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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

PAMELA TINKY MNYANDU, Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	B239104 (Los Angeles County Super. Ct. No. EC053872)

APPEAL from a judgment of the Superior Court of Los Angeles County, Donna Fields Goldstein, Judge. Affirmed.

Pamela Tinky Mnyandu, in pro. per., for Plaintiff and Appellant.

Charlie L. Hill and Alexander Molina for Defendants and Respondents.

In the underlying action, the trial court granted summary judgment against appellant Pamela Tinky Mnyandu in her action against her employer, respondent Los Angeles Unified School District (LAUSD), and respondent John McLaughlin. We affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

There are no material disputes about the following facts: Mnyandu is a black female from South Africa. In 2004, LAUSD hired Mnyandu as a special education teacher. During the 2009-2010 school year, she worked at Roy Romer Middle School, whose principal was respondent John McLaughlin.

In August 2010, Mnyandu initiated the underlying action. Her first amended complaint (FAC), filed December 9, 2010, asserted claims against LAUSD under the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.) for discrimination based on national origin, harassment, and retaliation; in addition, it asserted claims for assault, civil battery, and intentional infliction of emotional distress against both respondents.[1] The FAC alleged, inter alia, that McLaughlin made false and derogatory criticisms of Mnyandu's work, harassed her, and grabbed her hand, causing her physical injury.

In April 2011, the trial court sustained LAUSD's demurrer to Mnyandu's claims for assault, civil battery, and intentional infliction of emotional distress, with leave to amend. Mnyandu never filed an amended complaint reasserting those claims against LAUSD. On July 8, 2011, the trial court permitted Mnyandu's attorneys to withdraw as her counsel, and she represented herself

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[1] The FAC also named as a defendant the City of Los Angeles, which is not a party to this appeal.

during the remaining proceedings. In August 2011, the trial court denied McLaughlin's motion for judgment on the pleadings with respect to the claims for assault, civil battery, and intentional infliction of emotional distress.

On October 28, 2011, respondents filed a motion for summary judgment or adjudication on Mnyandu's claims. Mnyandu's opposition was filed by attorney Andrew Wyatt, who was permitted to associate with Mnyandu as her co-counsel. On January 13, 2012, in a 27-page order, the trial court granted respondents' motion for summary judgment on the FAC. On February 1, 2012, the trial court entered judgment in respondents' favor and against Mnyandu.

DISCUSSION

Mnyandu challenges the grant of summary judgment on several grounds. She argues that the evidence she presented in opposition to the motion for summary judgment established triable issues of fact. In addition, she maintains that summary judgment must be reversed due to the existence of evidence not presented to the trial court. In this regard, she argues that the trial court improperly denied her request for a continuance, and that she is entitled to relief from summary judgment. Furthermore, in a supplemental brief, she argues that the grant of summary judgment must be reversed under the doctrines of judicial and collateral estoppel. For the reasons discussed below, we disagree.

A. *Standard of Review*

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) Thus, we apply "'the same three-step process required of the trial court.

[Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid*.)

Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) Furthermore, in moving for summary judgment, "all that the defendant need do is show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X." (*Id*. at p. 853.)

Although we independently assess the grant of summary judgment (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819), our inquiry is subject to several constraints. Under the summary judgment statute, we examine the evidence submitted in connection with the summary judgment motion, with the exception of evidence to which objections have been appropriately sustained. (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 711; Code Civ. Proc., § 437c, subd. (c).) Furthermore, our review is governed by a fundamental principle of appellate procedure, namely, that "'[a] judgment or order of the lower court is presumed correct,'" and thus, "'error must be affirmatively shown.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, italics omitted, quoting 3 Witkin, Cal. Procedure (1954) Appeal, § 79, pp. 2238-2239.) Under this principle, Mnyandu bears the burden of establishing error on appeal, even though respondents had the burden of proving their right to summary judgment before the

trial court. (*Frank and Freedus v. Allstate Ins. Co*. (1996) 45 Cal.App.4th 461, 474.) For this reason, our review is limited to contentions adequately raised in Mnyandu's briefs. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126.) In addition, to overcome the presumption of correctness, Mnyandu is required to provide a record sufficient to show error. (*Lincoln Fountain Villas Homeowners Assn. v. State Farm Fire & Casualty Ins. Co.* (2006) 136 Cal.App.4th 999, 1003, fn. 1.)

B. *Propriety of Trial Court's Ruling*

Mnyandu maintains that the trial court erred in granting summary judgment on the basis of the evidence submitted in connection with respondents' motion. As explained below, this contention fails in light of the limited record she has submitted on appeal.

