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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JERRICK TORRES et al., Plaintiffs and Appellants, v. CITY OF VERNON et al., Defendants and Respondents.	B288558 and B289799 (Los Angeles County Super. Ct. No. BC620265)

APPEALS from judgments of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Law Offices of Helena Sunny Wise and Helena Sunny Wise for Plaintiffs and Appellants.

Rutan & Tucker, Edson K. McClellan, and Kimberly A. Nayagam, for Defendants and Respondents.

I. INTRODUCTION

Plaintiffs and appellants Jerrick Torres and Lyndon Ong Yiu brought an action asserting various employment-related claims against defendants and respondents the City of Vernon (City), their employer, and Leonard Grossberg, the City's Health Department Director.[1] The trial court granted the City and Grossberg summary judgment, and plaintiffs appeal. We affirm.

II. PROCEDURAL BACKGROUND[2]

In their complaint, plaintiffs alleged causes of action against the City for whistleblower retaliation, race/national origin discrimination, disability discrimination, and retaliation in violation of the Fair Employment and Housing Act (FEHA). Plaintiffs also alleged a cause of action for harassment against the City and Grossberg. Torres alleged a cause action for violation of the California Family Rights Act (CFRA) and the Family and Medical Leave Act (FMLA) against the City. Ong Yiu alleged a cause of action for violation of Labor Code section 230.8 against the City. In separate motions against Torres and On Yiu, the City moved for summary judgment or, alternatively, summary adjudication as to the causes of action against it (summary judgment motions). Also, in separate motions,

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[1] The action also named Teresa McAllister, the City's former Human Resources Director, as a defendant. Plaintiffs later dismissed McAllister from their action with prejudice.

[2] We will set forth the factual bases for plaintiffs' claims below in our discussion of the issues on appeal.

Grossberg moved for summary judgment as to the single cause of action for harassment against him. The trial court granted summary judgment to the City and Grossberg against Torres and Ong Yiu.

III. DISCUSSION

A. *Standard of Review*

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.] Under California's traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law. [Citations.]" (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334, fn. omitted (*Guz*).)

"The trial court's stated reasons for granting summary judgment are not binding because we review its ruling not its rationale. [Citation.] In addition, a summary judgment motion is directed to the issues framed by the pleadings. [Citation.] These are the only issues a motion for summary judgment must address. [Citation.]" (*Canales v. Wells Fargo Bank, N.A.* (2018) 23 Cal.App.5th 1262, 1268–1269 (*Canales*).)

B. *FEHA Discrimination*

Government Code section 12940, subdivision (a) provides in relevant part that it is an unlawful employment practice for an "employer, because of the race, . . . national origin, [or] physical disability . . . of any person . . . to discriminate against the person in compensation or in terms, conditions, or privileges of employment." To demonstrate a prima facie case of discrimination under FEHA, the plaintiff must show "(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, supra*, 24 Cal.4th at p. 355.)

C. *FEHA Retaliation and Labor Code Whistleblower Retaliation*

Under FEHA, it is an unlawful employment practice for an "employer . . . to . . . 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." (Gov. Code, § 12940, subd. (h).) "To establish a prima facie case of retaliation, the plaintiff must show he or she engaged in a 'protected activity,' the employer subjected the employee to an adverse employment action, and a causal link existed between the protected activity and the employer's action. [Citation.]" (*McRae v. Department of*

Corrections & Rehabilitation (2006) 142 Cal.App.4th 377, 386 (*McRae*).)

Under Labor Code section 1102.5, subdivision (b), "An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." (See also, Lab. Code, §§ 6310, subd. (a) & 6311.) A claim of whistleblower retaliation under the Labor Code shares the same prima facie case as a retaliation claim under FEHA. (See *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1540 (*Hager*).)

D. *Proving FEHA Discrimination and FEHA and Labor Code Retaliation*

"California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of disparate treatment.

[Citations.] [¶] This so-called *McDonnell Douglas*[3] test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially." (*Guz, supra*, 24 Cal.4th at p. 354, fn. omitted.)

