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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

IRINA MURADYAN, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B234203 (Los Angeles County Super. Ct. No. BC440960)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ruth Ann Kwan, Judge. Affirmed.

Law Offices of David R. Denis, David R. Denis and Timothy E. Kearns for Plaintiff and Appellant.

Kessel & Associates, Elizabeth M. Kessel, Armineh Megrabyan and James H. Demerjian for Defendants and Respondents.

* * * * * *

The trial court granted summary judgment in favor of defendants and respondents County of Los Angeles (County) and Shenaud Morgan (Morgan) on the complaint filed by plaintiff and appellant Irina Muradyan which alleged violations of Government Code section 12940, part of the Fair Employment and Housing Act (FEHA), and common law tort claims stemming from Morgan's sexually harassing and retaliating against appellant. The trial court ruled that appellant's claims were untimely on the basis of her failure to file a complaint with the Department of Fair Employment and Housing (DFEH) within one year of the harassment and retaliation (Gov. Code, § 12960, subd. (d)), and her failure to submit a government tort claim (Gov. Code, § 911.2).

We affirm. The trial court properly determined the undisputed evidence showed that appellant did not timely pursue her administrative remedies and failed to offer evidence to create a triable issue of fact as to whether the applicable limitations periods were tolled or otherwise satisfied.

FACTUAL AND PROCEDURAL BACKGROUND

Incidents During Appellant's Employment.

Appellant was employed as an ITC clerk with the County Probation Department. In 2006, appellant received a copy of the County's sexual harassment policy, which directed that complaints of sexual harassment be made either to the Department Affirmative Action Compliance Programs Office or the County Office of Affirmative Action Compliance (OAAC). The County's brochure describing the policy directed employees who believed they were sexually harassed to file a complaint with either their immediate supervisor, higher level manager, department affirmative action coordinator or the OAAC and provided the Web site address containing the complaint form.

As of October 2007, appellant worked in the probation department's Downey office and Morgan was her direct supervisor. Morgan verbally and physically sexually harassed appellant on multiple occasions beginning on June 27, 2008 and lasting through July 31, 2008.

Appellant and Lana Mouri were friendly as coworkers. Mouri was a program analyst in the security services and emergency preparedness unit in the probation department's risk management division. She was not a supervisor and did not have a duty to accept, process or forward complaints of sexual harassment. Nor was she trained on what to do when someone reported sexual harassment to her. During the first two or three days of July 2008, appellant told Mouri that Morgan had sexually harassed her a few days earlier. Appellant thought that Mouri was working for risk management and, though she was unsure of Mouri's exact job, appellant understood that if people "have something to report, they will report [it] to her as far as like harassment or other issues." But at the time appellant spoke with Mouri, she "wasn't thinking if she was accepting calls like that or not. [Appellant] just felt close to her; that's why [she] called and reported it to her." Mouri believed that appellant was confiding in her as a friend and that the information was personal; she did not discuss the information with anyone else in the probation department. Mouri advised appellant to report the harassment to Francesca Jones, specifically reminding appellant that she was not her supervisor and did not "know a lot about these things." Appellant's husband did not want her reporting to Jones because he and appellant were afraid that appellant would lose her job.

On July 3, 2008, appellant went to a hospital emergency room complaining of dizziness. The intake report indicated that appellant claimed to be the victim of sexual advances from her boss, but "did not report." Part of the treatment plan encouraged appellant and her husband to report the "alleged 'assault'" to the police.

Appellant was forced to transfer to the Van Nuys office because she refused to have sex with Morgan. He said that she would either need to be his "second wife" or transfer out of the office. Her last day in the Downey office was July 31, 2008, and she was scheduled to begin work in the Van Nuys office on August 4, 2008. Between August 5 and August 18, 2008, appellant was hospitalized as a result of exhibiting psychotic and delusional behavior. She was assaultive and agitated, and defecated and urinated on the floor. Appellant was stabilized with medication and discharged. With the exception of a 10-day period in December 2008 when she attempted to return to work,

appellant did not begin work in Van Nuys until July 1, 2009, having been on disability leave. Appellant never contacted the OAAC about Morgan's conduct.

