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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RONNIE LEE, Plaintiff and Appellant, v. HARBOR DISTRIBUTING, LLC et al., Defendants and Respondents.	B238872 (Los Angeles County Super. Ct. No. BC450405)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed in part, reversed in part, and remanded.

Law Offices of David Peter Cwiklo, David Peter Cwiklo for Plaintiff and Appellant.

Munger, Tolles & Olson, Katherine M. Forster and Alissa Branham, for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Ronnie Lee brought an action against his former employer Harbor Distributing, LLC (Harbor) and Harbor employees Dave Jackson, Dean Murata (Harbor's West Coast Facility Manager), Ana Davison (Harbor's Human Resources Manager), and Jim Hughes (Harbor's Safety Manager) (defendants) alleging various theories of wrongful termination in violation of public policy, defamation, and intentional infliction of emotional distress in connection with the termination of his employment. Defendants moved for summary judgment or, in the alternative, summary adjudication (summary judgment motion).[1] After giving Lee two opportunities to correct a perceived procedural defect in his memorandum of points and authorities in opposition to defendants' summary judgment motion, the trial court struck Lee's second amended memorandum of points and authorities and amended separate statement of disputed facts and granted defendants' motion. The trial court also sustained defendants' blanket objections to all of Lee's opposing evidence. Lee appeals from the judgment.[2] We affirm the grant of summary adjudication as to Lee's first and second wrongful termination in violation of public policy causes of action, parts of his third cause of action for wrongful termination in violation of public policy[3], his defamation cause of action,

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1 Murata's name was misspelled in the complaint. Hughes apparently was misidentified as "Jim Hill" in the complaint.

2 Lee's notice of appeal states that he appeals from the judgment "in the favor of defendant Harbor Distributing, L.L.C." and does not refer to Jackson, Murata, Davison, or Hughes (individual defendants). Consistent with the mandate that we liberally construe notices of appeal, we deem Lee's notice of appeal as including the judgment against the individual defendants. (Cal. Rules of Court, rule 8.100(a)(2); *Boynton v. McKales* (1956) 139 Cal.App.2d 777, 787-788; *Beltram v. Appellate Department* (1977) 66 Cal.App.3d 711, 715.)

3 Although identified as a single cause of action in his complaint, Lee's third cause of action for wrongful termination in violation of public policy asserts three public policies that serve as the basis for liability—(1) disability discrimination, (2) an employer's duty to engage in an interactive process with its disabled employee, and (3)

and his intentional infliction of emotional distress cause of action. We reverse the grant of summary adjudication as to part of Lee's third cause of action and as to his fourth cause of action for wrongful termination in violation of public policy and remand the matter to the trial court.

BACKGROUND

Lee brought an action against defendants asserting four causes of action against Harbor for wrongful termination in violation of various alleged public policies and causes of action for defamation and intentional infliction of emotional distress against all defendants, and alleging the following facts. Lee was a 53-year-old African American truck driver who worked for Harbor, a beer distributor, for about 10 years. He was injured in the course of his employment resulting in a physical disability for which he filed a workers' compensation claim. Lee exercised his rights under the California Family Rights Act, Government Code section 12945.2 (CFRA) to take medical leave for the diagnosis and treatment of his injuries. Harbor "unlawfully perceived" that he was incapable of returning to work, did not engage in an interactive process to determine if he could return to work with a reasonable accommodation, and did not reasonably accommodate his physical disability. Harbor terminated Lee's employment in retaliation for Lee exercising his rights to file a workers' compensation claim and take CFRA leave, and in part due to Lee's age, race, and physical disability. Lee alleged that the individual defendants made defamatory statements about his job performance and intentionally inflicted emotional distress by their retaliatory and discriminatory conduct.

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an employer's duty to reasonably accommodate its employee's disability. Those three separate grounds for liability constitute separate causes of action for purposes of Code of Civil Procedure section 437c, subdivision (f)(1). (*Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1188-1189.) Below, we hold that Harbor was entitled to summary adjudication as Lee's claims that Harbor failed to engage in an interactive process with him and to reasonably accommodate his disability, but not as to his claim with respect to disability discrimination.

Defendants moved for summary judgment. In support of their motion, defendants filed a memorandum of points and authorities in which they supported factual assertions with citations directly to the evidence they submitted in support of their motion. Lee filed his opposition to the motion. In his memorandum of points and authorities in opposition to defendants' motion, Lee also cited directly to evidence. Defendants filed an objection to all of the evidence Lee submitted in opposition to their motion on the ground that such evidence was not properly authenticated and was hearsay.[4]

At the October 3, 2011, hearing on defendants' summary judgment motion, the trial court ruled that the parties' respective memoranda of points and authorities in connection with "this complex motion for summary adjudication, consisting of 25 separate issues," were defective because they "fail[ed] to reference the facts in the separate statement, citing to the underlying evidence instead." The trial court's order stated, "A memorandum of points and authorities should demonstrate how each fact is material to the pleadings and how it supports positions asserted. (Juge v. County of Sacramento (1993) 12 Cal.App. 4th 59, 67-68.) The Court is not requried [*sic*] to expend efforts to ascertain the relationships between stated facts, and the law. (Ibid.)" The trial court continued the hearing to October 18, 2011, stating that it was not inclined to address the motion on the merits and giving the parties the opportunity to "correct" their memoranda of points and authorities by removing all citations to the underlying evidence and replacing them with citations to the facts in their separate statements. The amended memoranda were to be filed five court days before the hearing. The trial court stated that no other documents were to be filed.

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[4] Defendants apparently intended to object to all of Lee's evidence—the subject of their objection being "All exhibits (A through J) contained in Plaintiff Ronnie Lee's Exhibits" filed in opposition to their summary judgment motion. Lee's exhibits, however, contained an "Exhibit 'K'"—excerpts from Earl Jackson's deposition transcript.

