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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

SERGIO AGUIRRE, Plaintiff and Appellant, v. EAST VALLEY GLENDORA HOSPITAL, L.P., et al., Defendants and Respondents.	B262618, B264857 (Los Angeles County Super. Ct. No. KC065414)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert A. Dukes, Judge. Affirmed in part and reversed in part.

Michel & Associates, C.D. Michel, Joshua Robert Dale and Nicholas W. Stadmiller for Plaintiff and Appellant.

Carroll, Kelly, Trotter, Franzen, McKenna & Peabody, Mark V. Franzen, Jennifer L. Sturges and Seth E. Workman for Defendants and Respondents.

INTRODUCTION

After he was terminated from his employment, Sergio Aguirre sued his employer, its business-entity affiliates, and several individuals alleging violations of the Fair Employment and Housing Act (Gov. Code, § 12940 et seq.[1] (the FEHA)) and the Labor Code, along with tort and declaratory relief claims. The trial court granted summary adjudication in favor of four individual employees on the ground that as a matter of law they could not be held individually liable for the FEHA claims alleged against them and they did not engage in extreme and outrageous behavior so as to be liable for intentional infliction of emotional distress (IIED). Aguirre appeals from the judgment dismissing those four defendants from the action (case No. B262618).

The trial court also sustained the demurrer of one of the business-entity defendants, Prime Healthcare Services (Prime), and denied leave to amend on the ground that Aguirre could not allege successor liability. Aguirre appeals from the judgment dismissing Prime from the action (case No. B264857).

We consolidated Aguirre's appeals. We hold that the trial court did not err in granting summary adjudication of Aguirre's FEHA and IIED causes of action in favor of the four individual defendants. However, we conclude that the trial court abused its discretion in sustaining Prime's demurrer. Accordingly, we affirm the judgment dismissing the four individual defendants from the action and reverse the judgment dismissing Prime from the action.

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

FACTUAL AND PROCEDURAL BACKGROUND

1. *Aguirre's tenure at the hospital*

Aguirre was Chief Nursing Officer (CNO) at defendant East Valley Glendora Hospital (the hospital). A CNO is a senior administrative and leadership position often found in hospitals. Aguirre was discharged from his job less than seven months after commencing work and sued the hospital and his employers, defendants East Valley Glendora Hospital, L.P. (East Valley), Panpacific Health Enterprises, Inc. (Panpacific), and Chihchien Joseph Chang (Joseph Chang), who was East Valley's President and Chief Executive Operator and Panpacific's principal owner. Also named as individual defendants were the hospital's Director of Human Resources Kim Bui, Assistant Administrator Estella Renteria, Director of Administrative Services Denise Powell, and Officer and Administrator Shwu Chang (S. Chang) (collectively the individual defendants).

Although not at issue in this proceeding, Joseph Chang's conduct provided the backdrop. The operative complaint alleged that Joseph Chang was a "bully, hot-tempered[ ] racist," who was "unconcerned about East Valley patients' welfare if saving money could be achieved by neglecting patients' care." The allegations included that Joseph Chang told Aguirre that "Hispanics will stay overtime [but] will not actually work 10 to 18 hours . . . and that [Hispanics] only care about getting overtime pay." Joseph Chang stated that, as an Hispanic, Aguirre could only teach the Chinese nursing students "false and unhelpful information." Joseph Chang did not want to spend money on malfunctioning equipment, and criticized and chastised Aguirre for inter alia, making mandated reports about patient safety and hospital

conditions. Aguirre also alleged that Joseph Chang physically attacked him.

Focusing on the four individual defendants at issue in this appeal, Aguirre's declaration and deposition testimony, plus his 80 additional facts submitted in opposition to the summary judgment motion, described the following events: Immediately upon commencing work at the hospital, Aguirre encountered numerous patient safety issues. As he felt his nursing license mandated, Aguirre reported the hospital's violations of health care standards to the appropriate authorities. However, "[d]efendants seemed to take his reporting as a threat" and pressured him to disregard his reporting obligations. Aguirre faced continuing "resistance and hostile treatment" from Joseph Chang "and his immediate administrative team," Bui, Renteria, and Powell, who would "chide and scold" Aguirre for various reporting and patient-safety activities. Aguirre declared that his attempts to report patient care and conditions, and to discuss reporting compliance, resulted in "further warning, scolding, reprimanding, belittling, and disciplining."

a. *patient safety and hospital condition reports*

The individual defendants "criticiz[ed]" Aguirre for bringing to their attention nursing staff shortages, and "ignored" his requests to hire more nurses. S. Chang "reprimanded" him, "remind[ing]" him that any licensed nurse could be assigned to the Emergency Room or Intensive Care Unit. "Defendants" "reprimand[ed]" Aguirre when he notified the Department of Public Health that a patient complaining of chest pain was not treated in the Emergency Room because there was no triage nurse.