In a trial of a discrimination action, the *McDonnell Douglas* test places on the plaintiff the initial burden of establishing a prima facie case of discrimination. (*Guz, supra*, 24 Cal.4th at p. 354.) If the plaintiff establishes a prima facie case, a rebuttable presumption of discrimination arises. (*Id.* at p. 355.) The burden then shifts to the defendant to rebut the presumption by producing admissible evidence showing there was a nondiscriminatory reason for its adverse action. (*Id.* at pp. 355–356.) "If the employer sustains this burden, the presumption of discrimination disappears." (*Id.* at p. 356.) The employee then has the opportunity to attack the employer's proffered nondiscriminatory reason as a pretext for discrimination, or to offer other evidence of the employer's discriminatory motive. (*Ibid.*)

In a trial, "[t]he ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff. [Citations.]" (*Guz, supra*, 24 Cal.4th at p. 356.) ""[I]n the case of a motion for summary judgment or summary issue adjudication, [however,] the burden rests with the moving party to negate the plaintiff's right to prevail on a particular issue . . . . In other words, the burden is reversed in the case of a summary issue adjudication or summary judgment motion . . . ."" (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 150.)

The *McDonnell Douglas* burden shifting test also is used to adjudicate retaliation claims under FEHA (*Yanowitz v. L'Oreal*

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3 *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.

USA, Inc. (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*)) and whistleblower retaliation claims under the Labor Code (see *Hager, supra*, 228 Cal.App.4th at p. 1540.)

E. *Analysis of Plaintiffs' Discrimination and Retaliation Claims*

In their complaint, plaintiffs alleged that the City discriminated against them because of their races/national origins[4] and disabilities[5] and retaliated against them because they participated in protected activities and protested FEHA violations. In granting the City summary judgment, the trial court ruled that plaintiffs failed to show they suffered an adverse employment action, a necessary element of discrimination and retaliation claims.[6] (*Guz, supra*, 24 Cal.4th at p. 355 [FEHA discrimination]; *McRae, supra*, 142 Cal.App.4th at p. 386 [FEHA retaliation]; *Hager, supra*, 228 Cal.App.4th at p. 1540 [Labor Code whistleblower retaliation].) In their opening briefs,

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[4] Plaintiffs are of Filipino descent.

[5] In the complaint, Torres alleges that he has "disabilities affecting his immunological, musculoskeletal, digestive and respiratory body systems" related to his 2009 thyroid cancer diagnosis. Ong Yiu alleges he "suffers from a debilitating back condition which has affected his musculoskeletal and orthopedic body systems . . . [and] perceives himself to be disabled and has experienced limitations upon his ability to engage in major life activities."

[6] Plaintiffs claim the trial court demonstrated bias against them and FEHA in its ruling on the summary judgment motions. We perceive no bias in the trial court's remarks.

plaintiffs identify three adverse employment actions in support of their discrimination and retaliation claims: (1) salary discrimination, (2) solicitation and use of negative comments, and (3) inequitable distribution of work. Accordingly, we limit our analysis of plaintiffs' discrimination and retaliation claims to these identified adverse employment actions.[7]

1. Salary Discrimination

Although not clear, it appears that plaintiffs' claim that they suffered an adverse employment action based on salary discrimination concerns the promotion of David LeDuff to Deputy Director of the Health Department in 2012—with a salary presumably higher than plaintiffs' salaries, and a salary raise Linda Johnson, a fellow employee, received—at a rate presumably higher than simultaneous raises plaintiffs received.[8] The factual background for plaintiffs' claims is as follows:

In February 1991, the City hired Grossberg as an Environmental Specialist (ES) in its Health Department. The City promoted Grossberg to Senior Environmental Specialist

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[7] In their reply briefs, plaintiffs argue numerous additional adverse actions support their discrimination and retaliation claims. "Consistent with well-established authority, absent justification for failing to present an argument earlier, we will not consider an issue raised for the first time in a reply brief. [Citations.]" (*Save the Sunset Strip Coalition v. City of West Hollywood* (2001) 87 Cal.App.4th 1172, 1181, fn. 3; *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4.)