Defendants and Lee filed amended memoranda of points and authorities.[5] At the October 18, 2011, hearing, the trial court found that defendants had corrected the defect in their memorandum of points and authorities, but Lee had not because he "did not remove the citations to underlying issues but did add citations to issues for adjudication to some of the evidence citations." The trial court continued the hearing to October 28, 2011, giving Lee one last opportunity to "correct" his memorandum of points and authorities. Lee was to file an amended memorandum of points and authorities that did "not contain citations to evidence or issues but [did] contain citations to facts in the separate statement of facts." The trial court advised Lee that if he did not correct and timely file his memorandum of points and authorities, it would grant defendants' motion based on his failure to file a memorandum of points and authorities. The trial court did not order Lee to not file any other documents.

Lee filed a second amended memorandum of points and authorities. He also filed an amended separate statement of disputed facts. At the October 28, 2011, hearing, the trial court struck Lee's amended separate statement because it was filed in violation of the trial court's order that no other documents were to be filed. The trial court also struck Lee's second amended memorandum of points and authorities—which fully complied with the trial court's order not to cite to the underlying evidence but to facts in the separate statement—because it was not properly "redone" as it cited to facts in the stricken amended separate statement rendering the "citations meaningless as the original separate statement [was] the only document the court [would] consider." The trial court stated that it had given Lee "an opportunity to correct procedural errors, not a do over of the opposition."

Lee's counsel explained that he needed to file an amended separate statement of disputed facts because there were facts cited in the amended memorandum of points and authorities that were not cited in the original separate statement of disputed facts. In preparing the second amended memorandum of points and authorities, Lee removed

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5 Lee filed his memorandum five calendar days, not court days, before the hearing.

those facts from the amended memorandum and put them in an amended separate statement. According to Lee's counsel, there were no new facts cited, everything he had filed since his original opposition to defendants' summary judgment motion was essentially the same, the only difference was formatting. The trial court disagreed that the only difference was formatting, but did not identify any other difference. Defendants' counsel stated that she had identified two pages of deposition transcript that she claimed Lee had not previously cited. Lee's counsel stated those pages had been cited in Lee's memorandum of points and authorities. The trial court granted defendants' summary judgment motion without a hearing on the merits of the motion. The trial court did not address defendants' objections to Lee's evidence.

Counsel for defendants prepared an order granting summary judgment that the trial court signed. In the order, the trial court restated its ruling striking Lee's second amended memorandum of points and authorities and amended separate statement of disputed facts, and found that there were no triable issues of material fact as to any of Lee's causes of action. The trial court by that prepared order also sustained defendants' objections to Lee's evidence.

DISCUSSION

I. The Trial Court Erred When It Ordered Lee To File Amended And Second Amended Memoranda Of Points And Authorities

Lee contends that the trial court erred when it ordered him to prepare amended and second amended memoranda of points and authorities and when it struck his second amended memorandum of points and authorities and amended separate statement of disputed facts. The trial court erred because it imposed on Lee a procedural requirement in responding to defendants' summary judgment motion that was not contained in Code of Civil Procedure section 437c (section 437c) or California Rules of Court, rules 3.1113 and 3.1350[6].

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6 All rules citations are to the California Rules of Court.

A. Standard of Review

"[G]ranting a motion for summary judgment based on a procedural error by the opposing party is equivalent to a sanction terminating the action in favor of the other party. Accordingly, the propriety of the court's order should be judged by the standards applicable to terminating sanctions. [¶] Sanctions which have the effect of granting judgment to the other party on purely procedural grounds are disfavored. [Citations.] Terminating sanctions have been held to be an abuse of discretion unless the party's violation of the procedural rule was willful [citations] or, if not willful, at least preceded by a history of abuse of pretrial procedures, or a showing less severe sanctions would not produce compliance with the procedural rule. [Citations.]" (*Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 97-98, fn. omitted; *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1161-1162.)

B. Application of Relevant Principles

"It is . . . well established that courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them. [Citation.]" (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.) However, "[a] local court rule or practice which is inconsistent with a statute enacted by the Legislature is invalid." (*Mentzer v. Hardoin* (1994) 28 Cal.App.4th 1365, 1372; *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1086-1087.) "The statutory procedure for summary judgment may not be altered by local rule or general orders of the trial court. (*Boyle v. CertainTeed Corp.* [(2006)] 137 Cal.App.4th [645,] 651–655 [statutory requirements for summary judgment may not be altered in asbestos actions by order of the trial court].)" (*Magana Cathcart McCarthy v. CB Richard Ellis, Inc.* (2009) 174 Cal.App.4th 106, 122.) "Courts may not impose format requirements on summary judgment motions other than as provided in the statewide rules." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 10:102.1, p. 10-42, citing *Hope Internat. University v. Superior Court* (2004) 119 Cal.App.4th 719, 731.)

Rule 3.1113 states the format of moving papers generally, including motions for summary judgment. Rule 3.1113(a), "Memorandum in support of motion," requires a party filing a motion to serve and file a supporting memorandum. Rule 3.1113(b), "Contents of memorandum," provides, "The memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." Section 437c and rule 3.1350 state the procedural requirements for summary judgment and summary adjudication motions and oppositions thereto. Neither section 437c nor rule 3.1350 requires a memorandum of points and authorities in support of or opposition to a motion for summary judgment or summary adjudication to cite to facts in the separate statement and not to the underlying evidence. Accordingly, the trial court erred in imposing such a requirement on Lee's (and defendants') memorandum of points and authorities. (*Magana Cathcart McCarthy v. CB Richard Ellis, Inc.*, *supra*, 174 Cal.App.4th at p. 122; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 10:102.1, p. 10-42.)