Over one year later, on August 7, 2009, Mouri for the first time mentioned to her direct supervisor, Erbie Philips, that appellant had told her Morgan sexually harassed her. Philips advised her that, as a supervisor, he was required to file a formal report and asked her to provide a statement. Philips, in turn, reported the alleged harassment to Jones. On August 11, 2009, Francine Jimenez learned from Jones that appellant may have been sexually harassed by Morgan. Since April 2001, Jimenez had been employed as the affirmative action compliance director within the County's Probation Department. Her duties included receiving complaints of discrimination, including sexual harassment, from probation department employees and clients, making inquiries about those complaints and forwarding them to the OAAC. She was responsible for filing a complaint on behalf of an employee or client when she learned of incidents of discrimination or harassment in the workplace. She also received copies of DFEH complaints filed by probation department employees.

On the basis of information provided by Jones, Philips and appellant, Jimenez referred the matter to the OAAC on August 20, 2009 and asked for an investigation to be conducted. She did so notwithstanding appellant's stating that she was hesitant to participate in an investigation because she did not want to become ill again. Prior to August 11, 2009, Jimenez was unaware that appellant believed she had been sexually harassed by Morgan. Before appellant filed her lawsuit, Jimenez never received a copy of a DFEH complaint filed by appellant against the County.

The OAAC investigated the matter for the purpose of determining whether Morgan had violated the County's equal employment opportunity policy. Martina Wilson, who was assigned to investigate, determined that appellant's claim could not be substantiated and prepared a March 24, 2010 letter to appellant to that effect.

Appellant filed a DFEH complaint in May 2010, which immediately sought a right to sue letter, and the DFEH issued its notice of case closure and right to sue notice also in

May 2010. She amended her DFEH complaint in November 2010 to add a charge of retaliation.

Pleadings and Summary Judgment.

On July 1, 2010, appellant filed a complaint against the County and Morgan which alleged causes of a action for sexual harassment, retaliation, sexual discrimination and failure to prevent sexual harassment in violation of the FEHA; intentional and negligent infliction of emotional distress; and negligent hiring, retention and supervision. She sought compensatory and punitive damages. After the County and Morgan successfully moved to set aside entry of default, they demurred to the complaint and moved to strike portions of it. As to the County, the trial court sustained the demurrer with leave to amend and, as to Morgan, sustained the demurrer with leave to amend as to certain causes of action and without leave to amend as to others. Specifically, the trial court ruled that appellant had failed to allege facts to show she timely filed a complaint with the DFEH or to show that equitable tolling applied to her FEHA claims. It further ruled that appellant had failed to allege facts demonstrating or excusing compliance with the claim presentation requirement set forth in Government Code section 911.2.

Thereafter, appellant filed the operative first amended complaint (FAC) in December 2010, which contained the same allegations relating to harassment and retaliation, but added allegations relating to her reporting the incidents. Initially, appellant had alleged that on July 3, 2008, she "called Lana Mouri, a coworker, and told her everything. [Mouri] advised Plaintiff to call the Chief of her department, but Plaintiff's husband didn't want her to do anything." According to the FAC, on July 3, 2008 appellant "called Lana Mouri, a coworker in Risk Management for the County who she believed received these types of claims and submitted a formal complaint and claim against MORGAN and the COUNTY. Lana Mouri later on a date unknown reported the harassment and claim to, Francesca Jones (Chief of Management Services Bureau of Los Angeles Probation Department), which started the internal investigation process." The FAC added that appellant filed an internal complaint in July 2008 and voluntarily submitted to and pursued the County's internal remedies. She alleged she "was not

aware or ha[d] any other reason to be aware of any other claims procedure for the County or for FEHA." The FAC further described appellant's receipt of her right to sue letter from the DFEH in March 2010, and appellant alleged that she believed her claims were equitably tolled during this period when she was pursuing internal remedies. In addition, appellant alleged she "believed that she satisfied the Government Tort Act when she filed her complaint with the County in July 2008 and received a letter from the County on March 24, 2010. She did not know or have reason to know that she had to file any other claim to bring a suit against the County." Nonetheless, she filed another claim after receiving the March 2010 letter.