[8] Plaintiffs alleged LeDuff is Caucasian. Johnson is Caucasian.

(SES) in July 2001. It promoted Grossberg to Deputy Director of the Health Department on an interim basis on January 17, 2012, and on an official basis on August 7, 2012.

The City hired Ong Yiu as an ES on April 23, 2001; LeDuff as an ES on June 25, 2001; Torres as an ES on July 22, 2002; and Johnson as an ES on July 23, 2007. Effective July 1, 2012, the City approved Grossberg's recommendation that Ong Yiu, LeDuff, Torres, and Johnson be promoted to SES.

In promoting Johnson to the SES position, Grossberg adjusted her salary from Step 6 of the ES salary scale to Step 4 of the SES salary scale. He believed the adjustment was warranted as her salary (like all City employee salaries) had been frozen for over three years and she had not received step increases. In promoting Ong Yiu, LeDuff, and Torres to the SES position, Grossberg placed them at Step 3 of the SES salary scale, providing each with a raise.

On August 8, 2012, Grossberg recommended that the City promote LeDuff to Deputy Director of the Health Department. Grossberg recommended LeDuff, and not Ong Yiu or Torres, because LeDuff has two master's degrees and neither plaintiff had a post-graduate degree. Grossberg "believed that the Deputy Director, who would be gaining skills to potentially fill the Director-level role one day, should meet the City's desired qualifications for the Director position." He also believed LeDuff "had a better demeanor and skills handling people than either Mr. Ong Yiu or Mr. Torres." Effective August 12, 2012, the City promoted LeDuff to Deputy Director.

a. Johnson's increased salary

Assuming plaintiffs demonstrated prima facie cases of discrimination and retaliation, the City offered a nondiscriminatory reason for Johnson's salary increase that plaintiffs failed to show was a pretext for discrimination or retaliation and plaintiffs have not offered other evidence demonstrating discriminatory motive. When Grossberg promoted Johnson to the SES position, he placed her at Step 4 of the SES salary scale because her salary had been frozen for over three years and she had not received step increases.

By producing a nondiscriminatory, nonretaliatory reason for Johnson's salary increase, the City shifted the burden of proof to plaintiffs to show that the City's nondiscriminatory reason was a pretext for discrimination or retaliation or to offer other evidence demonstrating discriminatory motive. (*Guz, supra*, 24 Cal.4th at pp. 355–356; *Yanowitz, supra*, 36 Cal.4th at p. 1042.) Plaintiffs have failed to meet this burden. They have not identified any evidence that the rate by which Grossberg increased Johnson's salary, as compared to their salaries, had anything to do with plaintiffs' races/national origins, disabilities, participation in protected activities, or protests of FEHA violations. In fact, when Grossberg promoted plaintiffs to the SES position, he placed them at Step 3 of the SES salary scale—above Johnson whom he placed at Step 4. Moreover, although Torres testified in his deposition that Grossberg was biased against him based on his race, he also testified that Grossberg never said anything offensive about Torres's Filipino background and that Grossberg was not biased against him based on his disability. Torres further testified that no other City employee

was biased against him based on any protected category other than McAllister, who was biased against him based on his race and disability, but who plaintiffs do not allege was involved in setting Johnson's salary. Ong Yiu testified in his deposition that Grossberg never said anything disparaging to him about his Filipino background.

b. LeDuff's promotion

Even if plaintiffs demonstrated prima facie cases of discrimination and retaliation, the City offered a nondiscriminatory reason for LeDuff's promotion that plaintiffs failed to show was a pretext for discrimination or retaliation and plaintiffs have not offered other evidence demonstrating discriminatory motive. Grossberg promoted LeDuff over Ong Yiu and Torres because he believed LeDuff was better qualified. LeDuff has two master's degrees while neither plaintiff had a post-graduate degree.[9] Grossberg also believed that LeDuff had

