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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ROSA MARIA MASCARENO, Plaintiff and Appellant, v. EDISON MATERIAL SUPPLY, LLC, et al., Defendants and Respondents.	B270821 (Los Angeles County Super. Ct. No. BC555511)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Affirmed.

Ritchie, Kinkert & Gutierrez, James E. Klinkert and Paul J. Gutierrez for Plaintiff and Appellant.

Amy Gantvoort; Pacific Employment Law, Mary L. Guilfoyle and Noah Levin for Defendants and Respondents.

INTRODUCTION

The trial court granted motions by Edison Material Supply, LLC (Edison) and one if its supervisors, Eric Fisher, for summary judgment in an action by a former employee, Rosa Maria Mascareno, for sexual harassment, gender discrimination, retaliation, and wrongful termination in violation of public policy. Mascareno appealed from the trial court's judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Mascareno's Employment with Edison and Her Complaints About Fisher*

Edison, which performs procurement functions for its parent company, Southern California Edison Company, hired Mascareno in 2008. Mascareno initially reported to Robert Ferrey, but after Mascareno complained to management that Ferrey gave her too much work and was intimidating, Edison transferred her in March 2012 to a procurement agent position that reported to Fisher. Within a month, Mascareno began having problems with Fisher. Mascareno said Fisher "went from being friendly to just being a—just a bad person." Mascareno said everyone on her team suffered under Fisher's management style.

In her deposition testimony Mascareno described Fisher's conduct in April and June 2012 that caused her to experience problems with him. She testified that at a group meeting Fisher gave as an example of something he did not want employees to do a 90-minute lunch Mascareno had with a client, and he asked all members of the group to tell him their lunch hours in advance.

Mascareno found this rule unacceptable because work schedules changed according to meeting schedules. Mascareno also said Fisher once required her to provide support for a group of the company's contingent workers, for whom Mascareno believed she was not responsible, and she felt the assignment "glued [her] to [her] desk." She also testified about another assignment Fisher asked her to work on that Mascareno believed was a waste of time and not her responsibility. Mascareno stated that when on one occasion she told Fisher the department should not be responsible for completing a particular change order he had asked her to revise, Fisher "made it really clear that he was [her] manager and even though that wasn't within [their] department he wanted [her] to get that done." Mascareno also stated Fisher gave her assignments due the next day, and during one-on-one meetings asked her whether she understood his expectations and what she was doing wrong. Mascareno further testified Fisher was difficult to work for because during meetings Fisher "made it really clear that he was [the] manager" and Mascareno was "to do [basically] as [she] was told."

Mascareno also described in her deposition testimony conduct by Fisher that she claimed amounted to sexual harassment and gender discrimination. For example, Fisher had a motorcycle, which Mascareno had seen at a show. One day during the first month Mascareno worked for Fisher he said he would take her for a ride on his motorcycle, but he told her "not to let anybody [on] the team know." Mascareno said "sure," and the topic never came up again.

Soon after the motorcycle comment, there was an incident where Mascareno felt "extremely uncomfortable" when Fisher introduced her to individuals in another department. Mascareno

thought Fisher's body language had "like a Fonzie look," and she felt as if Fisher was showing her off like a "new toy." Mascareno explained, "There was just this posture about him, and I'm sorry, I can't explain it, but it was – it was uncomfortable."

On another day, during the afternoon after work, Mascareno and Fisher were at a pizza restaurant where Mascareno had asked Fisher to meet her so she could thank him for the opportunity of transferring from her position with Ferrey. She wanted to discuss the number of hours she had worked for Ferrey, "in hopes that . . . it wouldn't happen again." Fisher asked her "randomly, out of the blue," if she had "ever cheated on [her] husband." Mascareno "was very offended." She said to Fisher, "I just didn't understand why that question would even be asked. That if me caring about people, me smiling, me saying 'good morning' is . . . in any way, shape, or form giving out that—that someone would ever think that just makes no sense." Mascareno could not remember Fisher's response, but "it became very uncomfortable and he switched the subject," and he never again raised the subject of cheating on a spouse. Mascareno interpreted Fisher's question as a sexual proposition because "why else would anybody even ask that question?"