The County and Morgan answered, denying the allegations and asserting multiple affirmative defenses. In February 2011, the County and Morgan moved for summary judgment, primarily on the grounds that appellant failed to exhaust her administrative remedies under the FEHA and failed to file a timely government tort claim with the County. In support of their motion, they submitted declarations from County employees, excerpts of appellant's deposition, excerpts of appellant's medical records, copies of internal policies, and the results of a public records request to the DFEH, and sought judicial notice of local ordinances and pleadings. In particular, Katherine Medina, deputy clerk for the County Board of Supervisors, averred that she was familiar with the County's process for handling and recording the submission of claims. A search of the County's database revealed that no claims under appellant's name had been filed between June 27, 2008 and July 1, 2010, nor had there been any application for leave to file a late claim. A search of the correspondence data base similarly revealed no correspondence from appellant during the same time period.

Appellant opposed the motion. She asserted that triable issues of fact existed as to whether the time to file her DFEH complaint was equitably tolled or tolled by reason of the continuing violation doctrine, and whether she timely presented a government tort claim. She offered her husband's declaration, deposition excerpts, a doctor's letter, County policies and training documents, and documents relating to the County's internal

investigation in support of her opposition. The County and Morgan filed evidentiary objections to much of appellant's evidence.

Following a May 25, 2011 hearing, the trial court took the matter under submission and ultimately issued a written ruling granting summary judgment. Preliminarily, the trial court sustained the majority of the County's and Morgan's evidentiary objections, and overruled appellant's untimely evidentiary objections. With respect to appellant's first four causes of action alleging FEHA violations, the trial court granted summary judgment on the ground they were barred because appellant failed to file a timely DFEH complaint. The undisputed evidence showed that any harassment ended on July 31, 2008 and the retaliatory transfer occurred on August 4, 2008, more than one year before appellant filed her May 14, 2010 DFEH complaint. The trial court further found there were no triable issues of fact to support equitable tolling, as the undisputed evidence showed appellant did not pursue her administrative remedies within one year of the harassment and retaliation. The trial court likewise concluded that there was no admissible evidence creating a triable issue of fact concerning tolling due to appellant's mental incapacity or because of any continuing violations. With respect to appellant's remaining tort causes of action, the trial court granted summary judgment on the ground they were barred because of her failure to present a government tort claim prior to filing suit.

On July 1, 2011, appellant filed a notice of appeal before judgment had been entered. Thereafter, the County and Morgan filed a motion seeking attorney fees and costs pursuant to Code of Civil Procedure section 1038 or, alternatively, section 2033.420. Over appellant's opposition, the trial court granted the motion pursuant to Code of Civil Procedure section 1038. Judgment was entered on July 22, 2011.

DISCUSSION

Appellant contends that the trial court erred in granting summary judgment, asserting that triable issues of fact precluded the trial court from finding that her claims

were barred because of her failure to submit a timely DFEH complaint and government tort claim. We find no merit to her contentions.

I. Summary Judgment Principles and Standard of Review.

Summary judgment is appropriate where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the cause of action in question cannot be established or, as with the statute of limitations defense, that there is a complete defense to the action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Once the moving party's burden is met, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact. (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) The plaintiff must produce "substantial" responsive evidence sufficient to establish a triable issue of fact. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) "[R]esponsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact." (*Ibid*.) """When opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork."' [Citation.]" (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 894.)

We review a grant of summary judgment de novo, considering "'all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence.'" (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 612.) "In independently reviewing a motion for summary judgment, we apply the same three-step analysis used by the superior court. We identify the issues framed by the pleadings, determine whether the moving party has negated the opponent's claims, and determine whether the opposition has demonstrated the existence of a triable, material

factual issue." (*Silva v. Lucky Stores, Inc., supra,* 65 Cal.App.4th at p. 261.) Although we independently review a grant of summary judgment, we review the trial court's evidentiary rulings for an abuse of discretion. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

II. The Undisputed Evidence Established That Appellant Did Not Timely File a DFEH Complaint.

A. The County and Morgan Met Their Burden to Establish a Complete Defense to Appellant's FEHA Claims.

Appellant's first four causes of action alleged violation of the FEHA. As a prerequisite to filing suit against an employer for an unlawful employment practice under the FEHA, a plaintiff must first exhaust his or her administrative remedies. (Gov. Code, §§ 12960, 12965.) In order to do so, the plaintiff must timely file a verified, written complaint with the DFEH setting forth the substance of the claims, and receive a right-to-sue notice. (*Ibid*.; *Rickards v. United Parcel Service, Inc.* (2012) 206 Cal.App.4th 1523, 1526–1527; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63.) Exhaustion of administrative remedies is a jurisdictional prerequisite to filing suit. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70; *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1726.)