Defendants contend that the trial court acted properly in requiring the parties to file amended memoranda of points and authorities that corrected the purported procedural defects in their original memoranda and to require Lee to file a second amended memorandum of points and authorities correcting the procedural defects in his prior filed document. For this proposition, they analogize to *Parkview Villas Association, Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1211, which addressed a trial court's response to a procedurally deficient separate statement and stated, "the proper response in most instances, if the trial court is not prepared to address the merits of the motion in light of the deficient separate statement, is to give the opposing party an opportunity to file a proper separate statement rather than entering judgment against that party based on its procedural error." Defendants argue that was done here. Defendants' analogy is misplaced because, as we have held, Lee's memoranda of points and authorities, unlike the separate statement in *Parkview Villas Association v. State Farm Fire & Casualty Co.*, were not procedurally defective.

Defendants' analogy to *Collins v. Hertz Corporation* (2006) 144 Cal.App.4th 64 likewise is misplaced. In that case, the Court of Appeal held that a trial court did not abuse its discretion in striking parts of a separate statement filed in opposition to a motion for summary judgment when the trial court "specified deficiencies in appellants' initial filing, identified the precise manner in which those deficiencies could be rectified, and afforded appellants ample opportunity to prepare new papers in compliance with applicable rules." (*Id.* at p. 74.) Here, unlike the separate statement in *Collins v. Hertz Corporation*, there were no procedural defects in Lee's memoranda of points and authorities.

We note that summary judgment is "a drastic procedure . . . and should be used cautiously so that it is not a substitute for a trial on the merits as a means of determining the facts." (*Leep v. American Ship Management* (2005) 126 Cal.App.4th 1028, 1036; see *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 ["To grant the drastic remedy of summary judgment in the face of a defense obvious to the court and to the moving party, because of a mere procedural failure, was an abuse of discretion and compelled a reversal"].) As the court said in *Kulesa v. Castleberry* (1996) 47 CalApp.4th 103, 114, "'"[t]he sanction of peremptory dismissal, without consideration of the merits, is fundamentally unjust unless the conduct of a plaintiff is such that the delinquency interferes with the court's mission of seeking truth and justice."' [Citation.]" Requiring a party to cite to only a separate statement is a burden on the trial court. The trial court must go to the separate statement to find references to the critical underlying evidence. A trial court would often find it more efficient to have citations to the underlying evidence so that it could go directly to the evidence to determine if there are disputed issues of fact. Some courts have said the "golden rule" of summary adjudication is that if a fact is not set forth in a separate statement it does not exist. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, supra,* 102 Cal.App.4th at p. 313.) Other courts have said, in effect, that this so called rule is inconsistent with section 473c, subdivision (c), which requires the court to consider all admissible evidence on the motion. (See *Kulesa v. Castleberry, supra,* 47 Cal.App.4th 103, 112-116.) At the very least, the trial

court has the discretion to consider evidence not identified in the separate statement. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, supra*, 102 Cal.App.4th at p. 313.) Thus, ultimately, the trial court will at least have to examine the evidence. It might as well have available to it from the parties direct cites to that evidence.

The trial court erred in imposing on Lee a procedural requirement in responding to defendants' summary judgment motion that was not contained in section 437c or rules 3.1113 and 3.1350, and should have considered defendants' summary judgment motion based on defendants' original summary judgment motion and Lee's original opposition. Because we review the granting of a summary judgment de novo, rather than remanding the matter to the trial court to consider the summary judgment motion on the merits, we will consider the merits as set forth below.

II. Harbor's Objections To All Of Lee's Evidence

Defendants argue that even if the trial court erred in striking Lee's second amended memorandum of points and authorities in opposition to defendants' summary judgment motion and amended separate statement of disputed facts, the judgment in their favor must be affirmed because the trial court sustained their evidentiary objections to all of Lee's evidence filed in opposition to their summary judgment motion.[7] Thus, defendants argue, Lee failed to produce admissible evidence of a triable issue material fact in opposition to defendants' summary judgment motion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845 [if the moving party carries its burden of showing a prima facie entitlement to summary judgment, the opposing party is then subjected to a burden of production of its own to make a prima facie showing of the existence of a triable issue of fact].) We asked the parties to submit letter briefs addressing whether the trial court should have overruled defendants' objections to documents on which Lee relied when defendants relied on the same documents. We hold that defendants' objections were deficient and the trial court erred in sustaining them.

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[7] See footnote 4, above.

A. Forfeiture

Defendants contend that Lee forfeited any claim that the trial court erred in sustaining their evidentiary objections by failing to raise the issue in his opening brief. Ordinarily, we will not consider issues raised for the first time in a reply brief because the consideration of such an issue would deprive the respondent of an opportunity to counter the argument. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.) We depart from that ordinary practice here because defendants did not argue in the trial court that they were entitled to summary judgment or summary adjudication based on Lee's failure to present admissible evidence, the trial court did not grant summary judgment based on its ruling sustaining defendants' evidentiary objections, defendants raised in their respondents' brief the claim that we can affirm the judgment based on the trial court's ruling sustaining their evidentiary objections, and we gave the parties the opportunity to discuss the issue in letter briefs. Moreover, in challenging the trial court's evidentiary ruling in his reply brief, Lee did not assert a new theory for reversing the trial court's judgment. Instead, he was addressing defendants' argument in their respondents' brief.

B. Application of Relevant Principles

There is some uncertainty as to the standard of review that applies to a trial court's ruling on evidentiary objections in connection with a summary judgment motion. (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"].) The weight of authority prior to *Reid v. Google, Inc.* held that the abuse of discretion standard applies. (See *Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012), ¶ 8:168, p. 8–134.8.) We need not decide in this appeal whether the de novo or abuse of discretion standard of review applies as the trial court erred under both standards.

Rule 3.1354(b) provides, "All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Objections on specific evidence may be referenced by the objection number in the right column of a separate statement in opposition or reply to a motion, but the objections must not be restated or reargued in the separate statement. Each written objection must be numbered consecutively and must:

"(1) Identify the name of the document in which the specific material objected to is located;

"(2) State the exhibit, title, page, and line number of the material objected to;

"(3) Quote or set forth the objectionable statement or material; and

"(4) State the grounds for each objection to that statement or material."