On another occasion, Fisher stated in a low voice that he liked the way her perfume smelled. When Mascareno replied, "Oh, you like the way my perfume smells?" Fisher responded, "Shhhh." On yet another occasion, Fisher touched the sleeve of Mascareno's blouse and said, "Do you know what I like about your shirt so much?" Mascareno asked, "Why?" Fisher responded, "Because there's color in it."

Another time, during a workday excursion to a frozen yogurt store, Fisher stared at Mascareno inappropriately in the presence of other co-workers, and on several occasions Fisher patted Mascareno on the back of her hand. Finally, Fisher once invited Mascareno to a "Puerto Rican event." Mascareno testified, "He had mentioned how much he . . . like[d] Puerto Ricans," and he was "aware that [she was] Puerto Rican."

B. *Mascareno's Medical Leave of Absence and Subsequent Termination from Employment*

On June 21, 2012 Mascareno began a medical leave of absence.[1] After approximately three months, Mascareno returned to work on September 26, 2012, but she called in sick on October 1 and 2 and again on October 5 through 11, 2012. When Mascareno did not report for work on October 12, 2012 and did not contact Fisher about her continued absence, Fisher attempted to reach her by email. Mascareno did not respond.

Fisher learned from Edison's third party administrator for leave benefits, Sedgwick Claims Management Services, that Sedgwick had not approved Mascareno's leave beyond September 25, 2012. Fisher then consulted with Edison's human resources department about how to address Mascareno's unapproved absence. Pursuant to company policy, Fisher sent Mascareno a letter on October 23, 2012 by messenger informing her she was on an unpaid leave of absence, employees who were on an unapproved unpaid leave of absence for more than 30 days risked termination from employment, and she should contact him to

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[1] The record does not specify the reason for Mascareno's medical leave, and Fisher stated in his declaration he did not know the reason.

arrange for her return to work. Fisher informed her that if she failed to return to work by October 25, 2012 Edison would terminate her employment in accordance with company policy.

After she received Fisher's letter on October 23, 2012, Mascareno sent an email to an Edison Vice President, Walter Rhodes, the same day. In her email Mascareno alluded to her previous problems working with Ferrey and, for the first time, she complained about Fisher. Mascareno stated that while working for Fisher she was "the recipient of another unfair, unbalanced workload, unrealistic deadlines and horrific micro-management." Mascareno's complaints about Fisher included "intimidation," "fault finding," "badgering," "humiliation," "grossly unequal work distribution," "refusal to address conflicts," "retaliation for raising issues," "bullying," "instillation of fear," "intentional focus on isolating [her] from the others [on her] team," "assaulting [her] work ethic and character," "impugning [her] honesty," and "suppressing [her] from working directly with clients." Mascareno also complained of "sexual harassment (staring at [her] body inappropriately . . . [and] asking [her] if '[she] ever cheated on [her] husband[']), " "discrimination ([Fisher] treat[ed] [her] and the other women in the team with more intensity regarding all the above)," and "hostile work environment of stress and harassment based on all the above." Mascareno also stated she planned to visit her doctor on October 26, 2012 and she expected to return to work on November 5, 2012. She also told Rhodes she would report Fisher to the ethics department the next day.

Rhodes responded by email on October 25, 2012, advising Mascareno the ethics department would investigate her complaints of sexual harassment, discrimination, and retaliation,

and he would speak with her regarding her concerns about Fisher's "management behavior." He also stated his understanding she had been a "no call-no show" since October 12, 2012, and he warned her that her continued unexcused absence could result in termination of her employment if she did not return to work or certify her absence through Sedgwick. Rhodes reminded Mascareno that, because Sedgwick had not received any documentation from her doctor, Sedgwick had denied her disability claim as of September 25, 2012. On October 26, 2012 Mascareno responded to Rhodes by email and stated she had informed Sedgwick she planned to speak to her doctor, and she "left a message with [her] contact information" with "Ethics and Compliance."