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[9] Plaintiffs contend the City failed to meet its burden of proving that master's degrees were a bona fide occupational qualification (BFOQ) of the Deputy Director position. Plaintiffs' contention is misplaced. A BFOQ is "a practice that on its face excludes an entire group of individuals on a basis enumerated in the Act (e.g., all women or all individuals with lower back defects) . . . because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined." (Cal. Code Regs., tit. 2, § 11010(a).) Grossberg's preference for a Deputy Director who had earned post-graduate degrees was not a BFOQ because it did not on its face exclude an entire group of individuals on a basis enumerated in FEHA.

a better demeanor and ability to handle people than Ong Yiu or Torres.

By producing nondiscriminatory, nonretaliatory reasons for Grossberg's promotion of LeDuff, the City shifted the burden of proof to plaintiffs to show that the City's nondiscriminatory reasons were a pretext for discrimination or retaliation or to offer other evidence demonstrating discriminatory motive. (*Guz, supra*, 24 Cal.4th at pp. 355–356; *Yanowitz, supra*, 36 Cal.4th at p. 1042.) Plaintiffs have not met this burden. They have not identified any evidence that Grossberg's promotion of LeDuff had anything to do with plaintiffs' races/national origins, disabilities, participation in protected activities, or protests of FEHA violations. Moreover, as noted above, plaintiffs' deposition testimony supports the conclusion that Grossberg had no discriminatory or retaliatory animus against them and plaintiffs do not allege that McAllister was involved in LeDuff's promotion.

2. Solicitation and Use of Negative Comments

a. Torres

In 2013, Torres, Ong Yiu, and Johnson expressed concern about the need for full-face respirators for their jobs. The City permitted Torres to obtain full-face respirators and to draft a plan describing the legal requirements for the use of such equipment. In 2015, the City hired a consultant to evaluate whether Health Department employees should be part of a respirator program. While the City was resolving issues concerning the use of respirators, it decided not to formally adopt Torres's plan.

Torres contends that his respirator program was mandatory and implemented. On May 4, 2015, McAllister advised Torres that the City did not have a respirator program. On May 5, 2015, Torres sent an email to all Health Department field staff informing them of what McAllister had advised.

On May 27, 2015, Torres met with Grossberg and others concerning the respirator program. Grossberg said, "'[Torres] cannot establish a policy or program.'" On June 1, 2015, Torres sent an email to all Health Department field staff notifying them that Grossberg had described the respirator program as "'voluntary.'" It further stated, "I have been told by both Teresa McAllister and Leonard Grossberg that Health Department field staff can wear a respirator 'if it makes you feel any better.'"

On June 15, 2015, Grossberg formally reprimanded Torres for insubordination. According to the reprimand, Torres's May 5, 2015, email stated, "'employee safety was no longer a concern or has the support of management or HR staff and that it put staff at risk every time they responded to, investigated, and conducted enforcement actions involving a release of an unknown material.'" Grossberg responded to that email informing Torres that such communications, outside the chain of command, were inappropriate. Despite that advisement, Torres sent the June 1, 2015, email. Torres claims in his opening brief that Grossberg thereafter accused him of "lacking communication skills and of not understanding English."

Torres's theory of discrimination or retaliation is unclear. Grossberg advised Torres not to send emails about Health Department policy to fellow employees. Shortly thereafter, Torres sent such an email and Grossberg reprimanded him. Torres has presented no evidence that Grossberg's actions

derived from a discriminatory or retaliatory animus against Torres. That is, that Grossberg reprimanded him based on his race/national origin, disability, participation in protected activities, or protests of FEHA violations. Again, Torres's own deposition suggests that Grossberg lacks a discriminatory or retaliatory animus.