Aguirre alerted the Department of Public Health about a lack of communication concerning a patient's transfer between the Emergency Rooms at the hospital and another hospital. He "was again scolded for [his] efforts to comply with the law, and [he] was mockingly told that the only thing [he] had done during [his] employment was report incidents."

Joseph Chang and Powell "scolded" Aguirre for informing the Department of Mental Health that a patient on a psychiatric hold had escaped from the hospital. When Aguirre reported a patient's death to the Department of Mental Health, Powell and Renteria "warned" him that he was reporting " 'too much' " which would cause the hospital trouble.

Aguirre delayed a surgical procedure because the only operative sterilization instrument failed. "Defendants promptly reprimanded [him], even though the patient's surgeon had completely agreed with [his] decision." Aguirre closed the Emergency Room and notified other hospitals and the Medical Alert Center when a critical blood chemistry analyzer machine stopped functioning. Joseph Chang and the individual defendants called him out of the Emergency Room, over a doctor's objections, to "scold" him for this. Aguirre informed the Medical Alert Center and other facilities that water to the hospital's Emergency Room was shut off so that patients could be diverted elsewhere. S. Chang and Bui "reprimanded" him. Joseph Chang, Renteria, and Powell "chastised" Aguirre for reporting to Infection Control the planned removal of a soiled carpet.

Aguirre felt that his efforts to ensure the hospital's compliance with health and safety standards for patient care were met with ridicule and mockery. He viewed these events as

attempts to criticize his work performance and to dissuade him from, and punish him for, trying to comply with the law.

b. *reports about patient abuse by other facilities*

In mid March 2012, Aguirre notified the Department of Public Health that a patient had bedsores. In a staff meeting called to discuss the notification, Chang ordered Aguirre not to make any further reports before obtaining approval from him or Powell. Powell and Renteria "claimed" that they never reported such incidents to the State and that Aguirre should not because his predecessor had not. Aguirre declared that this caused him to be concerned that he would be punished for engaging in lawful reporting of patient abuse.

Then in late March 2012, a patient with advanced bedsores was transferred to the hospital from a facility that had not reported the injury. Aguirre informed Joseph Chang, Renteria, Powell, and Bui of the duty to report this incident. "They" disagreed with Aguirre's assessment and instructed him not to make the report because the hospital did not call out networking partners and vice versa. Joseph Chang told him not to make the report because it would cause facilities to stop sending patients to the hospital. Aguirre "understood this instruction to be another attempt to dissuade [him] from following mandatory reporting requirements and to be a further criticism of [his] work performance." He also declared that "this instruction" "substantiated" his "concern" that he would be punished for engaging in lawful reporting of patient abuse.

Aguirre felt that the individual defendants did not find his reports to be inaccurate or legally unnecessary. And they did not discuss Aguirre's lack of knowledge or performance. Rather,

Aguirre declared that the objections were about the heightened scrutiny of the hospital that his reports would invite.

c. complaints about his treatment

Aguirre also attempted several times to make formal complaints to Human Resources about the treatment he received from defendants and the unaddressed dangerous conditions at the hospital. Rather than to take his reports or to investigate them, Bui "smirked and walked away." Aguirre was frustrated because Bui, to whom he made these reports, was one of the employees he was complaining about. He filed several grievances with the Compliance Officer, who did not investigate his complaints or take corrective steps. Instead, Aguirre "sense[d]" that after trying to register his complaints, the criticisms of his legally protected reporting grew harsher.

On his last day at work, Aguirre attended a meeting of the hospital's board of directors. The chairman of the governing board, the chief medical officer, and the chief of staff complimented Aguirre on his work and professionalism, and his efforts to improve patient safety, the quality of care, the nurses' competency, and communication. Joseph Chang interrupted this praise to reprimand Aguirre in front of the Board by claiming that his reports were to " 'blame' " for the inspectors who had been investigating and auditing the hospital. Renteria and Powell "showed support for Joseph Chang's statements."

Aguirre's physical and mental well-being deteriorated over time as the result of "[d]efendants' " negative remarks and discrimination, retaliation, and "harassment for engaging in mandated and protected reporting activity." During the final meeting, Aguirre began to experience heart palpitations, a tight jaw, and his blood pressure became dangerously high. When he

told Bui, she looked at him, smiled, and left without commenting. At the Emergency Room nurse's suggestion, Aguirre went to his personal physician who diagnosed hypertension, stress, and severely high blood pressure, and placed Aguirre on medical leave. Bui called Aguirre at home on disability leave to terminate him from employment.