Fisher somehow learned, or his words, "was informed," Mascareno had contacted Rhodes on October 23, 2012 and told Rhodes she would provide medical documentation to Sedgwick on Friday, October 26, 2012. Fisher stated in his declaration he did not see the email communications between Rhodes and Mascareno, and he did not learn of "the content or substance of any information communicated between them, aside from [Mascareno's] indication that she would provide Sedgwick with the necessary documentation on Friday, October 26, 2012."

On Monday morning, October 29, 2012, Fisher contacted Sedgwick to see if Mascareno had submitted the documentation necessary to support her leave of absence. Sedgwick informed him it had not received any documentation from Mascareno. In consultation with the human resources department, Fisher terminated Mascareno's employment later that day. The October 29, 2012 letter Fisher sent Mascareno terminating her employment explained that, despite her promise to provide

documentation to support her medical leave of absence by October 26, as of October 29 Sedgwick had not received any documentation. On October 30, 2012, the day after Fisher fired Mascareno, Sedgwick mailed Mascareno a letter approving her claim for disability benefits for the period October 12, 2012 through November 4, 2012, but denying her claim for the period September 25 through October 11, 2012.

C. *Mascareno's Lawsuit and the Motions for Summary Judgment*

Mascareno's complaint asserted causes of action against Edison and Fisher for violation of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) and for wrongful termination in violation of public policy. The first cause of action, however, included three causes of action under FEHA for sexual harassment, discrimination, and retaliation.[2]

Edison and Fisher filed motions for summary judgment or in the alternative summary adjudication, arguing that each of Mascareno's causes of action (and the three causes of action within the FEHA cause of action) failed as a matter of law for multiple reasons. Mascareno opposed the motions and asserted hearsay objections to seven of the statements in Fisher's declaration relating to Fisher's knowledge of Mascareno's complaints about him and what Sedgwick told him about Mascareno's leave of absence. The court overruled Mascareno's

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[2] Claims for sexual discrimination, sexual harassment, and retaliation are distinct causes of action, each arising from different provision of FEHA. (See Gov. Code, § 12940, subds. (a), (h), (j); *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460, fn. 5; *Reno v. Baird* (1998) 18 Cal.4th 640, 644.)

evidentiary objections and granted the motions for summary judgment. The court entered judgment in favor of Edison and Fisher, and Mascareno timely appealed.

DISCUSSION

A. *Applicable Law and Standard of Review*

"'A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. [Citations.] The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish, a prima facie case. . . ." [Citation.]' [Citation.] '[O]nce a moving defendant has "shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established," the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff ". . . shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action. . . ."'" (*Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 274.)

"'On appeal from the granting of a motion for summary judgment, we examine the record de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party.'" (*Lyle, supra,* 38 Cal.4th at p. 274; see *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.) "'We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. . . . However, to defeat the motion for summary judgment, the plaintiff must show "'specific facts,'" and cannot rely upon the

allegations of the pleadings.'" (*Littlefield v. County of Humbolt* (2013) 218 Cal.App.4th 243, 249-250.) "'While we must liberally construe plaintiff's showing and resolve any doubts about the propriety of a summary judgment in plaintiff's favor, plaintiff's evidence remains subject to careful scrutiny.'" (*Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1206.) "[A] plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations. [Citations.] And finally, plaintiff's evidence must relate to the motivation of the decision makers to prove, by nonspeculative evidence, an actual causal link between prohibited motivation and termination." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433-434.)