Specifically, Government Code section 12960, subdivision (b) provides: "Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department." The administrative complaint must be filed with the DFEH within one year of the date the alleged violation occurred, subject to exceptions inapplicable here. (Gov. Code, § 12960, subd. (d); *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492.) The one-year period

starts to run when the administrative remedy accrues, which is upon the occurrence of the unlawful practice. (*Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 945.)

Here, the undisputed evidence showed that appellant's claims accrued—and hence the one-year period began to run—no later than August 4, 2008. It was undisputed that appellant had no contact with Morgan after July 31, 2008 and was transferred to the Van Nuys office effective August 4, 2008. It was equally undisputed that appellant did not file her DFEH complaint until May 14, 2010, well after the expiration of the one-year period. On the basis of the undisputed evidence showing that appellant filed her DFEH complaint more than one year after her FEHA claims accrued, the County and Morgan met their initial burden on summary judgment to establish a complete defense. (Gov. Code, § 12960, subd. (d); *Martin v. Lockheed Missiles & Space Co.*, *supra*, 29 Cal.App.4th at p. 1724 [in the context of the FEHA, the "failure to exhaust administrative remedies is a ground for a defense summary judgment"].)

B. Appellant Failed to Establish a Triable Issue of Fact Concerning the Timeliness of her DFEH Complaint.

In an effort to meet her burden to establish a triable issue of material fact, appellant offers three independent reasons why her FEHA claims were not time-barred. We conclude that the trial court properly rejected each reason.

1. Equitable tolling.

First, appellant contends that the time to file her DFEH complaint was equitably tolled. In *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 (*McDonald*), our Supreme Court described the doctrine of equitable tolling: "The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. [Citations.] It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' [Citation.] Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' [Citation.]" The *McDonald* court determined that

the one-year statute of limitations in Government Code section 12960, subdivision (d) is equitably tolled while an employee pursues an internal administrative grievance procedure. (*McDonald*, *supra*, at p. 108.)

Appellant characterizes her July 3, 2008 telephone conversation[1] with Mouri as the initiation of an internal administrative process sufficient to equitably toll the one-year limitations period. To support her characterization, she cites her own deposition testimony concerning her reporting the harassment to Mouri.[2]

"[COUNSEL] Q: Okay. And is Lana Mouri someone at the county who her job is to accept reports of sexual harassment?

"[APPELLANT] A: I think he was—I mean, she was dealing with—she was working for risk management. She was [an] analyst, and I don't know exactly what her job was, but I think they would report to her, also.

"Q: Who is they?

"A: Like people, if they have something to report, they will report to her as far as like harassment or any other issues.

"Q: How do you know that Ms. Mouri was someone assigned by the county to accept harassment complaints?

"A: Because we had classes, not—I've never been in a sexual harassment class . . . . It's a[n] HR forum. I think that's what it was called."

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[1] Mouri averred that the conversation occurred on July 1, 2008, while appellant testified that it occurred on July 3, 2008. This conflict is inconsequential for the purpose of ascertaining whether a triable issue of fact existed to preclude summary judgment.

[2] Appellant also relies on her husband's declaration, but the trial court sustained the County's and Morgan's evidentiary objections to that declaration and appellant has not challenged those rulings on appeal. When an appellant does not challenge the trial court's sustaining objections to evidence offered in support of a summary judgment motion, "any issues concerning the correctness of the trial court's evidentiary rulings have been waived. [Citations.] We therefore consider all such evidence to have been properly excluded. [Citation.]" (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014–1015.)

Relying on *McDonald, supra,* 45 Cal.4th 88, appellant contends that this evidence raised a triable issue of fact as to whether she pursued an internal administrative remedy beginning in July 2008. But *McDonald* only highlights why appellant's evidence failed to create a triable issue. There, the plaintiff pursued a formal grievance proceeding after she was not hired for a database administrator position at a community college district in January 2001. (*Id.* at p. 97.) In October 2001, she wrote a letter to the human resources office and followed up in November 2001 by filing a formal discrimination complaint with the chancellor's office. After the complaint was forwarded to the district office, the plaintiff learned there would be a formal investigation. (*Id*. at pp. 97–98.) While the formalized internal grievance proceeding was still pending, the plaintiff filed an administrative complaint with the DFEH in October 2002, alleging both race and sex discrimination. (*Id*. at p. 98.)

