supra,* 214 Cal.App.3d at p. 608.)

Being deprived of a key, presumably for the employee restroom in city hall, for a brief period of time, also did not constitute an adverse employment action within the applicable statute of limitations causally linked to plaintiff's engaging in protected activity or being a member of a protected class (*Patten,*

supra, 134 Cal.App.4th at p. 1384), nor was that action "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment" (*Fisher, supra,* 214 Cal.App.3d at p. 608).

Plaintiff was transferred to Area 5 in July 25, 2013, and remained in that assignment until July 3, 2014. She was not provided "team assistance" and was given substandard vehicles while assigned to Area 5. These allegations, too, were insufficient as a matter of law to state a cause of action for an adverse employment action or a hostile or abusive working environment.

Although plaintiff opposed her assignment to Area 5, no allegations suggested it was other than a routine assignment for code enforcement officers. There were no allegations the work she was expected to perform in Area 5 differed from the work she performed in other assigned areas or the work performed by other code enforcement officers previously assigned to Area 5. Plaintiff did not suggest the Area 5 assignment jeopardized her opportunities for advancement. Plaintiff's Area 5 assignment came more than one year after she complained of not receiving the building and safety manager position and more than two years after she raised the recycling monies issue and complained of racial discrimination against a coworker.

Plaintiff's complaint that the vehicle she was assigned for the work in Area 5 was in "disrepair" is conclusory. It was not supported by any fact allegations explaining the nature of the "disrepair" or how the disrepair created or resulted in an abusive working environment or constituted an adverse employment action. Plaintiff alleged she should have been given a coworker's vehicle beginning "the first week of in September 2013 and up to

the beginning of April 2014," but conceded the coworker was still using that vehicle in February 2014.

Plaintiff desired "team assistance" for the Area 5 assignment, but she did not allege she worked with team assistance in other geographical areas or that other code enforcement officers were given team assistance when assigned to Area 5.

Plaintiff naturally required access to a restroom during her shifts. She alleged the "mini parks" in Area 5 had no restrooms and "business establishments were frequently the focus of gang and drug activities." Plaintiff did not allege she could not leave Area 5 during her shift to use a restroom. We may take judicial notice of the fact that the City covers a mere 4.9 square miles.[20] The alleged facts concerning restroom access are insufficient as a matter of law to demonstrate a hostile work environment or adverse employment action.

Plaintiff spent 10 months doing her regular job in an area she did not like and considered undesirable. She complained to her superiors the entire time she worked in Area 5, but did not allege the assignment had a "detrimental and substantial effect on [her] employment." (*McRae, supra,* 142 Cal.App.4th at pp. 386-387.)

D. No Leave to Amend

On appeal, plaintiff has the burden to demonstrate she can amend the complaint to state a cause of action against the City. The Court of Appeal in *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39 explained a "plaintiff may make

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[20] City of Lynwood General Plan, page 4-1.

this showing for the first time on appeal. [Citations.] [¶] To satisfy [her] burden, . . . plaintiff must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation.] [¶] The burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. [Citation.] Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend." (*Id.* at pp. 43-44.)

Plaintiff has not offered any proposed factual allegations or legal authority. Accordingly, the demurrer was properly sustained without leave to amend.

DISPOSITION

The judgment is affirmed. The City is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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