B. *The Trial Court's Evidentiary Rulings Were Not Erroneous*

In his declaration in support of Edison's motion for summary judgment, Fisher made five statements to which Mascareno asserted hearsay objections. First, Fisher stated, "I was informed by Sedgwick, [the] third party administrator for leave benefits, that Ms. Mascareno's extended time off beyond September 25, 201[2], had not been approved due to lack of substantiating documentation." Second, Fisher stated, "Based on the information provided by Sedgwick on Ms. Mascareno's unapproved claim and Ms. Mascareno's lack of communication on her return to work, I consulted with Human Resources on how to handle her absence from work. After discussing the matter with Human Resources and per Company Policy, Ms. Mascareno was placed on unpaid leave." Third, Fisher stated, "[H]owever I was informed that Ms. Mascareno contacted . . . then Vice-President

Walter Rhodes on October 23, 2012 after receiving the letter to tell him that she would be providing documentation to Sedgwick on Friday, October 26, 2012, regarding her claim for additional time off. At that time I did not see any communication (e-mail or otherwise) between Mr. Rhodes and Ms. Mascareno, and I was not informed about the content or substance of any information communicated between them, aside from Ms. Mascareno's indication that she would provide Sedgwick with the necessary documentation on Friday, October 26, 2012." Fourth, Fisher stated, "In consultation with Human Resources, I terminated Ms. Mascareno's employment on Monday, October 29, 2012, based on her failure to return to work or provide additional documentation to support a further leave of absence. A true and correct copy of the letter I sent to Ms. Mascareno to notify her of the termination is attached as Exhibit B." Fifth, Fisher stated, "On Monday, October 29, 2012, I contacted Sedgwick to see if Ms. Mascareno had sent in the additional documentation to support her claim for leave. I was informed that, as of the morning of October 29, 2012, Sedgwick had not received any documentation from Ms. Mascareno."

Mascareno also objected to the statement in Fisher's October 23, 2012 letter, attached to Fisher's declaration, that on October 16, 2012 Sedgwick had notified her to "make arrangements to return to work." And Mascareno objected to the statements in Fisher's October 29, 2012 termination letter, also attached to Fisher's declaration, that Sedgwick had denied Mascareno's medical claim and told her she had to return to work, she had not reported to work or "made any effort to contact management regarding [her] continued absence," and, although she had informed Rhodes she would be submitting medical

documentation to Sedgwick on October 26, 2012, she had not done so. The trial court overruled all of Mascareno's objections.

The trial court's evidentiary rulings were not erroneous, whether we review those rulings for abuse of discretion or de novo. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 ["we need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo"]; *In re Automobile Antitrust Cases I and II* (2016) 1 Cal.App.5th 127, 143 [noting the standard of review for evidentiary rulings on summary judgment is not settled].) Evidence of an individual's state of mind regarding an employment decision is admissible to establish the decisionmaker's legitimate, non-discriminatory reason for the employment action. (See *West v. Bechtel Corp*. (2002) 96 Cal.App.4th 966, 983 [hearsay statement showing manager's state of mind in making an employment decision was admissible under Evidence Code section 1250, subdivision (a)]; *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1123-1124 [trial court properly admitted statements about the plaintiff's job performance to establish the supervisor's state of mind, where the central issue was whether the supervisor's employment decision was motivated by age discrimination or by plaintiff's job performance].) Fisher's statements about what someone at Sedgwick told him regarding Mascareno's leave of absence, and his statements that he did not know Mascareno had complained about him to Rhodes, were not hearsay and were admissible to show Fisher's state of mind in terminating Mascareno. The statements were admissible to show he terminated her employment because she did not return from an unapproved

leave of absence in violation of company policy and not because of gender discrimination, retaliation, or other prohibited conduct under FEHA.[3]

C. *Edison and Fisher Were Entitled to Judgment on Mascareno's Sexual Harassment Claims*

"FEHA expressly prohibits sexual harassment in the workplace." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460; see Gov. Code, § 12940, subd. (j)(1); *Hirst v. City of Oceanside* (2015) 236 Cal.App.4th 774, 782 ["FEHA establishes a comprehensive scheme intended to protect and safeguard the right and opportunity of all persons to seek and hold employment free from prohibited discrimination and harassment"].)