Further, the citations listed in Torres's brief do not support his claim that Grossberg accused him of "lacking communication skills and of not understanding English."

b. Ong Yiu

Ong Yiu's entire argument is as follows:

"Although the Court felt that Ong Yiu's performance evaluations have been positive, with some '*small comments*' Ong Yiu disagrees. (Tab 30, at 4223–4224 [citing the trial court's judgment].) To an employee like Ong Yiu, his professional reputation, integrity and honesty is his life's blood. Humiliating Ong Yiu at staff meetings and in memorandums which paint a false picture about what happened, i.e. Ong Yiu stuck the monitor by the exhaust pipe to cause the machine to alert at the Food Truck Inspections, suggests Ong Yiu will manipulate data to serve his own purpose. However, the City ignored evidence presented showing the alerting occurred quite some time later and that furthermore, environmental specialists know that what Ong Yiu did is the proper procedure for calibrating the monitoring device in question.

"Thus, as was the case in *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 346, Ong Yiu like [*Accardi*] was made the

subject of unsubstantiated complaints about his performance related to raising health and safety concerns."

Ong Yiu's argument does not cite to the record (Cal. Rules of Court, rule 8.204(a)(1)(C) [each appellate brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"]; *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1406 ["The court is not required to make an independent search of the record and may disregard any claims when no reference is furnished"]) and is incomprehensible (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699–700 ["When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary"].) Accordingly, we decline to address this argument.

3. Inequitable Distribution of Work

In his opening brief, Torres alleges, "Unlike their Caucasian counterparts, Plaintiffs have for many years borne the brunt of the more arduous and life-threatening toxic waste work in Vernon, with Torres now suffering from thyroid cancer and seizures." Ong Yiu makes a virtually identical claim in his opening brief. Plaintiffs use this claim as the apparent basis for their argument that the inequitable distribution of work was an adverse employment action.

Plaintiffs' argument fails, however, as plaintiffs did not allege in their complaint that they were subjected to an inequitable distribution of work. As we set forth above, "a summary judgment motion is directed to the issues framed by the

pleadings. [Citation.] These are the only issues a motion for summary judgment must address. [Citation.]" (*Canales, supra*, 23 Cal.App.5th at pp. 1268–1269.)

F. *Harassment*

In their complaint, plaintiffs alleged that McAllister and Grossberg harassed them because of their races/national origins, disabilities, and protests of discriminatory treatment. The trial court properly granted judgment on this cause of action as plaintiffs failed to raise a triable issue of fact that any of the complained of acts was based on plaintiffs' membership in a protected group.

It is an unlawful employment practice for an employer to harass an employee because of, among other things, the employee's race, national origin, or physical disability (Gov. Code, § 12940, subd. (j)(1)) or to fail to take all reasonable steps necessary to prevent harassment from occurring (Gov. Code, § 12940, subd. (k)). An employer is liable for the harassing conduct of one of its nonsupervisory employees when it knew or should have known of the harassment and failed to take immediate and appropriate corrective action. (Gov. Code, § 12940, subd. (j)(1).) An employer is strictly liable for the harassing conduct of its agents and supervisors. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608, fn. 6 (*Fisher*).)

The elements of a harassment claim under FEHA are: (1) the plaintiff belongs to a protected group, (2) the plaintiff was subjected to harassment, (3) the harassment was based on the plaintiff's membership in the protected group, and (4) the

harassment was sufficiently severe or pervasive that it altered the conditions of employment and created an abusive working environment. (*Fisher, supra*, 214 Cal.App.3d at p. 608.)

1. Torres

In his deposition, Torres testified that the only offensive, demeaning, or harassing comments McAllister made to him were her failure to "recognize" the respirator program he created and her statement that he did not have a medical condition that qualified for FMLA leave.[10]

Torres further testified in his deposition that Grossberg's harassing conduct consisted of: (1) Grossberg telling him he had to wear a black polo shirt on "casual Thursdays," (2) Grossberg's denial of one request for 15 minutes of flex time so Torres could pick up his daughter, (3) Grossberg's comment, "'Well, revert back to your HAZWOPER training,'" in response to Torres's question about personal protective equipment to be used in responding to emergencies, (4) Grossberg's requirement that Torres follow City policy and wear a tie except when it would be a safety hazard during inspections, and (5) Grossberg's denial that employees "need[ed] . . . personal protective equipment for the respirator program."