Our Supreme Court held traditional equitable tolling principles applied. It explained that equitable tolling "required a showing of three elements: 'timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.' [Citations.]" (*McDonald, supra,* 45 Cal.4th at p. 102.) The court determined that the plaintiff's pursuit of an internal remedy satisfied these elements, as the internal administrative procedures afforded the plaintiff and her employer "a full opportunity to formally or informally resolve a dispute in a way that will, in many cases, minimize or eliminate entirely the need for further judicial proceedings." (*Id*. at p. 105.)

In sharp contrast to *McDonald,* the undisputed evidence here supported none of the elements required for equitable tolling. Timely notice was lacking. The evidence was undisputed that Mouri did not report Morgan's incidents of sexual harassment against appellant until August 2009, over one year after they had occurred. Mouri had not received training in handling complaints of sexual harassment, and it was not within her job description to report such incidents. Nor was there any evidence that appellant took it upon herself to provide timely notice to Jimenez, the individual at the County trained and authorized to accept complaints of sexual harassment, despite having received County policies regarding sexual harassment complaints. As a result, the County was

prejudiced in its investigation, which necessarily commenced over one year after the incidents had occurred.

Most significantly, there was no evidence of appellant's reasonable and good faith conduct in pursuing an internal grievance procedure. The evidence offered by both Mouri and appellant herself showed that the conversation appellant seeks to characterize as a "report" was intended to be private, among friends. Mouri believed that the information appellant disclosed was personal and that appellant was contacting her to confide in her as a friend. Similarly, appellant testified that her conversation with Mouri was personal in nature:

"[COUNSEL] Q: How do you know that Lana Mouri was someone at the county who accepted complaints of harassment?

"[APPELLANT] A: At that time I wasn't thinking if she was accepting calls like that or not. I just felt close to her; that's why I called and reported it to her.

"Q: Okay. Was she a friend of yours?

"A: We went to lunches together, yes.

"Q: Okay. Why did you tell Ms. Mouri about what happened on June 27, 2008?

"A: I felt she's the only one I could talk to.

"Q: Why is that?

"A: I didn't know anybody else to talk to."

Appellant further testified that during their conversation Mouri advised her to report the incidents to bureau chief Jones, but appellant responded that her husband would not let her. Following their conversation, appellant exhibited no conduct that would be consistent with participating in an investigation. When Jimenez finally contacted her over one year later, appellant inquired about what an investigation would involve and stated she was hesitant to participate in an investigation.

The undisputed evidence showed that appellant's conversation with Mouri was intended to be personal and that appellant did not reasonably and in good faith pursue an internal grievance process. In view of this evidence, we agree with the trial court that appellant's isolated comments speculating about Mouri's job title were insufficient to

create a triable issue of fact as to whether her conversation was a formal report of sexual harassment. "'When opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork.' [Citation.] [Appellant's] circumstantial evidence required 'inferences based entirely on tortured reasoning or logic strained to the breaking point . . . .' [Citation.]" (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 647; accord, *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1105 [in opposing summary judgment, "[i]t is not enough to produce just some evidence. The evidence must be of sufficient quality to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment"].) Appellant failed to create a triable issue of fact as to whether equitable tolling should excuse her failure to timely file a DFEH complaint.

2. Continuing violation.

Solely with respect to her claim of retaliation in violation of the FEHA, appellant contends that her May 2010 DFEH complaint was timely under the continuing violation doctrine, "an 'equitable exception to the timely filing requirement.' [Citation.]" (*Morgan v. Regents of University of California, supra,* 88 Cal.App.4th at pp. 63–64.) "A continuing violation may be established by demonstrating 'a companywide policy or practice' or 'a series of related acts against a single individual.'" (*Id.* at p. 64.) More specifically, "[a] continuing violation exists if: (1) the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period; (2) the conduct was reasonably frequent; and (3) it had not yet acquired a degree of permanence. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823.)" (*Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 721.) Pursuant to this doctrine, a DFEH complaint is timely if the unlawful practices occurring outside the limitations period continued into the one-year period. (*Ibid.*)