2. *the second amended complaint and defendants' summary judgment motion*

Aguirre obtained a right-to-sue letter from the Department of Fair Employment and Housing and brought this lawsuit. The operative complaint contained 13 causes of action alleging discrimination, harassment, retaliation, in violation of the FEHA, several Labor Code violations, assault, battery, and IIED, among other claims against various defendants.

Only three of the 13 causes of action were alleged by Aguirre against the individual defendants personally. The second cause of action was entitled "Harassment in violation of the FEHA (Government Code § 12940(g))." Therein, Aguirre alleged that Joseph Chang and the individual defendants harassed him "because he engaged in lawful reporting of patient abuse" under Penal Code section 11161.8, and terminated him from employment for complaining to human resources and his supervisors that he was being harassed for engaging in "protected reporting activity." In the 12th cause of action for IIED, Aguirre alleged that Joseph Chang and the individual defendants, acting in the course and scope of their employment, engaged in extreme and outrageous conduct that proximately caused him to suffer severe and continuous humiliation, emotional distress, and mental and physical pain, and anguish. The thirteenth cause of action sought declaratory relief.

Defendants moved for summary judgment, or in the alternative, summary adjudication. The individual defendants argued, inter alia, that they were not Aguirre's supervisors. Aguirre does not dispute that the individual defendants Bui, Powell, Renteria, and S. Chang, were not his supervisors; they were "non-supervisory coworkers." Joseph Chang was Aguirre's sole supervisor and no other hospital staff exercised supervisory control over Aguirre.

With respect to the 12th cause of action asserting IIED, the defendants argued that none of the alleged conduct was wrongful, and even if wrongful, was not extreme or outrageous.

In a 14-page statement of decision, the trial court denied summary adjudication of the causes of action alleged against the business-entity defendants and Joseph Chang. As for the four individual defendants, the court granted summary adjudication of the FEHA, IIED, and declaratory relief causes of action. The court discerned no dispute that the four individual defendants were not Aguirre's supervisors. The court agreed that discipline and criticism for Aguirre's reporting activities constituted a "normal part of employment and [did] not rise to extreme and outrageous conduct." The trial court dismissed the individual defendants from the lawsuit. Aguirre filed his timely appeal.

3. *the third amended complaint and Prime's demurrer*

Around the time defendants moved for summary adjudication, their counsel informed Aguirre's attorney, without providing details, that Prime had purchased the hospital and its assets from East Valley and Panpacific. Aguirre filed a Doe Amendment to add Prime to this lawsuit. The trial court sustained Prime's demurrer to the Doe Amendment and second amended complaint, but granted Aguirre leave to amend his

complaint to "state Prime Healthcare's successor liability as Doe 1" and to state Aguirre's ignorance of Prime's identity.

In his ensuing third amended complaint (TAC), Aguirre alleged on information and belief the following: East Valley and Panpacific "sold their interests in the hospital to Prime" in May 2014. Prime was a successor in interest to East Valley and Panpacific, who had notice of Aguirre's employment claims before its acquisition. Prime's "acquisition was a standard 'asset liability' purchase, where PRIME purchased assets and assumed liabilities of EAST VALLEY AND PANPACIFIC, which would include liabilities incurred from unlawful treatment of Plaintiff." Prime had the same internal complaint and grievance policies, and the same board of directors as did East Valley and Panpacific at the time of Aguirre employment. Continuing, the TAC alleged that East Valley and Panpacific were no longer in operation and could not provide Aguirre relief. Prime had substantially continued the business operations of the hospital at the same location, using the same facility, working conditions, workforce, and supervisory personnel as during Aguirre's employment, with few operational changes. As a result, Aguirre alleged, Prime inherited the responsibility to remedy unlawful practices committed by its predecessors. Aguirre's ensuing causes of action for violation of Labor Code sections 1102.5 and 226, Health and Safety Code section 1278.5, Business and Professions Code section 17200, declaratory relief, and his *Tameny* claim (the fifth through ninth, and 13th causes of action) were all alleged against East Valley, Panpacific and Prime.

Prime demurred to the TAC on the ground of misjoinder of an improper party and failure to state a cause of action. (Code Civ. Proc., § 430.10, subds. (d), (e), & (f).) Prime argued that

Aguirre had not pled facts sufficient to demonstrate successor liability. Prime asserted that it "merely purchased controlling stocks of East Valley." Citing *Potlatch Corp. v. Superior Court* (1984) 154 Cal.App.3d 1144, 1151, Prime explained that successor liability applies where the predecessors are no longer in existence. In connection therewith, Prime submitted two webpages from the Office of the California Secretary of State, indicating that East Valley and Panpacific were "active."