In his deposition, Torres also testified Grossberg never said anything offensive about Torres's Filipino background or offensive or harassing about Torres's disability. He further testified that no one "at the [C]ity ever said anything to [him]

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[10] Below we hold that the City did not violate Torres's FMLA rights and Torres has failed to demonstrate that the City retaliated against him for exercising those rights.

that suggested that that person had an animus against Filipinos"—i.e., that McAllister never said anything to him that suggested an anti-Filipino bias.

The trial court found that Torres failed to cite any evidence linking the alleged harassing conduct to Torres's race or disability. We agree. Even assuming the statements and conduct Torres complains of constitute harassment, Torres has not identified any evidence that even remotely suggests that anything McAllister or Grossberg said or did was because Torres was Filipino or disabled or because he protested discriminatory treatment.[11] (*Fisher, supra*, 214 Cal.App.3d at p. 608.)

2. Ong Yiu

Ong Yiu testified in his deposition that McAllister's harassing conduct consisted of: (1) In a May 2015, conversation in McAllister's office, McAllister advised Ong Yiu that health care costs would be going up. Ong Yiu replied, "'Well, you know, you really don't know me, Teresa.'" McAllister responded, "'Are you threatening me, Lyndon?'" McAllister's door was open and Ong Yiu believed McAllister was falsely portraying him as having threatened her. (2) During union negotiations, McAllister lied about the scope of SES job functions. (3) In a mediation connected with the union negotiations, the mediator said that the City was unwilling to pay employees more, saying that they were not "'worth it.'" McAllister was the City's lead negotiator. (4) McAllister's failure to act on safety complaints. (5) McAllister

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[11] Torres does not contend on appeal that there was evidence that he was harassed because he protested discriminatory treatment.

requested that Ong Yiu fill out paperwork to classify certain leave as FMLA leave. Ong Yiu did not request or want FMLA leave. Ong Yiu also testified that McAllister never said anything disparaging to him about his Filipino background.

Ong Yiu testified that Grossberg's harassing conduct consisted of: (1) In 2016, Grossberg called Ong Yiu into his office and told him he was wearing the wrong color shirt on a Thursday in violation of a non-existent City policy. (2) In 2014, Grossberg told Ong Yiu that he was taking too much time off from work. (3) Ong Yiu and others complained that they were being overexposed to diesel fumes. The employees borrowed a meter from "public works" to measure their exposure. Grossberg "closed off the inspection line, and . . . sent the fire department out there to monitor." The Fire Department used the wrong monitor and Grossberg used the Fire Department's results to conclude there was no exposure problem. Grossberg went to Ong Yiu's cubicle to discuss the results. Ong Yiu told Grossberg his conclusion was wrong and he was endangering his employees. Grossberg yelled and waved his finger at Ong Yiu. Ong Yiu yelled at Grossberg. (4) Grossberg falsely accused Ong Yiu of violating City policy by failing to report to Grossberg, his supervisor, that he had broken his work cell phone. Instead, City policy required employees to immediately report broken cell phones to the Information Technology Department, as he had. (5) Grossberg denied Ong Yiu's request to attend a conference. According to Ong Yiu, Grossberg never said anything disparaging to him about his Filipino background.

The trial court found that Ong Yiu failed to cite any evidence linking the alleged harassing conduct to Ong Yiu's race or disability. We agree. Even assuming the statements and

conduct Ong Yiu complains of constitute harassment, Ong Yiu has not identified any evidence that suggests in any way that anything McAllister or Grossberg said or did was because Ong Yiu was Filipino or disabled or because he protested discriminatory treatment.[12] (*Fisher, supra*, 214 Cal.App.3d at p. 608.)