There was no evidence that appellant was subject to any unlawful practice after she was assigned to the Van Nuys office on August 4, 2008. Rather, appellant seeks to invoke this doctrine by arguing that her remaining employed at the Van Nuys office after

being assigned there in retaliation for rejecting Morgan's advances constituted a continuing violation. The trial court found her position unsupported by authority, and we agree. The cases applying the continuing violation doctrine connect conduct occurring within the one-year limitations period—here May 14, 2009 to May 14, 2010—to conduct occurring outside that period. (E.g., *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 821–823 [continuing violation doctrine applied where employer failed to accommodate disabled employee in multiple ways over the course of several years and some of the employer's conduct occurred within the limitations period].) The only evidence of conduct occurring within the limitations period was appellant's continued employment. As a matter of law, we decline to find this type of evidence sufficient to create a triable issue of fact concerning application of the continuing violation doctrine. Taken to its logical conclusion, appellant's position would eviscerate the limitations period by allowing an employee to delay filing a DFEH complaint during any period of continued employment. Where, as here, there is no evidence of unlawful conduct occurring within the limitations period, the doctrine does not apply. (See *Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319, 327 ["at least one act of harassment or retaliation [must] occur during the limitations period to make the continuing violation doctrine applicable"].)

3. Mental incapacity.

Finally, appellant contends that she offered evidence sufficient to create a triable issue of fact as to whether the one-year period in Government Code section 12960, subdivision (d) was tolled due to her mental incapacity. (See *Stoll v. Runyon* (9th Cir. 1999) 165 F.3d 1238, 1242 [evidence that the plaintiff "was completely psychiatrically disabled during the relevant limitation period" sufficient to equitably toll the applicable statute of limitations].) To support her contention, appellant offered a June 2009 letter from Lukas Alexanian, M.D., which attached her August 2008 discharge summary and her claim for insurance benefits. The letter indicated that appellant had remained under Dr. Alexanian's care since August 2008. On appeal, appellant again relies on this evidence in asserting the trial court should have found she created a triable issue of fact.

Until her reply brief, however, appellant neglects to mention that the trial court sustained the County's and Morgan's objections to that evidence. Though on reply appellant challenges the trial court's evidentiary ruling as to the documents' authenticity (see *Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499, 506 [considering medical records authenticated by custodian of records]), she does not address the multiple other grounds raised for the exclusion of the documents. We must therefore conclude that the documents were properly excluded. (E.g., *Lopez v. Baca, supra,* 98 Cal.App.4th at pp. 1014–1015.)

In any event, even if the trial court had considered appellant's evidence, it was insufficient to create a triable issue. Dr. Alexanian's letter merely indicated that appellant had been under his care from August 2008 to June 2009; his letter did not state that appellant had been incapacitated during that time period. (Compare *Stoll v. Runyon, supra,* 165 F.3d at p. 1240 [evidence of the plaintiff's mental incapacity shown by treating psychiatrist's testimony that the plaintiff was unable to communicate with counsel or to understand her legal rights, had attempted suicide multiple times, was heavily medicated and might not ever be able to return to work].) Moreover, appellant's hospital discharge summary indicated that appellant had suffered delusional behavior and remained hospitalized for a period of 12 days—a time period insufficient to affect the timeliness of her May 10, 2010 DFEH complaint. Accordingly, the trial court properly concluded that appellant failed to create a triable issue of material fact concerning equitable tolling due to mental incapacity.

III. The Undisputed Evidence Established That Appellant Did Not Timely Present a Government Tort Claim.

The trial court granted summary judgment on appellant's fifth through seventh causes of action for intentional and negligent infliction of emotional distress, and negligent hiring, retention and supervision on the ground that appellant failed to present a government tort claim before filing suit. California's Tort Claims Act (Gov. Code, § 810 et seq.) (Act) authorizes limited governmental liability for injuries suffered as a result of

the acts or omissions of public entities or their employees. (Gov. Code, §§ 815.2, 815.6; *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897.) The County is a public entity subject to the Act. (Gov. Code, § 811.2; *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 854, fn. 3.)