1. *FAC*

In assessing the trial court's grant of summary judgment, we look first at Mnyandu's allegations in the FAC, which frame the issues pertinent to a motion for summary judgment.[2] (*Bostrom v. County of San Bernardino*, *supra*, 35 Cal.App.4th at p. 1662.) The FAC asserts FEHA claims against LAUSD for discrimination, harassment, and retaliation. Generally, FEHA prohibits employers from engaging in discrimination and harassment that targets an employee on the basis of his or her national origin (Gov. Code, § 12940, subds. (a), (j)(1)); in addition, FEHA bars an employer from retaliating against an employee for

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[2] Attached to the FAC are several documents described in the FAC's allegations. To the extent these documents constitute the foundation of Mnyandu's claims, we treat the statements in them as allegations essential to her claims. (See 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 430-431, pp. 564-565.)

opposing such practices (Gov. Code, § 12940, subd. (h)).[3] The FAC also asserts claims against respondents for assault, civil battery, and intentional infliction of emotional distress. However, as Mnyandu never amended the FAC following the LAUSD's successful demurrer attacking those claims, they are effectively directed solely at McLaughlin.

The FAC alleges that Mnyandu was assigned to the individualized education program for special education students at the Roy Romer Middle School. LAUSD policies required Mnyandu to draft an individualized education plan (IEP) for a student after meeting with the student's parents. According to the FAC, in October and November 2009, McLaughlin falsely stated that Mnyandu misbehaved during IEP meetings with students, and ordered her to submit IEPs to him in advance of meetings, contrary to LAUSD policy. In addition, he yelled at her, directed other LAUSD employees to yell at her, and fabricated student complaints regarding her. On November 18, 2009, after McLaughlin ordered her to meet with him and threatened "disciplinary action" if she did not attend, Mnyandu filed a discrimination complaint with LAUSD. In retaliation, McLaughlin sent her a memorandum inviting her to another meeting and accusing her of not doing her work.

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[3] FEHA provides that it is an unlawful employment practice for an employer "to discriminate against [a] person in compensation or in terms, conditions, or privileges of employment" due to the person's national origin. (Gov. Code, § 12940, subd. (a).) Aside from barring employment discrimination, FEHA provides that it is an unlawful employment practice "[f]or an employer . . . or any other person, because of . . . national origin . . . to harass an employee. . . . An entity shall take all reasonable steps to prevent harassment from occurring." (§ 12940, subd. (j)(1).) FEHA also provides that it is an unlawful employment practice "[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (§ 12940, subd. (h).)

The FAC further alleges that in early December 2009, McLaughlin arranged for an LAUSD employee to ask Mnyandu to sign an IEP for a student, even though she had not attended the pertinent parent meeting. When Mnyandu refused, McLaughlin wrote a memorandum that contained false accusations regarding her, and described her native language as "gibberish." Mnyandu filed grievances with United Teachers Los Angeles (UTLA) and a discrimination charge with the United States Equal Employment Opportunity Commission. Nonetheless, throughout December 2009, McLaughlin yelled at her and criticized her for failing to submit her IEP plans to him four days in advance of meetings.

The FAC further alleges that in January 2010, the LAUSD Division of Special Education Compliance determined that McLaughlin had incorrectly asked Mnyandu to sign an IEP arising from a meeting she did not attend. Nonetheless, from February to April 2010, McLaughlin sent Mnyandu a letter of reprimand, made false accusations regarding her performance during meetings and in memoranda, arranged for other employees to solicit student complaints regarding her, and had 14.75 hours of pay deducted from her paycheck without explanation. Furthermore, on April 29, 2010, McLaughlin saw her in the school mail room, accused her of falsifying documents, and grabbed her left hand, causing her great bodily injury. Although Mnyandu complained to the LAUSD regarding this assault and battery, it took no action.

2. *Respondents' Showing*

In seeking summary judgment, respondents presented a declaration from McLaughlin and other evidence supporting the following version of the underlying facts: As Mnyandu's supervisor, McLaughlin was required to evaluate Mnyandu by visiting her classroom, meeting with her to discuss his observations, and memorializing the meetings. After viewing Mnyandu's class in September and

October 2009, McLaughlin developed concerns regarding her teaching. He asked all special education program instructors, including Mnyandu, to provide draft IEPs four days in advance of the pertinent meetings, and also requested that Mnyandu present her lesson plans in advance of their implementation. According to respondents, LAUSD's bargaining agreement with UTLA permitted McLaughlin to ask for advance copies of lesson plans.