The trial court sustained Prime's demurrer and denied Aguirre leave to amend. The court took judicial notice of the "active" status of East Valley and Panpacific and "*found* that Prime . . . was not a successor in interest to" East Valley and Panpacific. (Italics added.) Aguirre timely appealed from the ensuing judgment.

DISCUSSION[2]

Summary Adjudication

1. *standard of review*

A defendant meets its burden in a summary judgment motion by showing one or more essential elements of the cause of action cannot be established, or there is a complete defense thereto. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic*

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[2] This appeal does not violate the one final judgment rule, notwithstanding fewer than all defendants were dismissed from the lawsuit. When an action involves multiple parties and a judgment is entered leaving no issue to be tried as to one party, the judgment as to that one party is appealable. (*Ram v. OneWestBank, FSB* (2015) 234 Cal.App.4th 1, 9.) No issue concerning the four individual defendants or Prime remains to be determined, with the result that the judgments dismissing them from the lawsuit are immediately appealable.

Richfield Co. (2001) 25 Cal.4th 826, 849.) A defendant has shown that the plaintiff cannot establish at least one element of the cause of action "by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence . . . ." (*Aguilar*, at p. 854.) Once the moving defendant has met its initial burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or defense. (*Id*. at p. 849.)

We review a summary judgment "de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Whitehead v. Habig* (2008) 163 Cal.App.4th 896, 901.) We liberally construe the evidence in support of the party opposing summary judgment, Aguirre here, and strictly scrutinize the moving party's papers (*Wiener v. Southcoast Childcare Centers, Inc*. (2004) 32 Cal.4th 1138, 1142 (*Wiener*), to assess whether the evidence would, if credited, permit the factfinder to find in favor of the party opposing the motion. (Cf. *Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 850.)

2. *The trial court properly granted summary adjudication of the second cause of action under the FEHA in favor of the individual defendants.*

a. *There is no dispute of material fact*.

Aguirre does not dispute that individual defendants Renteria, Bui, Powell, and S. Chang were coworkers, not supervisory employees. When there are no material issues of fact and the sole remaining question is one of law, it is the duty of the court to determine the legal issue, which issue we may review on appeal. (*Gates v. Superior Court* (1987) 193 Cal.App.3d 205, 214.)

b. *As a matter of law, S. Chang, Kim Bui, Estella Renteria, and Denise Powell cannot be held personally liable under section 12940, subdivisions (g) or (h).*

Addressing subdivision (h) of section 12940 first, that provision makes it an unlawful employment practice "[f]or *any employer,* labor organization, employment agency, *or person* to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part . . . ." (Italics added.) The unlawful employment practice prohibited by subdivision (h) is "retaliation." (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1162.) Individual employees are not personally liable for their role in subdivision (h) retaliation. This is so notwithstanding that subdivision restricts "any employer . . . *or person*" from engaging in unlawful business practices. (§ 12940, subd. (h), italics added; *Jones*, *supra*, at p. 1173.) Our Supreme Court explained that the definition of "employer" includes "any *person* acting as an agent of an employer, directly or indirectly . . . ." (§ 12926, subd. (d).) This "person-as-agent language" was " ' "intended only to ensure that *employers* will be held liable if their supervisory employees take actions later found discriminatory, and that *employers* cannot avoid liability by arguing that a supervisor failed to follow instructions or deviated from the employer's policy." ' " (*Jones*, *supra*, at p. 1163, quoting *Reno v. Baird* (1998) 18 Cal.4th 640, 647 & *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 66.)

Paragraph 56 of Aguirre's second cause of action alleged that Aguirre was terminated from employment because he "complain[ed] to Defendants about their unlawful conduct regarding his reporting activities, specifically complaining to his

supervisors and human resources that he was being harassed and retaliated against because he was engaging in protected reporting activity, as described above." Liberally construed, this is a subdivision (h) allegation for which individuals cannot be held personally liable.

Subdivision (g) of section 12940 makes it an unlawful employment practice "[f]or *any employer, labor organization, or employment agency* to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that *prohibits retaliation* against hospital employees who report suspected patient abuse by health facilities or community care facilities."[3] (Italics added.) Subdivision (g) prohibits retaliation by "*employers*" for making a very specific kind of work-related report. But, by its own words, subdivision (g) does not impose personal liability on individuals. Subdivision (g) is more narrowly written than subdivision (h), which does not impose personal liability on individuals, notwithstanding it restricts "any

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[3] Penal Code section 11161.8 reads in relevant part: "Every person, firm, or corporation conducting any hospital in the state . . . who receives a patient transferred from a health facility . . . who exhibits a physical injury or condition which, in the opinion of the admitting physician, reasonably appears to be the result of neglect or abuse, shall report such fact by telephone and in writing, within 36 hours, to both the local police authority having jurisdiction and the county health department. [¶] Any registered nurse . . . employed at such hospital may also make a report under this section, if, in the opinion of such person, a patient exhibits a physical injury or condition which reasonably appears to be the result of neglect or abuse."

employer . . . *or person*" from retaliating against an employee for making complaints. (§ 12940, subd. (h), italics added.)