In *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 738, our highest court explained that a prerequisite to liability is compliance with the claims procedure of the Act: "Claims for personal injury and property damage must be presented within six months after accrual; all other claims must be presented within a year. ([Gov. Code,] § 911.2.) '[N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity and has been acted upon . . . or has been deemed to have been rejected . . . .' ([Gov. Code,] § 945.4.) 'Thus, under these statutes, failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity.' [Citation.]" (Accord, *State of California v. Superior Court* (*Bodde*) (2004) 32 Cal.4th 1234, 1239 [same]; *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776 [same].) The contents of the claim are dictated by statute. (Gov. Code, § 910.)[3] "A claim served on a governmental entity must fairly describe what that entity is alleged to have done. A theory of recovery not included

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[3] Government Code section 910 provides: "A claim shall be presented by the claimant or by a person acting on his or her behalf and shall show all of the following: [¶] (a) The name and post office address of the claimant. [¶] (b) The post office address to which the person presenting the claim desires notices to be sent. [¶] (c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted. [¶] (d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim. [¶] (e) The name or names of the public employee or employees causing the injury, damage, or loss, if known. [¶] (f) The amount claimed if it totals less than ten thousand dollars ($10,000) as of the date of presentation of the claim, ... If the amount claimed exceeds ten thousand dollars ($10,000), no dollar amount shall be included in the claim. However, it shall indicate whether the claim would be a limited civil case."

in the claim may not thereafter be maintained." (*Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1426.)

If the injured party fails to submit a claim within the requisite time period, a written application may be made to the public entity for leave to present a late claim, provided the application is made within a reasonable time, not to exceed one year of the accrual of the cause of action. (Gov. Code, § 911.4, subd. (a).) If the application is denied or deemed denied under Government Code section 911.6, the Act authorizes the injured party to petition the superior court for relief from the claim requirements of Government Code section 945.5 as a precondition to bringing suit. (Gov. Code, § 946.6, subds. (a), (b)(1)-(3).)

Here, the evidence was undisputed that appellant never presented a government tort claim before filing suit, nor did she submit an application for leave to file a late claim. In opposition to summary judgment, she attached as an exhibit an untimely claim filed in September 2010, but the trial court sustained the County's and Morgan's evidentiary objection to that exhibit and the ruling is unchallenged on appeal. Nonetheless, appellant contends that she offered sufficient evidence to create a triable issue of fact as to whether she complied with the Act's requirements.

First she contends that the filing of her DFEH complaint created a triable issue of fact as to whether she satisfied the government tort claim requirement. Initially, we observe that evidence of the March 2010 DFEH complaint in no way satisfied the claim presentation requirement because the complaint was untimely, filed more than six months after the last injury-producing act in August 2008. Moreover, the authorities appellant cites in support of her contention are inapposite, as they hold that plaintiffs may be excused from the claim presentation requirement where they allege only FEHA claims against a public entity and fully comply with the FEHA administrative requirements. (See *Garcia v. Los Angeles Unified School Dist.* (1985) 173 Cal.App.3d 701, 710, 711 [acknowledging that because FEHA actions "have also been held exempt from the claim-presentation requirements of the general tort claims act," the plaintiff "was not required to file a claim with the school district prior to bringing this superior court action under the

FEHA for redress of unlawful employment practices"]; *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 868 [observing a "legislative intention to exempt actions under the FEHA from the general Tort Claims Act requirements. The procedural guidelines and the time framework provided in the FEHA are special rules for this particular *type* of claim which control over the general rules governing claims against governmental entities"].)

Second, appellant contends that Jimenez's forwarding the matter to the OAAC for investigation in August 2009 was the equivalent of her presenting a claim, thereby creating a triable issue of fact as to her compliance with the Act. The trial court properly rejected this contention on multiple grounds. "A defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers." (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98–99, fn. 4.) In her FAC, appellant never alleged that the OAAC referral amounted to a government claim; instead, she alleged that her July 2008 conversation with Mouri satisfied the Act. Further, there was no evidence to support appellant's contention. The trial court sustained the County's and Morgan's evidentiary objection to appellant's attempt to characterize the OAAC complaint process as satisfying the claim presentation requirement; once again, appellant has not challenged that ruling on appeal. Jimenez's e-mail referring the matter to the OAAC likewise lacked the statutorily-mandated components of a tort claim. (See Gov. Code, § 910.) It was not presented by appellant or anyone acting on her behalf; it did not include mailing information for appellant; and it did not describe with specificity the occurrences giving rise to the claim. (See *ibid*.) In addition, appellant offered no evidence to show that the OAAC—in contrast the County Board of Supervisors—was the appropriate entity to accept a claim. (See Gov. Code, § 915, subd. (a).) Finally, even if evidence of the OAAC referral had created a triable issue of fact as to whether it constituted a claim under Government Code section 910, the referral occurred in August 2009 and was therefore untimely under Government Code section 911.2, submitted more than six months after appellant's injury.