Mnyandu submitted a lesson plan for the period from November 20 to December 4, 2009, in Zulu, her native language. The plan contained entries such as "Ngenza imininingwane yami," and "siqhubeka lapha sigcine khona." When McLaughlin received the plan, he did not know that it was written in Zulu, a language he neither read nor understood. On December 3, 2009, McLaughlin wrote to Mnyandu regarding the lesson plan, stating, "Please note that this is gibberish. This is not written in English. Your submission of this paper is an act of defiance and is unprofessional." The next day, Mnyandu gave McLaughlin a second lesson plan in Zulu, together with a note that stated: " . . . . I feel better if I plan in my language. Please consult the South African Consulate for translation or the LAUSD office."

During the 2009-2010 academic year, Mnyandu's IEPs contained spelling and grammatical errors. When McLaughlin attempted to meet with Mnyandu, she often stated that she was unavailable, forcing McLaughlin to reschedule the meetings. After meeting with Mnyandu, McLaughlin sent her a memorandum, advising her that disciplinary action might result from a failure to comply with his directives. According to McLaughlin, it is "common and routine" for LAUSD employees to receive such advisements.

In February 2010, Mnyandu sent McLaughlin a lesson plan in English for her 7th and 8th grade classes. The plan contained the following item: "Students will learn specialized vocabulary lessons and word meanings such as: [¶] . . . [¶]

Bully (Boss): Ignorant, manipulative, cunning, ruthless, cold, insidious, lack in knowledge, envy[.]" (Underscoring omitted.)

On April 17, 2010, Mnyandu sent McLaughlin written responses to McLaughlin's concerns expressed in a memorandum dated April 4, 2010. Mnyandu prefaced her responses with the remark, "I've noticed over and over that logical reasoning is not your strength." Regarding an item entitled "Continued complaints by parents," Mnyandu stated: "You are a bold faced liar. I asked you to give me those complaints in writing and to this day you have not. . . . What do you want from me? Are people sleeping with you in order to get preferential treatment?" In response to McLaughlin's directive to meet with him, Mnyandu stated, "Oooops!!!!! I forgot."

On April 29, 2010, after Mnyandu failed to give McLaughlin a student assessment he had requested, McLaughlin approached her in the school mail room and again asked her for the document. According to McLaughlin, Mnyandu ignored him and began singing out loud. To get her attention, he tapped his index finger on her wrist. She screamed, took out a tape recorder, and began recording her screams. McLaughlin backed away from Mnyandu, who followed him as he walked to his office. After Mnyandu calmed down, she left the school campus. The next day, she went on medical leave.

With respect to Mnyandu's FEHA claims against LAUSD, respondents denied that any LAUSD employee ever disparaged Mnyandu's national origin or native language. They submitted evidence that the only remark directed to Mnyandu concerning her national origin came from a school counselor, who said that she felt sorry for the people of South Africa "because of the way they have to live and the oppression they suffer." Respondents also asserted that Mnyandu was never disciplined, suspended, or terminated, and that she received only memoranda

issued to provide guidance. According to McLaughlin, deductions were made to Mnyandu's salary solely for unauthorized absences.

Regarding Mnyandu's claims for assault, battery, and infliction of emotional distress against McLaughlin, respondents asserted that Mnyandu had not complied with the California Tort Claims Act (Gov. Code, § 810 et seq.). They presented evidence that although Mnyandu had presented timely claims for damages to the City and County of Los Angeles, she submitted no such claim to LAUSD.

3. *Mnyandu's Showing and Trial Court's Rulings*

In opposition to the summary judgment motion, Mnyandu filed a separate statement of undisputed facts based entirely on a transcript of a recorded interview of Wendi Cowan, who was Mnyandu's teacher's assistant during the 2009-2010 academic year. The interview was provided in connection with Mnyandu's claim for worker's compensation benefits. According to Cowan, McLaughlin improperly targeted Mnyandu, and made false accusations regarding her instruction and conduct.

To support the allegations in the FAC, Mnyandu also submitted two other items of potential evidence not cited in the separate statement described above, specifically, a copy of physician's report arising from her worker's compensation claim, and a June 3, 2010 memorandum to her from McLaughlin. The report contained the physician's description of Mnyandu's account of the underlying events, and the memorandum stated McLaughlin's intent to initiate proceedings potentially resulting in Mnyandu's suspension. The limited record on appeal

otherwise discloses no declaration from Mnyandu or additional potential evidence supporting the allegations in the FAC.[4]

Respondents filed objections to Mnyandu's evidentiary showing, including Cowan's interview.[5] At the hearing on the summary judgment motion, the trial court determined that Cowan's interview and the physician's report constituted inadmissible hearsay. Following these rulings, the court granted the motion for summary judgment, concluding that Mnyandu's claims failed on the undisputed facts.