G. *Torres's CFRA/FMLA Leave Claim*

In his complaint, Torres asserted a cause of action against the City because it "denied, revoked and penalized [him] for seeking and ultimately receiving" CFRA and FMLA leave. Torres's apparent complaint is that in the fall of 2014 and in October 2015 he had medical appointments in connection with his 2009 cancer diagnosis and the City refused to characterize those appointments as CFRA or FMLA leave until he filed a complaint with the Department of Fair Employment and Housing (DFEH) and the Department of Labor.

"The CFRA, which is contained within the FEHA ([Gov. Code,] § 12900 et seq.), 'is intended to give employees an opportunity to take [leave] from work for certain personal or family medical reasons without jeopardizing job security.' [Citation.] [¶] Generally, the CFRA makes it an unlawful employment practice for an employer of 50 or more persons to refuse to grant a request by an employee to take up to 12 workweeks in any 12-month period for family care and medical [leave]. ([Gov. Code,] § 12945.2, subds. (a), (c)(2)(A).)" (*Faust v.*

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[12] Ong Yiu does not contend on appeal that there was evidence that he was harassed because he protested discriminatory treatment.

California Portland Cement Co. (2007) 150 Cal.App.4th 864, 878 (*Faust*).) "A CFRA interference claim "'consists of the following elements: (1) the employee's entitlement to CFRA leave rights; and (2) the employer's interference with or denial of those rights.'" [Citation.]" (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 601.)

The FMLA is the federal law counterpart to the CFRA. (*Faust, supra,* 150 Cal.App.4th at p. 878, fn. 5.) It provides job security to an employee who must be absent from work due to family care or medical needs by allowing the employee up to 12 weeks of annual leave. (*Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1119; 29 U.S.C. §§ 2612(a)(1)(D) & 2614(a)(1).) "There are five elements for a prima facie case of interference with [FMLA] rights. The employee must establish "'that: (1) he was eligible for the FMLA's protections, (2) his employer was covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and (5) his employer denied him FMLA benefits to which he was entitled." [Citation.]'" (*White v. County of Los Angeles* (2014) 225 Cal.App.4th 690, 701.)

After Torres was treated for thyroid cancer in 2009, he had follow-up appointments every two to four months. Depending on the nature of the appointment, Torres took a half or full day off. The City always allowed Torres time off, and he used sick leave for those appointments.

In October 2014, for the first time, Torres requested the City designate his time off for his follow-up appointments as FMLA leave. On December 4, 2014, Torres emailed McAllister and others requesting written confirmation that McAllister had denied his FMLA designation request. The same day, McAllister

responded in part, "Your doctor's appointments are not required to be designated as FMLA whereby taken away your eligibility of FMLA should you need it every 12 months. Your request for a sick day to attend a doctor's appointment for either routine or follow-up care with your doctor should be easily approved by your department head . . . . [¶] . . . [¶] It is not 'denial' of FMLA, it is just not designating the sick time as FMLA. Designating as FMLA would then limit you from protected leave when you need it for a serious health condition of which you need to be off work and are protected from. You may not understand correctly the designation of FMLA. This is not extra time that is awarded, it is just designated your sick leave as protected leave you are entitled to in a 12 month period."

Thereafter, notwithstanding McAllister's explanation that designating sick leave he took for follow-up cancer appointments as FMLA leave would needlessly reduce the FMLA leave available to him, Torres filed a complaint with the DFEH and the Department of Labor. The City met with the Department of Labor concerning Torres's complaint. In January 2015, the City retroactively classified as FMLA leave 33 hours of sick leave that Torres had taken in September, October, November of 2014 and January of 2015.