Aguirre's second cause of action alleged that defendants "harassed Plaintiff *because he engaged in lawful reporting of patient abuse as that term is applied under Section 11161.8*." (Italics added.) This is a subdivision (g) allegation for which individuals cannot be held personally liable.

Aguirre observes that individuals may be held liable under subdivision (j) of section 12940 and argues that we should recognize the harassment perpetrated by the individual defendants here. At oral argument, Aguirre contended that he had alleged harassment under section 12940 "as a whole," which would include harassment under subdivision (j). After oral argument, we asked the parties to submit supplemental briefs (§ 68081) addressing what effect section 12940, subdivision (j)(3) has on the personal liability of employees for harassment in violation of section 12940, subdivision (g). We have received and reviewed those briefs and conclude that summary judgment was properly granted. " '[A] summary judgment motion is directed to the issues framed by the *pleadings*. [Citations.]' " (*Van v. Target Corp*. (2007) 155 Cal.App.4th 1375, 1387, italics added.) Aguirre is correct that allegations of the complaint, not the caption or title of a cause of action, determine the nature of the claim. However, reading the operative complaint liberally in his favor, Aguirre did not allege harassment under section 12940, subdivision (j). The allegations were that Aguirre was harassed "*because he engaged in lawful reporting* of patient abuse" i.e., "as that term is applied under [Penal Code] *Section 11161.8*," -- a section 12940 subdivision (g) allegation. (Italics added.) He further alleged in paragraph 56 that he was terminated from employment because

he complained about being harassed and retaliated against *for making reports* -- a section 12940, subdivision (h) violation. The complaint did not allege that the *individual defendants* harassed Aguirre for being a member of a protected class, such as would state a subdivision (j) violation. Thus, the version of Aguirre's complaint to which the summary judgment motion was properly aimed, alleged violations of subdivisions (g) and (h), but not of subdivision (j).[4]

In sum, it is undisputed that the individual defendants were not Aguirre's employers. As a matter of law, they cannot be held personally liable under section 12940, subdivisions (g) and (h) for the conduct alleged in the second amended complaint. The trial court properly granted summary adjudication of the second cause of action in favor of the individual defendants.

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[4] Aguirre argues at length that he has demonstrated triable issues of fact that the individual defendants harassed him to defeat summary judgment. He contends that the trial court failed to consider the totality of the harassing conduct when determining liability as a matter of law. However, "only material factual disputes bear any relevance: 'no amount of factual conflict upon other aspects of the case will preclude summary judgment.' [Citation.]" (*Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1379.) As the individual defendants cannot be held personally liable under section 12940, subdivisions (g) and (h) as a matter of law, no amount of dispute about whether the individual defendants' conduct constituted harassment will defeat summary judgment.

3. *The trial court properly granted summary adjudication of the IIED cause of action in favor of the individual defendants.*

a. *extreme and outrageous conduct*

A cardinal requirement for the success of an IIED cause of action is that the defendants' conduct be extreme and outrageous. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 450, pp. 668-669.) Additionally, the defendants must act with the intent to cause emotional distress or with reckless disregard of the probability of causing that result, and the conduct must be the actual and proximate cause of the plaintiff's distress. (*Hughes v. Pair*, at p. 1050.)

"A defendant's conduct is 'outrageous' when it is so ' " 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' " ' [Citation.]" (*Hughes v. Pair*, *supra*, 46 Cal.4th at pp. 1050-1051.) "To be 'outrageous,' the conduct must go 'beyond all bounds of decency . . . .'" (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294-295.) The distress inflicted must be of such substantial or enduring quality that no reasonable person in civilized society should be expected to endure it. (*Hughes v. Pair*, *supra*, at p. 1051, quoting from *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1004.)

"Liability for intentional infliction of emotional distress ' "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." (Rest.2d Torts, § 46, com. d.)' [Citations.]" (*Hughes v. Pair*, *supra*, 46 Cal.4th at p. 1051.) Discipline and criticism are considered "a normal part of the employment relationship." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 25.) "[O]rdinary rude or insulting

behavior is not enough . . . .' [Citation.]" (*McCoy v. Pacific Maritime Assn.*, *supra*, 216 Cal.App.4th at p. 295.)

b. *The record is devoid of evidence that the conduct of S. Chang, Kim Bui, Estella Renteria, and Denise Powell was extreme and outrageous.*

The individual defendants contend that their conduct was not extreme or outrageous because it constituted a normal part of Aguirre's employment as it was "intended to assist Plaintiff in his performance as the CNO." Aguirre argued that an employer's harassment and discriminatory conduct, which behavior falls outside the normal workplace environment, have been held to be outrageous for purposes of an employee's IIED claims.