4. *Analysis*

We find no error in the trial court's rulings. As explained below, regarding each of Mnyandu's claims, respondents' showing was sufficient to shift the burden to Mnyandu to raise a triable issue, which she failed to do.

a. *Discrimination Based on National Origin*

We begin by examining Mnyandu's claim for discrimination based on her national origin. In assessing respondents' showing regarding that claim, we apply established principles. Under FEHA, discrimination claims are ordinarily evaluated in light of a three-stage burden shifting test. (*Guz*, *supra*, 24 Cal.4th at p. 354.) Under the test, had Mnyandu reached trial on her claim, she "would . . . have borne the initial burden of proving unlawful discrimination, under well-

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[4] Although Mnyandu refers to a second document that she characterized as a separate statement of "disputed" facts, the record does not contain that document or describe its contents.

[5] The record that Mnyandu has provided does not contain respondents' written objections or reply to her opposition. We also note that although Mnyandu filed written objections to respondents' showing (one of which was sustained by the trial court), the record does not disclose the nature of her objections.

settled rules of order of proof: '[T]he employee must first establish a prima facie [showing] of wrongful discrimination. If she does so, the burden shifts to the employer to show a lawful reason for its action. Then the employee has the burden of proving the proffered justification is mere pretext.' [Citations.]" (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1730.) However, as respondents' summary judgment motion offered a nondiscriminatory rationale for LAUSD's conduct, we need not address the existence of a prima facie case. (*Guz, supra*, 24 Cal.4th at p. 357.) As we explain below, because respondents' showing shifted the burden on summary judgment to Mnyandu, our focus is on whether she identified sufficient evidence that the proffered rationale was a pretext for discrimination.[6]

To establish that LAUSD had a legitimate, nondiscriminatory basis for its conduct, respondents relied primarily on a declaration from McLaughlin, supplemented by declarations from other employees who interacted with Mnyandu. As noted above (see pt. B.2, *ante*), McLaughlin maintained that his conduct toward Mnyandu was directed solely at deficiencies in her instruction and professional performance; moreover, he and the other employees denied that they

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[6] We recognize that the trial court granted summary judgment on Mnyandu's FEHA claims on several grounds, including that she suffered no "adverse employment action," for purposes of her discrimination and retaliation claims under FEHA. Generally, FEHA proscribes "not only so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1053-1054.) At least one appellate court has held that a supervisor's counseling memoranda containing negative assessments of an employee may constitute an adverse employment action, for purposes of a retaliation claim under FEHA. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1454-1455.) Here, it is unnecessary for us to address whether McLaughlin's memoranda amounted to such action, as the grant of summary judgment is properly affirmed on the grounds we discuss below.

fabricated complaints regarding Mnyandu, yelled at her, or directed derogatory comments at her regarding her national origin.

In view of this showing, the trial court concluded that respondents had tendered legitimate nondiscriminatory reasons for their conduct regarding Mnyandu. We agree. As our Supreme Court has explained, "'legitimate' reasons [citation] in this context are reasons that are facially unrelated to prohibited bias, and which, if true would thus preclude a finding of discrimination. [Citations.]" (*Guz, supra*, 24 Cal.4th at p. 358, italics deleted.) Thus, if an employer's reasons for its conduct are not discriminatory, they "need not necessarily have been wise or correct. [Citation.] While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*." (*Ibid*.) Because the reasons offered for the actions of McLaughlin (and the other LAUSD employees) were not discriminatory, they constitute a facially proper basis for the actions. (*Ibid*.)

The burden on summary judgment thus shifted to Mnyandu to demonstrate that the "actual motive [of the LAUSD employees] was discriminatory." (*Guz, supra*, 24 Cal.4th at p. 361.) To carry this burden, Mnyandu could not rely on the allegations in the FAC, insofar as respondents' showing disputed them. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162; *Conn v. National Can Corp*. (1981) 124 Cal.App.3d 630, 639.) Rather, Mnyandu was required to offer "substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.) For this reason, Mnyandu could not merely question the proferred reasons, as "'[a] reason

cannot be proved to be a "pretext for discrimination" unless it is shown both that the reason was false, and that discrimination was the real reason.'" (*Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003, italics omitted, quoting *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 515.)