Defendants filed blanket evidentiary objections to all of Lee's exhibits (Exhibits A through J) in opposition to their motion for summary judgment or summary adjudication as follows: "Lack of authentication (Evid. Code § 1401); Hearsay (Evid. Code § 1200). Section 1401 provides as follows: '(a) Authentication of a writing is required before it may be received in evidence. (b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.' None of [Lee's] exhibits have been authenticated and thus neither the exhibits themselves nor their contents may be received in evidence. Furthermore, [Lee] has not established that the exhibits fall within any exception to the hearsay rule."

Defendants' objections to Lee's evidence were deficient, and the trial court should not have sustained them. Lee submitted approximately 300 pages of exhibits (Exhibits A through K).[8] These exhibits consisted of Lee's workers' compensation claim form (Exh. A); Lee's workers' compensation application (Exh. B); a declaration from Ana Davison (Exh. C); an Equal Employment Opportunity Commission enforcement guideline (Exh.

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8 As noted in footnote 4, defendants' objections to Lee's exhibits did not include an objection to Lee's Exhibit K (transcript excerpts from Earl Jackson's deposition). Accordingly, the trial court's ruling sustaining defendants' objections did not concern Exhibit K.

D); background information on Harbor's parent company (Exh. E); and transcript excerpts from the depositions of Lee (Exh. F), Ana Davison (Exh. G), Keith Covarrubias (Exh. H), Steven Knowles (Exh. I), Jim Hughes (Exh. J), and Earl Jackson (Exh. K). Defendants objected to "all" of the exhibits (Exhibits A through J) on the grounds that the exhibits lacked authentication and were hearsay.

1. Authentication

"[A] document is authenticated when sufficient evidence has been produced to sustain a finding that the document is what it purports to be." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.) Evidence Code section 1414 provides, "A writing may be authenticated by evidence that: [¶] (a) The party against whom it is offered has at any time admitted its authenticity; or [¶] (b) The writing has been acted upon as authentic by the party against whom it is offered."

Lee's counsel stated in a declaration describing the exhibits that Lee filed in opposition to defendants' summary judgment motion, "If called upon as a witness I would and could competently testify to those matters contained in this declaration based upon my handling of this matter on behalf of Mr. Lee." Counsel's declaration, based on his representation of Lee in this case, was sufficient to establish personal knowledge of the exhibits and establish their authenticity. (See *The Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 34-35.)

Moreover, as to certain of Lee's exhibits, even if Lee's counsel's declaration was insufficient to authenticate those exhibits, defendants' assertion of the authenticity of those same exhibits established their authentication. (Evid. Code, § 1414; *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1527.) As for Lee's Exhibits A and B (the two workers' compensation documents), defendants submitted copies of the very same documents in support of their summary judgment motion. As defendants asserted the authenticity of these exhibits in support of their motion, the documents were authenticated under Evidence Code section 1414, and defendants' authenticity objection appears to be "disingenuous." (*Ambriz v. Kelegian, supra,* 146 Cal.App.4th at p. 1527.)

As to Exhibit C (Davison's declaration), defendants' counsel prepared Davison's declaration to be used in this action, pursuant to the agreement of the parties' counsel, in lieu of Davison's personal appearance in response to a person most knowledgeable deposition notice. In their objections to Lee's evidence, defendants' counsel took the remarkable position in the trial court that a declaration they prepared to be used in this action was inadmissible because Lee had not established its authenticity (and because it was hearsay). On appeal defendants' counsel take the position that because defendants did not rely on Davison's declaration in support of their summary judgment motion, the declaration's authenticity was not established under *Ambriz v. Kelegian, supra,* 146 Cal.App.4th 1519 and Evidence Code section 1414. Even if *Ambriz v. Kelegian* can be read so narrowly, Evidence Code section 1414 cannot. By preparing Davison's declaration and using it in this action, defendants asserted the declaration's authenticity within the meaning of subdivision (b) of Evidence Code section 1414.

With respect to Lee's Exhibits F, G, I, and J (transcript excerpts from the depositions of Lee, Davison, Knowles, and Hughes), defendants submitted excerpts from these same deposition transcripts. Although defendants' excerpts were not page for page the same as Lee's excerpts, defendants made no claim that Lee's excerpts were not a part of the same deposition transcripts. (*Ambriz v. Kelegian, supra,* 146 Cal.App.4th at p. 1527 & fn. 3.) As to those page excerpts that were the same, defendants often highlighted the exact same deposition testimony as Lee. Once again, having asserted the authenticity of the deposition transcripts in support of their summary judgment motion, defendants may not claim that the excerpts had not been authenticated when submitted by Lee. (Evid. Code, § 1414, subds. (a) and (b); *Ambriz v. Kelegian, supra,* 146 Cal.App.4th at p. 1527.)

Even if the trial court correctly sustained defendants' authentication objection to Lee's remaining exhibits—Exhibit D (Equal Employment Opportunity Commission Enforcement Guidance), Exhibit E (background information on Reyes Holdings and the Reyes Beverage Group), and Exhibit H (transcript excerpts from Covarrubias's deposition)—we do not rely on those exhibits in addressing defendants' arguments on the

merits which arguments we address below. Moreover, as noted, there was no objection to Exhibit K, the deposition extracts of Earl Jackson.

2. Hearsay

Defendants' objections on hearsay grounds as to Lee's exhibits were deficient because they did not quote or set forth the statements they contended were hearsay as required by rule 3.1354(b). Moreover, in support of their summary judgment motion defendants at times relied on the very same documents and deposition testimony as Lee. The trial court erred by, in effect, ruling anomalously, that such documents and testimony were admissible, non-hearsay evidence when relied on by defendants, but inadmissible, hearsay evidence when relied on by Lee. As noted above, we do not rely on Lee's Exhibits D, E, and H in addressing defendants' merits arguments.