Third, appellant asserts that she raised a triable issue of fact as to whether the County failed to comply with Government Code provisions requiring it to advise her of the deficiencies in her claim. (See Gov. Code, §§ 910.8, 911 & 911.3.) The court in *Westcon Construction Corp. v. County of Sacramento* (2007) 152 Cal.App.4th 183, 202, summarized the pertinent principles: "'A "claim as presented" is a claim that is defective in that it fails to comply substantially with Government Code sections 910 and 910.2, but nonetheless puts the public entity on notice that the claimant is attempting to file a valid claim and that litigation will result if it is not paid or otherwise resolved. A "claim as presented" triggers a duty on the part of the governmental entity to notify the claimant of the defects or omissions in the claim. A failure to notify the claimant of the deficiencies in a "claim as presented" waives any defense as to its sufficiency. [Citations.] A document will be deemed a "claim as presented" "if it discloses the existence of a 'claim' which, if not satisfactorily resolved, will result in a lawsuit against the entity. [Citation.] A public entity's receipt of written notice that a claim for monetary damages exists and that litigation may ensue places upon the public entity the responsibility, and gives it the opportunity, to notify the potential plaintiff pursuant to [Government Code] sections 910.8 and 911 of the defects that render the document insufficient under [Government Code] sections 910 and 910.2 and thus might hamper investigation and possible settlement of the claim." . . . ' [Citation.]"

Here, appellant did not offer any evidence that would support the application of this doctrine, as it is contingent on the injured party's submission of something notifying the public entity of an intent to commence litigation. (See *Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 703, 707 [hospital's receipt of notice under Code Civ. Proc., § 364 of intent to commence suit deemed a defective claim because it notified the public entity of the existence of a claim for monetary damages and an impending lawsuit]; *Watts v. Valley Medical Center* (1992) 8 Cal.App.4th 1050, 1058 [same].) Because appellant offered no admissible evidence showing that the County received written notice of appellant's intent to sue, the County owed no statutory duty to advise her of a deficient claim. (See *Stromberg, Inc. v. L.A. County Flood etc. Dist.* (1969) 270 Cal.App.2d 759,

764 ["if in fact no claim was filed, plaintiff cannot assert a duty on the part of the county to notify it of 'insufficiency of claim' under sections 910.8 and 911, Government Code, or of its failure to file a claim or advise it to do so," fn. omitted].) Indeed, the only evidence of a "claim as presented" offered by appellant was her September 2010 claim which was excluded from evidence and, in any event, inadequate as a matter of law to constitute a defective claim. (See *Castaneda v. Department of Corrections & Rehabilitation* (2012) 207 Cal.App.4th 1488, 1502–1503 [written document submitted after litigation commenced cannot suffice as a defective claim].) Because appellant offered no evidence that she submitted a document to the County that constituted a "claim as presented," there was no triable issue of fact concerning the County's statutory obligations.[4]

IV. The Trial Court Retained Jurisdiction to Award Attorney Fees.

Finally, appellant contends that her July 1, 2011 notice of appeal served to divest the trial court of jurisdiction to hear and rule on the County's and Morgan's July 7, 2011 motion for an award of attorney fees and costs pursuant to Code of Civil Procedure section 1038 or, alternatively, pursuant to Code of Civil Procedure section 2033.420. We disagree. Appellate courts have repeatedly held that a trial court has jurisdiction to consider a motion for attorney fees after a notice of appeal from the judgment has been filed. (E.g., *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 360; *Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 368; *Sherry H. v. Thomas B.* (1988) 203 Cal.App.3d 1500, 1502–1503; see generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 20, p. 82 ["Pending appeal, the trial court retains jurisdiction to determine matters related to attorneys' fees"].) "Moreover, the [July 1, 2011] notice of appeal was premature in that final judgment had not yet been entered. [Citation.] It is a perfected appeal which stays

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[4] In view of our conclusion, we need not address the County's alternative bases for affirming summary judgment on the tort claims.

proceedings in the trial court. [Citation.]" (*Robertson v. Rodriguez, supra,* at p. 360.) The trial court retained jurisdiction to rule on the motion for attorney fees.

DISPOSITION

The judgment is affirmed. The County and Morgan are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