Viewing Aguirre's evidence liberally and construing defendants' evidence strictly (*Wiener*, *supra*, 32 Cal.4th at p. 1142), the individual defendants claimed they (1) corrected some of Aguirre's work, (2) disagreed with him about whether certain conduct triggered a reporting requirement, (3) were concerned about the effect the reports were having on the ability of the hospital to conduct its work, and (4) did not disagree with Joseph Chang's instructions. In response, Aguirre failed to dispute the quality of the individual defendants' behavior. The only conduct he described was that Bui looked at him and smiled, but made no comment, and Renteria and Powell "showed support for Joseph Chang's statements." Otherwise, Aguirre declared that Bui, Renteria, Powell, and S. Chang variously "resisted," "chided," "scolded," "warned," and "reprimanded" him. Aguirre cited no specific facts to support these conclusory, adjectival descriptions, whereas he quoted Joseph Chang's statements at length. The record contains portions of Aguirre's deposition that are likewise devoid of facts describing the individuals'

objectionable comments. Most of Aguirre's separate facts and declaration are stated in the passive voice, making it impossible to determine what any individual defendant, as opposed to Joseph Chang, actually said. Having failed to particularize more of the individuals' conduct, Aguirre's opposition showed no more than rude, inconsiderate, or insulting behavior which, as a matter of law, does not rise to the level of extreme or outrageous conduct. (*McCoy v. Pacific Maritime Assn.*, *supra*, 216 Cal.App.4th at p. 295.)

Aguirre contends that his FEHA-based harassment claims support reversal of the summary adjudication of the IIED cause of action. An employer's retaliatory action may derivatively constitute outrageous conduct redressable under a theory of intentional infliction of emotional distress. (*Hughes v. Pair*, *supra*, 46 Cal.4th at p. 1051 ["a claim of sexual harassment can establish 'the outrageous behavior element of a cause of action for intentional infliction of emotional distress.' "].) However, although a " 'series of subtle, yet damaging, injuries' is sufficient to constitute retaliation; . . . it does not necessarily rise to the 'extreme and outrageous' standard required for an intentional infliction of emotional distress claim. [Citation.]" (*McCoy v. Pacific Maritime Assn.*, *supra*, 216 Cal.App.4th at p. 295, quoting from *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1055.)

We conclude that Aguirre has failed to carry his burden to demonstrate a triable issue of material fact with the result, as a matter of law, the individual defendants' conduct was not

extreme or outrageous. The trial court properly granted summary adjudication of these defendants on this ground.[5]

Demurrer

1. *standard of review*

On appeal from a judgment of dismissal following an order sustaining a demurrer, "we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory." (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that can reasonably be inferred from those pleaded, and facts of which judicial notice may be taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).) We liberally construe the complaint's allegations with a view toward substantial justice. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 43, fn. 7.) If we determine that an amendment could cure the defect, then the trial court has abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Schifando*, *supra*, at p. 1081.) The plaintiff has the burden of proving that amendment would cure the defect. (*Ibid.*)

2. *The trial court abused its discretion in sustaining the demurrer to the successor liability allegations.*

a. *Aguirre has adequately alleged successor liability.*

"As set forth in *Ray* [*v. Alad Corp.* (1977)] 19 Cal.3d 22, 28, a successor company has liability for a predecessor's actions if[:] (1) the successor expressly or impliedly agrees to assume the

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[5] For the same reason, the trial court properly granted the summary adjudication motion of the individual defendants with respect to the 13th cause of action for declaratory relief.

subject liabilities . . . , (2) the transaction amounts to a consolidation or merger of the successor and the predecessor, (3) the successor is a mere continuation of the predecessor, or (4) the transfer of assets to the successor is for the fraudulent purpose of escaping liability for the predecessor's debts. [Citation.]" (*CenterPoint Energy, Inc. v. Superior Court* (2007) 157 Cal.App.4th 1101, 1120.)

In the labor law context, "[s]uccessorship has been found 'where the new employer purchases a part of all of the assets of the predecessor employer [citation] [and] where the entire business is purchased by the new employer [citations]' " who continued the predecessor's business operations without interruption or substantial change. (*Golden State Bottling Co., Inc. v. NLRB* (1973) 414 U.S. 168, 182-183, fn. 5 & 184 [affirming order of the National Labor Relations Board that employer and its successors and assigns reinstate employee with back pay where successor purchased with knowledge of unfair labor practice litigation]; accord *Fall River Dyeing & Finishing Corp. v. NLRB* (1987) 482 U.S. 27, 43 (*Fall River*).)