III. Merits

Defendants argue that even if the trial court erred in striking Lee's second amended memorandum of points and authorities in opposition to defendants' summary judgment motion and amended separate statement of disputed facts, the judgment in their favor must be affirmed because summary judgment was appropriate on the merits. Because the trial court erred in requiring the parties to file amended memoranda of points and authorities in support of and opposition to defendants' summary judgment motion, we rely on the parties' original memoranda and supporting documents in addressing defendants' merits arguments. Of Lee's four causes of action for wrongful termination in violation of public policy, Harbor is entitled to summary adjudication as to the first (retaliation for filing a workers' compensation claim), second (retaliation for exercising CFRA rights), and parts of the third (failure to engage in an interactive process and failure to reasonably accommodate) cause of action, but not as to part of the third (physical and/or mental disability discrimination) and fourth (age, race, and disability) causes of action. Harbor and the individual defendants are entitled to summary

adjudication as to Lee's fifth cause of action for defamation and sixth cause of action for intentional infliction of emotional distress.

A. Standard of Review

A trial court properly grants a motion for summary judgment if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment bears the burden of showing the trial court that the plaintiff has not established, and cannot reasonably expect to establish, the elements of a cause of action. We review the trial court's decision de novo. (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.)

B. Wrongful Termination In Violation of Public Policy Causes of Action

A claim for wrongful termination in violation of public policy requires a plaintiff to prove (1) he was employed by the defendant, (2) the defendant discharged him, (3) a violation of public policy was a motivating reason for the discharge, and (4) the discharge caused him harm. (*Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 641; CACI 2430.) California courts use the three-step burden-shifting analysis in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 to evaluate a plaintiff's claim of wrongful termination in violation of public policy. (*Loggins v. Kaiser Permanente International* (2007) 151 Cal.App.4th 1102, 1108–1109.) "In the first stage, the '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.' [Citation.] If the employee successfully establishes these elements and thereby shows a prima facie case exists, the burden shifts to the employer to provide evidence that there was a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces evidence showing a legitimate reason for the adverse employment action, 'the presumption of retaliation "'"drops out of the picture,'"'" [citation], and the burden shifts back to the employee to provide 'substantial responsive evidence' that the employer's proffered reasons were

untrue or pretextual [citation]." (*Loggins v. Kaiser Permanente International, supra,* 151 Cal.App.4th at pp. 1108–1109.) "'A defendant employer's motion for summary judgment slightly modifies the order of [the *McDonnell Douglas*] showings. . . .'" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1005.) Under that modified order, the employer has the initial burden to either (1) negate an essential element of the employee's prima facie case or (2) establish a legitimate, nonretaliatory reason for terminating the employee. (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 160.)

1. First Cause of Action – Retaliation for Filing a Workers' Compensation Claim

Lee's first cause of action for wrongful termination in violation of public policy claimed, among other things, that Harbor fired him in retaliation for filing a workers' compensation claim. Lee claimed that such termination violated the public policy in Labor Code section 132a (section 132a) that proscribes discrimination against persons who file workers' compensation claims.

"Labor Code section 132a . . . prohibits employers from discriminating against employees 'who are injured in the course and scope of their employment.' When an injury of this kind results in disability, we have held that section 132a prohibits discrimination based on the disability. [Citation.]" (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1147 (*Moorpark*).) In *Moorpark*, the Supreme Court held that section 132a "does not provide the exclusive remedy for this type of discrimination and that [Fair Employment and Housing Act (FEHA)] and common law remedies are available." (*Id.* at p. 1148.)

Subsequent to the briefing on appeal in Lee's case, the Court of Appeal decided *Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750, 754 (*Dutra*), which held that section 132a "does not qualify under case authority as the type of policy that can support a common law action for wrongful termination." Harbor filed a copy of *Dutra* with this court asserting that it was relevant to Lee's first cause of action. Lee

submitted a letter in which he argued that the holding in *Dutra* is contrary to the holding in *Moorpark, supra,* 18 Cal.4th 1143 that section 132a does not preclude an employee from pursuing FEHA and common law remedies.

The plaintiff in *Dutra, supra,* 209 Cal.App.4th at page 755, argued that *Moorpark, supra,* 18 Cal.4th 1143 allowed her to bring a common law action for wrongful termination in violation of public policy based on the policy in section 132a. The *Dutra* court stated that the plaintiff overstated *Moorpark's* holding. The court explained that *Moorpark* held that section 132a is not the exclusive remedy for disability discrimination, but did not reach the issue of whether the public policy in section 132a can serve as the basis for a wrongful termination in violation of public policy claim. (*Dutra, supra,* 209 Cal.App.4th at p. 755.)

The court in *Dutra, supra,* 209 Cal.App.4th 750 set forth the Supreme Court's test, reiterated in *Moorpark, supra,* 18 Cal.4th at page 1159, for determining whether a policy can support a common law wrongful termination claim. "[F]or a policy to support a common law cause of action, '[t]he policy "must be: (1) delineated in either constitutional or statutory provisions; (2) 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental." [Citations.] "'[P]ublic policy' as a concept is notoriously resistant to precise definition, and . . . courts should venture into this area, if at all, with great care . . . ." [Citation.] Therefore, *when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action.* Stated another way, the common law cause of action cannot be broader than the constitutional provision or statute on which it depends, and therefore it "presents no impediment to employers that operate within the bounds of law." [Citation.]' (*City of Moorpark, supra,* 18 Cal.4th at p. 1159, italics added.)" (*Dutra, supra,* 209 Cal.App.4th at pp. 755-756.)