FEHA "'recognize[s] two theories of liability for sexual harassment claims . . . ". . . quid pro quo harassment, where a term of employment is conditioned upon submission to unwelcome sexual advances . . . [and] hostile work environment, where the harassment is sufficiently pervasive so as to alter the

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[3] Mascareno also argues the trial court erred by issuing a "blanket" ruling on her evidentiary objections without individually considering each objection. (See, e.g., *Twenty-Nine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, 1447 [trial court erred in sustaining 33 objections of "48 pages in length" to large sections of deposition testimony based on a variety of grounds]; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255-256 [trial court erred in conclusorily sustaining all but one of the defendants' 764 objections].) Unlike the objecting parties in *Twenty-Nine Palms* and *Nazir*, however, Mascareno made only seven objections, each one based on hearsay and each one directed at statements in Fisher's declaration. It was entirely proper for the trial court to rule on the seven objections together.

conditions of employment and create an abusive work environment.'"'" (*Hughes*, *supra*, 46 Cal.4th at p. 1043; accord, *Holmes v. Petrovich Development Co.* (2011) 191 Cal.App.4th 1047, 1058-1059; see *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706, fn. 8 ["we have in the past categorized quid pro quo sexual harassment (in which a job benefit is conditioned upon sexual favors and therefore an actual or potential exercise of delegated authority is at issue) as a type of harassment"]; *Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 160-161 [quid pro quo sexual harassment consists of unwelcome demands for sexual favors in return for advancement or other perquisites in the workplace; hostile environmental claims arise when the workplace is permeated with discrimination that is '"'"'sufficiently severe *or* pervasive to alter the conditions of the victim's employment'"'"].)[4]

Mascareno alleged both kinds of sexual harassment claims, quid pro quo and hostile work environment, in her FEHA cause of action. Mascareno, however, did not meet her burden to create a triable issue of material fact on either claim.

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[4] "Sexual harassment is also prohibited by title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). . . . [T]he antidiscriminatory objectives and overriding public policy purposes of the two acts are identical . . . '[and] it is appropriate [in interpreting FEHA] to consider federal cases interpreting title VII.'" (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 517; see *Miller*, *supra*, 36 Cal.4th at p. 463 ["[o]ur courts frequently turn to federal authorities interpreting Title VII . . . for assistance in interpreting the FEHA and its prohibition against sexual harassment"].)

1. *Edison and Fisher Were Entitled to Judgment on Mascareno's Claim for Quid Pro Quo Sexual Harassment Because Fisher Did Not Condition a Term of Her Employment on Acceptance of a Sexual Proposition*

"To establish quid pro quo sexual harassment . . . a plaintiff must show 'that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands.'" (*Hughes, supra*, 46 Cal.4th at p. 1049; see *Holly D. v. California Institute of Technolog*y (9th Cir. 2003) 339 F.3d 1158, 1169 ["a supervisor's demand for sexual favors accompanied by a threat of discharge represents archetypical quid pro quo harassment"].) A "tangible employment action" is a significant change in employment status, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." (*Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 761.)

When Fisher asked Mascareno in April 2012 if she ever cheated on her husband, she said she did not understand why he would ask her such a question. Fisher changed the subject and never brought it up again. Even considering Fisher's statement as a sexual proposition, Mascareno did not create a factual issue on whether acceptance of the proposal was a condition of her continued employment, or whether her refusal resulted in any change in the terms of her employment. After Fisher asked Mascareno in April 2012 about cheating on her husband (and the subject was immediately and permanently dropped), Mascareno continued to work at Edison and under Fisher's supervision until June 2012, when she took a medical leave of absence. Edison did not terminate Mascareno's employment until October 29, 2012,

six months after Fisher's comment, when she failed to return to work or provide the documentation necessary to remain on leave. Mascareno submitted no evidence (as opposed to argument) Edison terminated her employment because she did not submit to a sexual proposition by Fisher. (See *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1418, 1435 [employer entitled to summary judgment where "quid pro quo claim arose from an inference drawn by plaintiff without supporting evidence"]; *Holly D., supra,* 339 F.3d at p. 1173 [employer entitled to summary judgment where the plaintiff "failed to present sufficient evidence to raise a genuine issue of material fact as to whether [supervisor] implicitly threatened to discharge her or conditioned her continued employment on her submission to his sexual demands"].)