Successor "liability must be determined on a case by case basis." (*Superior Care Facilities v. Workers' Comp. Appeals Bd.* (1994) 27 Cal.App.4th 1015, 1027.) The focus is on whether "there is 'substantial continuity' between the enterprises." (*Fall River*, *supra*, 482 U.S. at p. 43.) The relevant factors are: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. (*Ibid.*) Additional factors include " 'whether the

successor company had notice of the charge, . . . whether the new employer uses the same plant, . . . whether he uses the same machinery, equipment and methods of production and . . . whether he produces the same product. [Citations.]' [Citation.]" (*Superior Care Facilities*, *supra*, at pp. 1027-1028.)

Here, Aguirre alleged that "PRIME's acquisition was a standard 'asset and liability' purchase, where PRIME purchased assets and assumed liabilities of EAST VALLEY and Panpacific, which would include liabilities incurred from unlawful treatment of Plaintiff." Also, Aguirre alleged that Prime continued the operation of the same business, with the same policies, personnel, and board of directors, at the same location, using the same facility as East Valley and Panpacific, and that Prime's predecessors are no longer in operation. He also alleged that Prime had notice of his claims before acquiring the hospital. Aguirre sought to hold Prime liable under the fourth through ninth causes of action for Labor Code violations and discrimination. Assuming, as we must, the truth of the allegations (*Schifando*, *supra*, 31 Cal.4th at p. 1081), Aguirre has alleged the necessary facts to state successor liability. Whether Prime did indeed assume the liabilities of East Valley and Panpacific and whether the *Fall River* factors have been met necessarily raise myriad factual issues not properly addressed on demurrer.[6]

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[6] Prime's reliance on *Potlatch Corp. v. Superior Court*, *supra*, 154 Cal.App.3d at page 1151 is unavailing as that case involved review of a summary judgment ruling where there was no dispute as to certain of the *Ray* factors of successor liability.

b. *Although the trial court took judicial notice of the Secretary of State's webpages, it erred in making factual findings based on those webpages*.

In issuing its ruling, the trial court took judicial notice of two webpages from the Office of the Secretary of State. The court stated Prime "contends that successor liability only applies when the predecessor is no longer in existence [citations]. JUDICIAL NOTICE is taken of the fact that East Valley is currently an active California limited partnership and Panpacific is currently an active California corporation. The judicially noticeable documents contradict Plaintiff's allegation . . . that East Valley and Panpacific are no longer in operation. [¶] . . . [¶] There is no allegation of judicially noticeable evidence that East Valley had been dissolved or liquidated." Stated otherwise, by citing *Potlatch Corp. v. Superior Court*, *supra*, 154 Cal.App.3d 1144, the court here *made a factual finding* that East Valley and Panpacific continued to carry on the business of the hospital because Aguirre had no evidence that these two acquired companies were liquidated or dissolved after Prime's acquisition. This ruling was an abuse of discretion.

Although we take judicial notice of the two webpages from the Office of the Secretary of State (see Evid. Code, § 452, subd. (h) [a court may take judicial notice of matters not reasonably subject to dispute]),[7] all that they show is the "active" status of

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[7] We grant Prime's request, filed February 29, 2016, to take judicial notice of the same webpages judicially noticed by the trial court. Otherwise, we deny Prime's request that we "judicially notice" that "As of April 10, 2015, East Valley Glendora Hospital, L.P. was an active limited partnership, and Panpacific Health Enterprises, Inc. was an active corporation, under the laws of the State of California."

East Valley and Panpacific. Yet, "active" status means that a business legally exists. (See *Center for Self-Improvement & Community Development v. Lennar Corp*. (2009) 173 Cal.App.4th 1543, 1552.) Active means only that the entity has filed all required tax returns and paid the necessary fees. (*Id*. at p. 1553; cf. *Cahill v. San Diego Gas & Electric Co*. (2011) 194 Cal.App.4th 939, 958-959 [judicial notice of certificate stating association was active and in good standing and thus had the capacity to file pleadings].) Nothing in the webpages justifies the further factual determination that East Valley and Panpacific continue to conduct business and that Prime therefore has no control of the hospital and is not operating it. Who has control over and runs the hospital are factual questions not resolvable on demurrer. "[A] court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show." (*Fremont Indemnity Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 115.) A demurrer is simply not the appropriate procedure for determining the truth of disputed facts or what inferences should be drawn where competing inferences are possible. (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 635.)