The court in *Dutra, supra,* 209 Cal.App.4th at page 756 reasoned that "Section 132a includes limitations on its scope and remedy that prevent it from being the basis of a

common law cause of action. The statute establishes a specific procedure and forum for addressing a violation. It also limits the remedies that are available once a violation is established. Allowing plaintiff to pursue a tort cause of action based on a violation of section 132a would impermissibly give her broader remedies and procedures than that provided by the statute. Thus, the statute cannot serve as the basis for a tort claim of wrongful termination in violation of public policy, and the trial court correctly granted [the defendant's] motion to dismiss the action."

We agree with the court in *Dutra, supra,* 209 Cal.App.4th at page 755 that while *Moorpark, supra,* 18 Cal.4th 1843 holds that section 132a does not provide an exclusive remedy for disability discrimination, *Moorpark* also does not establish section 132a as the basis for a wrongful termination in violation of public policy claim. We also agree with the court in *Dutra, supra,* 209 Cal.App.4th at page 756 that section 132a does not provide the public policy for such a wrongful termination claim. Accordingly, Harbor was entitled to summary adjudication as to Lee's first cause of action.

2. Second Cause of Action – Retaliation for Exercising CFRA Rights

A discharged employee may bring an action for wrongful termination in violation of public policy against an employer based on the public policy in the CFRA. (*Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 607-612.) In his second cause of action, Lee alleged that Harbor terminated his employment in retaliation for exercising his CFRA leave rights for the diagnosis and treatment of certain medical conditions and physical disabilities in violation of California Government Code section 12945.2, subdivision (l). Lee contends that the trial court erred in granting summary adjudication as to his second cause of action because an inference can be drawn, based on the timing of his discharge, that a motivating factor in his discharge was his exercise of his CFRA leave rights.

Lee does not dispute that he took CFRA leave that expired on March 5, 2008, and that Harbor terminated his employment on February 5, 2009. An 11-month gap between

the exercise of CFRA leave rights and an adverse employment action is, as a matter of law, insufficiently close to establish the causation element of a prima facie case of retaliation based on proximity of time. (See *Holtzclaw v. Certainteed Corp.* (E.D.Cal. 2011) 795 F.Supp.2d 996, 1020 ["'"[I]n order to support an inference of retaliatory motive, the termination must have occurred fairly soon after the employee's protected expression."' [Citations.] Courts have found a three-month period between the protected activity and the adverse employment action insufficiently close to support a finding of causation based on proximity of time. [Citations.]].") Accordingly, Harbor was entitled to summary adjudication as to Lee's second cause of action.

3. Third Cause of Action – Physical and/or Mental Disability Discrimination, Failure to Engage in an Interactive Process, and Failure to Reasonably Accommodate

a. Disability discrimination

"A prima facie case for discrimination on grounds of physical disability under the FEHA requires plaintiff to show: (1) he suffers from a disability; (2) he is otherwise qualified to do his job; and, (3) he was subjected to adverse employment action because of his disability. [Citations.]" (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.) An employee who has been discharged based on disability discrimination may bring a common law wrongful termination action relying on the public policy against disability discrimination in Government Code section 12940 (section 12940), subdivision (a)(1). (*Moorpark, supra,* 18 Cal.4th at pp. 1160-1161.)

As stated above, when a "statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action." (*Moorpark, supra,* 18 Cal.4th at p. 1159.) "The FEHA 'does not prohibit an employer from . . . discharging an employee with a physical or mental disability, . . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with

reasonable accommodations . . . .' (§ 12940, subd. (a)(1).)" (*Scotch v. Art Institute of California*, *supra*, 173 Cal.App.4th at p. 1005.)

In its summary judgment motion, Harbor contended that it had a legitimate, non-discriminatory reason for terminating Lee's employment. According to Harbor, Lee was unable to perform the essential duties of his job as a "side loader" delivery truck driver, even with a reasonable accommodation, and there were no other vacant positions at the time of his termination that he could fill. In support of its contention, Harbor presented defendant's deposition testimony that his job as a driver was referred to as a "side loader," and that the daily essential duties of that job included lifting over 18,000 pounds of product—cases and kegs of beer—that were stacked seven to eight feet high. According to Murata, Harbor permitted Lee to work as a "transfer driver" on a temporary basis in 2007 while Lee was awaiting shoulder surgery, even though Harbor did not need another transfer driver during much of that time. Lee was diagnosed in October 2008 with permanent physical restrictions that indicated that he could no longer hold a position that required heavy lifting and repetitive bending and stooping.

On February 5, 2009, Hughes and Davison met with Lee to discuss his employment with Harbor. Prior to the meeting, Davison checked to see if there were any available jobs at Harbor, determined there were none, and informed Hughes that there were no vacant jobs at Harbor. At the meeting, Hughes told Lee that he could not return to work as a "side loader" with his physical restrictions and discussed other positions at Harbor that Lee might perform. Lee stated that he was not qualified for the positions identified, and suggested only one position at Harbor that he could perform—transfer driver. Hughes checked with the department that had authority to hire a permanent transfer driver and was told that the department did not need another transfer driver. According to Davison, Harbor employed only one permanent, full-time transfer driver from 2001 through September 2012, and did not hire any transfer drivers from 2006 through 2009. According to Davison, Hughes, and Murata, "In and around February 2009, it was Harbor's view that using drivers to transfer product between Harbor facilities was unnecessary operational waste. For that reason, it was Harbor's plan at that

time to reduce the number of product transfers, transfer driver shifts, and transfer drivers to zero or as close as possible to zero." According to Hughes, Lee was terminated at the conclusion of the meeting because he could not return to his job as a side loader and there were no available jobs at Harbor that Lee could perform.

Harbor's evidence established a legitimate, non-discriminatory reason for terminating Lee's employment. Thus, the burden shifted to Lee to show that Harbor's proffered reason for terminating his employment was untrue or pretextual. (*Loggins v. Kaiser Permanente International, supra,* 151 Cal.App.4th at p. 1109.) Lee presented evidence that Harbor's claim that it was eliminating the transfer driver position and thus had no job Lee could perform was false.