Citing *Kohler v. Inter-Tel Technologies* (9th Cir. 2001) 244 F.3d 1167, Mascareno argues that whether termination of employment resulted from an employee's resistance to her supervisor's sexual proposition is always a question of fact. *Kohler* actually supports a contrary proposition. In that case the court affirmed summary judgment on the plaintiff's sexual harassment claim because the plaintiff had "not demonstrated disputed facts showing that her rejection of [her supervisor's] advances caused any of the employment actions she claims to have suffered" and could not "connect any of the alleged employment actions she experienced to her rejection of [her supervisor's] advances." (*Id.* at pp. 1179-1180.)

2. *Edison and Fisher Were Entitled to Judgment on Mascareno's Claim for Hostile Work Environment Sexual Harassment Because Fisher's Conduct Was Not Severe or Pervasive*

To establish a claim for hostile environment sexual harassment, a plaintiff must show he or she was subjected to sexual advances, conduct, or comments that were unwelcome, because of sex, and sufficiently severe or pervasive to alter the conditions of his or her employment and create an abusive work environment. (*Lyle, supra,* 38 Cal.4th at p. 279; see *Miller*, *supra*, 36 Cal.4th at p. 462.) "In evaluating the totality of the circumstances to determine the existence of a hostile work environment, the following factors can be considered: "'(1) the nature of the unwelcome sexual acts or words (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred. . . . In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a *concerted pattern of harassment of a repeated, routine or a generalized nature*.'"" (*Brennan v. Townsend & O'Leary Enterprises, Inc.* (2011) 199 Cal.App.4th 1336, 1347-1348; see *Lyle, supra,* 38 Cal.4th at pp. 283-284 [""[w]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances [including] 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""]; *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 150 ["liability for sexual harassment may not be imposed based on a single incident that does not involve egregious conduct akin to a physical assault or the threat of physical assault"], italics and capitalization omitted.)

The evidence of Fisher's acts of harassment falls short of a "pattern of continuous, pervasive harassment" necessary to establish a hostile working environment under FEHA. (*Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, 382; see *Lyle*, *supra*, 38 Cal.4th at p. 284 ["when the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions"].) Much of the conduct about which Mascareno complained was related to her workload and the nature of the work Fisher assigned to her. This conduct was non-sexual, and Mascareno conceded Fisher's demanding management style adversely affected everyone on her team. (See *Lyle,* at p. 283 [hostile environment sexual harassment claim fails when the supervisor's conduct is not gender-specific]; *Haberman,* at p. 382 [employer entitled to summary judgment where most of the conduct the plaintiff complained of was not conduct based on sex or of a sexual nature].)

Moreover, the conduct that was gender-related or of a sexual nature amounted to eight incidents over approximately two months, none of which was severe. Of the eight incidents, only two incidents—patting the back of Mascareno's hand and touching the sleeve of her shirt—involved incidental physical (but non-sexual) touching. (See *Herberg, supra*, 101 Cal.App.4th at p. 152 ["even unwelcome sexual touching is insufficient to constitute severe pervasive harassment when the incidents are isolated and

there is no violence or threat of violence"].) Nor were all the incidents, taken together, as pervasive as those in other cases where courts have found no pervasive harassment. (See, e.g., *Brennan v. Townsend & O'Leary Enterprises, Inc.*, *supra*, 199 Cal.App.4th at pp. 1353-1356 [conduct over a three-year period consisting of an email referring to the plaintiff as a "'big-titted, mindless one,'" employees wearing a veil with a "plastic penis attached to it" at a staff meeting and dressing as Santa Claus at office Christmas parties and asking female employees personal questions while sitting in Santa's lap, and business owner's "'intrusive and offensive questions about [the plaintiff's] relationships and whether she was having sex,'" was not severe or pervasive]; *Haberman, supra*, 180 Cal.App.4th at p. 385 [13 incidents over two- or three-year period, including telling a colleague the plaintiff was "'drop dead gorgeous,'" telling the plaintiff a client had "'the "hots"'" for her and wanted to date her, asking the plaintiff if she was getting married, calling the plaintiff while they were separately parking at a convention and stating that he was coming up behind her and it felt pretty good, and telling the plaintiff he was not interested in a relationship and just wanted to have sex, were not severe or pervasive]; *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 145 [three incidents over five-week period, including asking the plaintiff about her marital status, telling her she had a nice suit and nice legs, and putting his arm around her and rubbing her breast with his arm while asking for her address, "fall short of establishing 'a pattern of continuous, pervasive harassment'"].)