c. *Factual questions preclude demurrer based on Corporations Code sections 15903.03 and 15904.04.*

For the first time on appeal, Prime argues, citing Corporations Code sections 15903.03, subdivision (a) and 15904.04, subdivision (b),[8] that it cannot be held liable for the

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[8] Corporations Code section 15903.03 reads in relevant part, "A limited partner is not liable for any obligation of a limited partnership *unless* named as a general partner in the certificate

conduct of East Valley and Panpacific that occurred before Prime became a general partner of those two defendants. Prime argues, "to the extent" Aguirre alleged that Prime became a partner of the limited partnership, that it cannot be held personally liable "*unless* it participated in the control of the hospital." (Italics added.) Aguirre argues that we must ignore this contention because it was not raised in the trial court.

"[T]he rule that on appeal a litigant may not argue theories for the first time does not apply to pure questions of law. [Citation.]" (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.) Aguirre has alleged sufficient facts. Insofar as Prime contends it had no significant involvement in, management of, or control over the operations of East Valley, Panpacific, or the hospital under Corporations Code sections 15903.03 and 15904.04, Prime raises factual questions not properly addressed in this proceeding. As this argument does not present a purely legal issue, we may not address it on appeal.

3. *The trial court abused its discretion in sustaining Prime's demurrer to the declaratory relief cause of action.*

"A complaint for declaratory relief must demonstrate: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or

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or, in addition to exercising the rights and powers of a limited partner, *the limited partner participates in the control of the business*." (*Id.*, subd. (a), italics added.)

Corporations Code section 15904.04 reads, "A person that becomes a general partner of an existing limited partnership is not personally liable for an obligation of a limited partnership incurred before the person became a general partner." (*Id.*, subd. (b).)

obligations of a party. [Citation.]" (*Brownfield v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 410.) "The 'proper subjects' of declaratory relief are set forth in Code of Civil Procedure section 1060 and other statutes" (*ibid.*), and includes "[a]ny person . . . who desires a declaration of his or her rights or duties with respect to another . . . ." (Code Civ. Proc., § 1060.) Declaratory relief and injunctive relief to stop discriminatory practices of an employer are appropriate in FEHA cases. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 211.) Aguirre's 13th cause of action alleged that a dispute has arisen between him and Prime in that Aguirre contends he was wrongfully denied timely payment of wages, was discriminated, harassed, and retaliated against, and was wrongfully discharged from employment. He has adequately stated a cause of action.

Prime argues that declaratory relief is not available because it was not Aguirre's employer. However, that East Valley and Panpacific had the authority to hire, pay, and terminate Aguirre, does not conclusively foreclose inquiry into which entity has the authority to hire, pay, and terminate employees. Aguirre is entitled to declaratory relief against the hospital -- regardless of who is now the actual owner or successor to that entity -- to stop illegal employment practices. (*Harris v. City of Santa Monica*, *supra*, 56 Cal.4th at p. 234.)

4. *Prime's statute of limitations argument is unavailing*.

Prime contends that Aguirre's claims against it are barred by the statute of limitations because he brought Prime into the lawsuit as a Doe defendant without alleging in the original and first amended complaint his ignorance of Prime's identity and so his allegations do not relate back to the filing of the original complaint. (Code Civ. Proc., § 474.) The trial court allowed

Aguirre to amend the second amended complaint to state that he was "ignorant of the name of a defendant," after noting that the fourth through ninth causes of action in all versions of the complaint alleged the claims against Doe defendants.

"[T]he purpose of section 474 is to enable a plaintiff to commence an action before it has become barred by the statute of limitations due to plaintiff's ignorance of the identity of the defendant. The statute should be liberally construed to accomplish that purpose. [Citations.]" (*Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 355.) The statutory purpose of section 474 and substantial justice are served by allowing inadvertent omission of the ignorance allegation to be cured by amendment of the complaint, upon proper evidentiary showing under section 473. (*Dieckmann*, at pp. 355-356.) Thus, a plaintiff who fails to allege ignorance of the true names of fictitious defendants should be allowed to amend to allege ignorance and substitute the newly discovered true name of a defendant. (*Id*. at pp. 355-358, 365.) With the trial court's leave, Aguirre alleged just that. There was no error in allowing the amendment, and so these allegations against Prime are not barred by the statute of limitations.

DISPOSITION

The judgment dismissing Kim Bui, Estella Renteria, Denise Powell, and Shwu Chang from the action after granting the summary judgment motion of those defendants is affirmed. The judgment dismissing Prime Healthcare Services from the action is reversed. Aguirre is to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.*

We concur:

EDMON, P. J.

JOHNSON (MICHAEL), J.**

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* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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