At his deposition, Lee testified that when he asked about a position as a transfer driver at his termination meeting, Davison interjected that Harbor was eliminating the transfer driver position. Lee asked Davison when the position was going to be eliminated. Davison responded that the exact time had not been determined, but that the position would be eliminated "very soon." When Lee pressed Davison about when the position would be eliminated, Davison responded, "Soon. It doesn't matter." Counsel for Harbor then asked Lee if he believed that there was a transfer driver position open on the day he was terminated. Lee responded, "Yes," and explained the basis for his opinion. Lee said, "Because I know the company. I know—I know the job. I know what it entails . . . . I know how many guys were doing transfers. And when they—when I was doing transfers upon waiting for my—my surgery, it was a blessing to have me do transfers, to help out, which was solely [*sic*] needed, because they only had Steve Knowles and one other guy that was doing transfers off and on. [¶] And then by me being the third wheel coming in, it helped out tremendously. And it helped out so much, where I could see it was helping out. And the transfer supervisor, Thomas, would always tell me how much he appreciates me being here to help out." Lee testified that there were three employees working as transfer drivers in 2007, and it was his and Harbor's view that the transfer position was needed on a day-to-day basis. Knowles, a Harbor transfer driver since the end of 2002 or the beginning of 2003, testified at his deposition that in

2011 Harbor employed him and three other transfer drivers, one of whom was "temporary."

Lee's and Knowles's deposition testimony are sufficient to create triable issues as to whether a transfer driver position was available when Harbor terminated Lee's employment, whether Harbor intended to eliminate the transfer driver position, and whether Harbor's proffered reason for terminating Lee's employment—his inability to perform the side loader driver position and the unavailability of any position he could perform—was untrue or pretextual. (*Loggins v. Kaiser Permanente International*, *supra*, 151 Cal.App.4th at p. 1109.) Accordingly, Harbor was not entitled to summary adjudication as to Lee's wrongful termination in violation of the public policy against disability discrimination.

b. Failure to engage in an interactive process

Lee bases his public policy claim for the failure to engage in an interactive process on section 12940, subdivision (n) which provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." The essential elements of a cause of action for failure to engage in an interactive process are: (1) the plaintiff has a disability that was known to his employer, (2) the plaintiff requested that his employer make a reasonable accommodation for that disability so he would be able to perform the essential job requirements, (3) the plaintiff was willing to participate in an interactive process to determine whether a reasonable accommodation could be made, (4) the employer failed to participate in a timely, good faith interactive process with the plaintiff, (5) the plaintiff was harmed, and (6) the employer's failure to engage in a good faith interactive process was a substantial factor in causing the plaintiff's harm. (CACI No. 2546.)

Lee admits that he did not file an administrative claim with the Department of Fair Employment and Housing with respect to his discrimination claims. Lee's failure to exhaust his administrative remedies bars an action for violation of the FEHA, including an action for violation of section 12940, subdivision (n). (See *Rojo v. Kliger* (1990) 52 Cal.3d 65, 88; *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724.) Thus, in his third cause of action, Lee did not seek recovery for Harbor's alleged violation of section 12940, subdivision (n). Instead, Lee raised Harbor's alleged failure to engage in an interactive process as a violation of public policy. Lee, however, cites no case recognizing that a wrongful termination in violation of public policy action may be based on the failure to participate in the interactive process required by section 12940, subdivision (n). Moreover, Lee does not even argue that section 12940, subdivision (n) represents the sort of "substantial and fundamental" public policy (*Moorpark, supra,* 18 Cal.4th at p. 1159) on which a wrongful termination in violation of public policy may be based. Instead, Lee merely repeats the statute's language that it is an "unlawful employment practice" for an employer to fail to engage in a good faith interactive process. As noted above, not every statute states a fundamental public policy that will support a common law tort cause of action for wrongful termination. (See *Dutra, supra,* 209 Cal.App.4th 750 [section 132a does not provide the public policy for such a wrongful termination claim].) Because California courts have not yet recognized an action for wrongful termination in violation of public policy based on section 12940, subdivision (n), and Lee offered no argument for establishing such an action, Harbor was entitled to summary adjudication with respect to this claim.

c. Failure reasonably to accommodate Lee's disability

The asserted public policy basis for Lee's claim that Harbor failed reasonably to accommodate his disability is found in section 12940, subdivision (m), which provides, in relevant part, that it an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." "The elements of a failure to

accommodate claim are (1) the plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed reasonably to accommodate the plaintiff's disability. [Citation.]" (*Scotch v. Art Institute of California, supra,* 173 Cal.App.4th at pp. 1009-1010.)[9]

As with his claim that Harbor failed to participate in an interactive process, Lee's admitted failure to exhaust his administrative remedies with respect to his claim that Harbor failed reasonably to accommodate his disability bars an action under the FEHA. (See *Rojo v. Kliger, supra,* 52 Cal.3d at p. 88; *Martin v. Lockheed Missiles & Space Co., supra,* 29 Cal.App.4th at p. 1724.) Here again, instead of an action under the FEHA (Gov. Code, § 12940, subd. (m)), Lee brought a common law cause of action for wrongful termination in violation of public policy. Like his prior claim, however, Lee cites no case that recognizes that the failure reasonably to accommodate a disability required by section 12940, subdivision (m) is a "substantial and fundamental" public policy (*Moorpark, supra,* 18 Cal.4th at p. 1159) on which a wrongful termination in violation of public policy may be based. Lee does not argue that section 12940, subdivision (m) represents such a public policy and instead only repeats the statute's language that it is an "unlawful employment practice" for an employer to fail to reasonably accommodate an employee's disability. Again, not every statute states a fundamental public policy that will support a common law tort cause of action for wrongful termination. (See *Dutra, supra,* 209 Cal.App.4th 750 [section 132a does not provide the public policy for such a wrongful termination claim].) Because California does not recognize a cause of action for wrongful termination in violation of public policy based on section 12940, subdivision (m), and Lee offered no argument for establishing such an action, Harbor was entitled to summary adjudication with respect to this claim.