There is no dispute that the City permitted Torres to take sick leave to attend his appointments. Also, there is no dispute that the City ultimately permitted Torres to classify retroactively sick leave as FMLA leave. Why Torres later sought to designate this sick leave as FMLA leave is not clear from the record. In any event, Torres has not articulated either in the trial court or on appeal how any delay by the City in retroactively designating the

sick leave as FMLA leave constitutes a violation of the FMLA or CFRA.[13]

H. *Ong Yiu's Labor Code Section 230.8 Claim*

Labor Code section 230.8, subdivision (a)(1) provides:

"An employer who employs 25 or more employees working at the same location shall not discharge or in any way discriminate against an employee who is a parent of one or more children of the age to attend kindergarten or grades 1 to 12, inclusive, or a licensed child care provider, for taking off up to 40 hours each year, for the purpose of either of the following child-related activities:

"(A) To find, enroll, or reenroll his or her child in a school or with a licensed child care provider, or to participate in activities of the school or licensed child care provider of his or her child, if the employee, prior to taking the time off, gives reasonable notice to the employer of the planned absence of the employee. Time off pursuant to this subparagraph shall not exceed eight hours in any calendar month of the year.

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[13] To the extent that Torres's cause of action can be read as also asserting a retaliation claim under the CFRA (see *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 248 [CFRA retaliation]) and the FMLA (see *Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 261 [FMLA retaliation]), Torres does not argue on appeal that the City's summary judgment motion did not address that claim or that the trial court improperly entered judgment for that reason.

"(B) To address a child care provider or school emergency, if the employee gives notice to the employer."[14]

In his deposition, Ong Yiu testified that in 2014 he took or requested to take time off for child-related activities on two occasions. On one occasion, he took time off to help his son, a college sophomore, find an apartment in San Francisco. On a second occasion, Ong Yiu requested to "flex [his] time" to attend his younger son's club track practices and meets. Grossberg denied the request.

In its summary judgment motion, the City argued that Ong Yiu never sought qualifying leave under Labor Code section 230.8. That is, the leave he took or sought—to help his college-age son find an apartment and to attend his other son's club team track practices—were not school emergencies under the Labor Code. Ong Yiu's entire response to the City's summary judgment motion on this issue was: "Contrary to Defendants claim, this

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[14] Labor Code section 230.8, subdivision (e)(2) defines "child care provider or school emergency" as follows:

"'Child care provider or school emergency' means that an employee's child cannot remain in a school or with a child care provider due to one of the following:

"(A) The school or child care provider has requested that the child be picked up, or has an attendance policy, excluding planned holidays, that prohibits the child from attending or requires the child to be picked up from the school or child care provider.

"(B) Behavioral or discipline problems.

"(C) Closure or unexpected unavailability of the school or child care provider, excluding planned holidays.

"(D) A natural disaster, including, but not limited to, fire, earthquake, or flood."

violation has been established. Ong Yiu was forced to use comp time, while others flexed their schedules. (DF 298, 300)."

On appeal, Ong Yiu contends he never claimed his need to miss work while helping his son find an apartment implicated Labor Code section 230.8. Instead, he claims "[i]t was . . . another example of differential treatment that Grossberg allowed to persist and in turn threatened Ong Yiu for using on the guise of excessive absences." If Ong Yiu ever based his Labor Code section 230.8 claim on his helping his older son find an apartment, he has abandoned the claim on appeal. Moreover, any such claim would have been without merit as assistance to a child in college is not a qualifying activity under Labor Code section 230.8 as that section applies only to activities involving children grade 12 or below.

Ong Yiu's son's *club* track team practices were not school track team practices. Accordingly, they were not a qualifying "school activity" under Labor Code section 230.8, subdivision (a)(1)(A). Ong Yiu does not address whether club track team practices are a qualifying activity in either his opening or his reply brief.[15]

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15 During his deposition, Ong Yiu was asked, "was this a club, or is this a school?"

Ong Yiu responded, "It's a track club."

In his reply separate statement in opposition to the City's motion for summary judgment, Ong Yiu, citing his own declaration, states that his son's club team "Track Program was a school-sanctioned extracurricular activity." He offers no explanation of how an activity outside of school of which the school approves qualifies as an "activit[y] of the school."

IV. DISPOSITION

The judgments are affirmed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.