Although Fisher's conduct may have been "rude," "offensive" and "boorish" (*Mokler*, *supra*, 157 Cal.App.4th at p. 145), and some of his comments "too personal and inappropriate

for the workplace" (*Haberman*, *supra,* 180 Cal.App.4th at p. 384), they were not sufficiently severe or pervasive to amount to hostile work environment sexual harassment. (See *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 788 [standards of liability for sexual harassment "filter out" "'the ordinary tribulations of the workplace,'" such as "offhand comments," "isolated incidents," "'sporadic use of abusive language, gender-related jokes and occasional teasing'"]; *Lyle*, *supra*, 38 Cal.4th at p. 283 ["[w]ith respect to the pervasiveness of harassment, courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature"].)

D. *Edison and Fisher Were Entitled to Judgment on Mascareno's Claim for Gender Discrimination Because There Was No Evidence Edison's Reason for Terminating Her Was Pretextual*

To establish a prima facie case of employment discrimination, "the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel Nat., Inc.* (2000) 24 Cal.4th 317, 355; see *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 583.) "A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory

reason. If the employer discharges this burden, the presumption of discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 214-215; see *Soria*, at p. 591; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1529.) ""[T]he plaintiff may establish pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" [Citations.] Circumstantial evidence of "'pretense' must be 'specific' and 'substantial' in order to create a triable issue with respect to whether the employer intended to discriminate" on an improper basis.'" (*Batarse v. Service Employees Intern. Union Local 1000* (2012) 209 Cal.App.4th 820, 834.)

Even assuming Mascareno established a prima facie case of gender discrimination (see *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 322 [the burden of establishing prima facie case of discrimination is "not intended to be 'onerous'"]), Edison offered a legitimate, non-discriminatory reason for terminating Mascareno's employment: Mascareno failed to return from an unapproved leave of absence or timely provide the documentation necessary to extend her leave. In response, Mascareno offered no evidence this reason was untrue or a pretext for discrimination. She did not dispute her leave was unapproved, she failed to provide the required documentation by the October 26, 2012 deadline, or her conduct violated company policy. Nor did

Mascareno present any evidence that Edison did not terminate the employment of male employees under similar conditions. (See, e.g., *McGrory, supra*, 212 Cal.App.4th at p. 1535 [a plaintiff may show gender discrimination by showing similarly situated employees of the opposite sex were treated more favorably].)

Mascareno argues only that the timing of her termination is evidence of pretext. Fisher terminated Mascareno's employment on Monday, October 29, 2012, immediately after learning from Sedgwick that Mascareno had not provided documentation of her need for an extended medical leave of absence by Friday, October 26, 2012. Mascareno argues that, because Sedgwick approved her "disability leave" on October 30, 2012, "[i]t is reasonable to infer . . . that the purported October 29, 2012 communication between Fisher and an unidentified person at Sedgwick CMS concerning Mascareno did not occur."[5]

There is no evidence, however, from which the trial court could have drawn (or we can draw) this inference. Fisher's statements in his declaration that he spoke with Sedgwick, when he had the conversation, and what he spoke about, are unchallenged and uncontradicted. Mascareno did not submit any deposition testimony or a declaration from anyone at Sedgwick stating the conversation with Fisher, in which Fisher learned Mascareno had not submitted to Sedgwick the paperwork required to support a leave of absence, did not occur. Nor did Mascareno dispute she did not provide the requested

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[5] In fact, Sedgwick only approved Mascareno's claim for disability benefits, not her request for additional leave, which meant Mascareno would continue to receive disability insurance payments for the time her doctor certified that she was disabled and unable to work.

documentation by the October 26, 2012 deadline. Although the timing of events may have supported an inference that Edison was anxious to terminate Mascareno's employment, it did not create a triable issue of fact on whether the reason for her termination was gender discrimination rather than violation of the company's leave policies. (See *King*, *supra*, 152 Cal.App.4th at p. 436 [fact that the company discovered the plaintiff had breached its integrity policy shortly after returning to work from medical leave "is insufficient to raise an inference that his [disability] prompted his discharge"].)