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9 At least one case has disagreed about the need to prove that the plaintiff was qualified to perform the essential function of the position. (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 361, fn. 4.)

4. Fourth Cause of Action – Age/Race/Disability Discrimination

Lee's fourth cause of action for wrongful termination in violation of public policy asserted that he was terminated because he was a 53-year-old, disabled, African American. That is, that his termination was the product of those combined characteristics rather than any one of those characteristics. As discussed above, Harbor contended that it had a legitimate, non-discriminatory reason for terminating Lee's employment—Lee was unable to perform the essential duties of his job as a "side loader" delivery truck driver, even with a reasonable accommodation, and there were no other vacant positions at the time of his termination that he could fill. We held above, however, that Lee's and Knowles's deposition testimony is sufficient to create triable issues as to whether a transfer driver position was available when Harbor terminated Lee's employment, whether Harbor intended to eliminate the transfer driver position, and whether Harbor's proffered reason for terminating Lee's employment—his inability to perform the side loader driver position and the unavailability of any position he could perform—was untrue or pretextual. (*Loggins v. Kaiser Permanente International*, *supra*, 151 Cal.App.4th at p. 1109.) Accordingly, Harbor was not entitled to summary adjudication as to Lee's fourth cause of action for wrongful termination because of his age, race, and disability in violation of public policy.

C. Defamation Cause of Action

The statute of limitations for a defamation action is one year. (Code Civ. Proc., § 340, subd. (c); *Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1246.) Lee filed his complaint on December 1, 2010. Defendants' summary judgment motion contended, among other things, that Lee's fifth cause of action for defamation was barred by the one-year statute of limitations. In his memorandum of points and authorities and separate statement of disputed facts in opposition to defendants' summary judgment motion, Lee did not identify any alleged defamatory statement that he contends was made after February 2009. Accordingly, Lee's defamation action was barred by the one-year statute of limitations, and defendants were entitled to summary adjudication as to Lee's fifth

cause of action for defamation. (Code Civ. Proc., § 340, subd. (c); *Shively v. Bozanich, supra,* 31 Cal.4th at p. 1246.)

D. Intentional Infliction of Emotional Distress

"The elements of a cause of action for intentional infliction of emotional distress are: '"(1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress."' [Citation.]" (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1376.) "The California Supreme Court has set a 'high bar' for what can constitute severe distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 [95 Cal.Rptr.3d 636, 209 P.3d 963] (*Hughes*).) 'Severe emotional distress means "'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'" [Citations.]' [Citations.]" (*Ibid.*)

The California Supreme Court has held that a plaintiff's assertions that the defendant's conduct caused her to suffer "discomfort, worry, anxiety, upset stomach, concern, and agitation" did not constitute the substantial or enduring emotional distress that would support a cause of action for intentional infliction of emotional distress. (*Hughes, supra,* 46 Cal.4th at p. 1051.) In *Wong v. Jing, supra,* 189 Cal.App.4th 1354, the plaintiff claimed that the defendant's conduct was "very emotionally upsetting" and caused her to lose sleep and to have an upset stomach and generalized anxiety. The Court of Appeal held that the plaintiff had not shown emotional distress that was any more "severe, lasting, or enduring" than the emotional distress shown by the *Hughes* plaintiff. (*Id.* at p. 1377.) Thus, the plaintiff's reaction did not "constitute the sort of severe emotional distress of such lasting and enduring quality that no reasonable person should be expected to endure. [Citation.]" (*Ibid.*)

Lee claimed that he suffered emotional stress from the events alleged in his lawsuit that manifested as an apparent loss of concentration and focus, loss of sleep—he slept only one and a half to two hours a night, and a high stress level. Such emotional

distress is no more severe than the emotional distress alleged in *Hughes, supra,* 46 Cal.4th 1035, and *Wong v. Jing, supra,* 189 Cal.App.4th 1354. Thus, it does not constitute "'"'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'"'" (*Hughes, supra,* 46, Cal.4th at p. 1051, citations omitted.) Accordingly, defendants were entitled to summary adjudication of Lee's fifth cause of action for intentional infliction of emotional distress.

DISPOSITION

Summary adjudication is affirmed as to Lee's first and second causes of action for wrongful termination in violation of public policy, his claims that Harbor failed to engage in an interactive process and to reasonably accommodate his disability in his third cause of action for wrongful termination in violation of public policy, his fifth cause of action for defamation, and his sixth cause of action for intentional infliction of emotional distress. The judgment and summary adjudication are reversed as to Lee's claim of disability discrimination in his third cause of action for wrongful termination in violation of public policy and as to his fourth cause of action for wrongful termination in violation of public policy. The matter is remanded to the trial court. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

I concur:

ARMSTRONG, J.

I concur in my colleague's well thought out analysis except in one narrow respect. I dissent from the determination that a failure to engage in the interactive process and accommodate an employee's disability may not serve as a wrongful termination theory. I believe a wrongful termination in violation of public policy claim can be maintained for failure to engage in the interactive process and accommodate an employee's disability. In my opinion, these claims are tethered to fundamental anti-discrimination public policies in Government Code section 12940, subdivisions (m) and (n). (See *Harris v. Superior Court* (Feb. 7, 2013, S181004) __ Cal.4th __, __ [2013 Cal. LEXIS 941 * 33] ["'the right to seek and hold employment free of prejudice is fundamental'"]; *Silo v. CHW Medical Foundation* (2002) 27 Cal.4th 1097, 1104 ["this public policy exception to the at-will employment rule must be based on policies 'carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions . . . ."']).

TURNER, P. J.