E. *Edison and Fisher Were Entitled to Judgment on Mascareno's Claim for Retaliation Because There Was No Causal Link Between Her Complaint and Her Termination*

"[T]o establish a prima facie case of retaliation under the 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." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042; see *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 380.)[6]

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[6] As with a discrimination claim, "[o]nce an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation 'drops out of the picture,' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz, supra,* 36 Cal.4th at p. 1042.)

Mascareno potentially engaged in a protected activity when she complained in her October 23, 2012 email to Rhodes about what she perceived was inappropriate conduct by Fisher. (See Gov. Code, § 12940, subd. (h); *Yanowitz, supra,* 36 Cal.4th at p. 1043 ["[i]t is well established that a retaliation claim may be brought by an employee who has complained of or opposed conduct that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA"]; accord, *Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 381.) Mascareno, however, failed to show a causal connection between her complaint and the termination of her employment. Fisher notified Mascareno on October 23, 2012, before Mascareno made the complaint she alleges Edison retaliated against her for making, that her absence was unexcused and Edison would terminate her employment if she did not return to work by October 25, 2012. (See *Clark County School Dist. v. Breeden* (2001) 532 U.S. 268, 272 ["proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality" for Title VII retaliation claim]; *Coons v. Secretary of U.S. Dept. of Treasury* (9th Cir. 2004) 383 F.3d 879, 887 [no causal connection between protected activity and adverse employment action where the employer began investigating employee misconduct before the employee requested accommodation for disability].)

Moreover, on October 29, 2012, the day Fisher terminated Mascareno's employment, Fisher did not know Mascareno had complained about him to Rhodes. Fisher stated in his declaration he did not know of the content of Mascareno's email to Rhodes, and Mascareno submitted no evidence to contradict, directly or

indirectly, Fisher's statement. In the absence of any evidence of a causal link between Mascareno's complaint to Rhodes and Fisher's decision to terminate Mascareno's employment, Mascareno's retaliation claim fails. (See *George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1491 ["employer's knowledge of protected activity is essential element to required causal link in retaliation cases"]; *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 420 ["[p]laintiff must show that he or she engaged in protected activity and was thereafter subjected to adverse employment action by his or her employer because of that protected activity"]; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 70 ["'[e]ssential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity'"].)

Mascareno argues in her reply brief it is reasonable to infer "Fisher was aware of the content of Mascareno's complaints to Rhodes notwithstanding his uncorroborated self-serving statements to the contrary." She asserts the fact Fisher knew Mascareno contacted Rhodes rather than Fisher about her absence gives rise to an inference that Mascareno's communication to Rhodes must have concerned Fisher. Once again, Mascareno provided no evidence to support this inference. Mascareno did not submit any documentary evidence or deposition testimony by Fisher, Rhodes, or anyone else at Edison to show that Rhodes told Fisher about Mascareno's complaint, or that Fisher otherwise learned of her complaint.[7]

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[7] Mascareno's cause of action for wrongful termination in violation of public policy alleged Edison's termination was wrongful because "it was grounded in discrimination against

DISPOSITION

The judgment is affirmed. Edison and Fisher are to recover their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

SMALL, J.*

[Mascareno] because of her gender and physical disabilities, and in retaliation for the reporting of discriminatory and harassing conduct and other unlawful practices." Because Edison and Fisher were entitled to judgment on Mascareno's claims for sexual harassment, discrimination, and retaliation, there was no wrongful conduct on which to base a claim for wrongful termination in violation of public policy. (See *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 229 [because the plaintiff's "FEHA claim fails, his claim for wrongful termination in violation of public policy fails"].)

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