In view of the record before us, we agree with the trial court that Mnyandu failed to carry her burden. Because the court excluded Cowan's interview and the physician's report that Mnyandu submitted in opposition to summary judgment, the record contains no evidence supporting Mnyandu's account of the underlying events, as related in the FAC. For this reason, there are no material factual disputes regarding respondents' version of those events. Nor does the record reasonably suggest that McLaughlin or the other LAUSD employees acted on the basis of a discriminatory motive. Although McLaughlin's December 3, 2009 memorandum referred to the Zulu phrases in Mnyandu's lesson plan as "gibberish," the record shows only that he did not know that the lesson plan was in Zulu. The record is otherwise devoid of any derogatory references to Mnyandu's national origin.

Mnyandu suggests that the trial court erred in declining to consider Cowan's recorded interview and the physician's report. However, under the summary judgment statute, evidence submitted for or against a motion for summary judgment must be admissible. (See *Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 82-83; Code Civ. Proc., § 437c, subd. (d).) Here, Cowan's unsworn interview in an unrelated proceeding was inadmissible hearsay.[7] (*Nissel v. Certain*

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[7] As the trial court correctly noted, although Cowan promised to tell the truth during the interview, that promise did not render the interview admissible. (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1025 [for purposes of summary judgment motion, transcripts of investigator's conversations with witnesses were inadmissible hearsay, even though witnesses declared to investigator that their
(Fn. continued on next page.)

Underwriters at Lloyd's of London (1998) 62 Cal.App.4th 1103, 1106-1107 & fns. 2 & 4.) The same is true of the physician's report, as it contains the physician's description of Mnyandu's out-of-court statements regarding the underlying events (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524-1525 ["Although experts may properly rely on hearsay in forming their opinions, they may not relate the out-of court statements of another as independent proof of the fact."]).[8] In sum, Mnyandu's discrimination claim fails for want of a triable issue of fact.

b. *Remaining FEHA Claims*

As the trial court observed, Mnyandu's claims for harassment and retaliation fail for similar reasons. To begin, FEHA's prohibition against harassment bars "'discriminatory intimidation, ridicule[,] and insult'" based on an employee's national origin that is """"sufficiently severe or persuasive to alter the condition's of the victim's employment and create an abusive working environment."""" (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 951, quoting *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 409.) To prevail on such claims, employees must show that the workplace conduct that they confronted qualified as hostile or abusive to employees "because of" their national origin. (See *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462 (*Miller*).) Here, Mnyandu's claim that LAUSD created such a workplace relies on the factual allegations in the FAC supporting her claim for discrimination. As explained above, respondents shifted the burden to Mnyandu to raise a triable issue whether

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statements were true under penalty of perjury].)

[8] In addition, the report was inadmissible as a declaration because it was not executed under penalty of perjury. (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 608-610.)

she encountered misconduct based on a discriminatory motive, which she did not do.

We reach the same conclusion regarding Mnyandu's claim for retaliation, which also relies on the factual allegations underlying her other FEHA claims. Under FEHA, retaliation claims, like discrimination claims, are subject to the "three stage burden-shifting test." (*Guz, supra*, 24 Cal.4th at p. 354.) "The elements of . . . [FEHA] claims require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant articulate a legitimate nonretaliatory explanation for its acts, and (3) the plaintiff show that the defendant's proffered explanation is merely a pretext for the illegal [conduct]. [Citations.]" (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) To establish a prima facie case of retaliation, employees may show that "(1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action." (*Miller, supra*, 36 Cal.4th at p. 472.)

Here, Mnyandu's retaliation claim alleges that after she filed grievances with LAUSD and UTLA regarding McLaughlin, he required her to submit advance copies of draft IEP plans and lesson plans, directed her to meet with him, sent her numerous counseling memoranda, and arranged for deductions from her salary. As with Mnyandu's discrimination claim, respondents offered a showing of legitimate nonretaliatory reasons for their conduct.[9] As noted above (see pt. B.2., *ante*), McLaughlin's declaration stated that his conduct toward Mnyandu was based on concerns regarding her instruction and professional conduct, and that the

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[9] In view of this showing by respondents, we do not address whether Mnyandu established a prima facie case of retaliation. (See *Guz, supra*, 24 Cal.4th at p. 357.)

deductions from her salary were due to unauthorized absences. We see no evidence in the record raising the reasonable inference that despite his proffered reasons, McLaughlin's conduct was, in fact, retaliatory. In sum, Mnyandu's harassment and retaliation claims fail for want of a triable issue of fact.

c. *Assault, Battery, and Infliction of Emotional Distress*

We next examine Mnyandu's claims for assault, battery, and infliction of emotional distress against McLaughlin. These claims are predicated on the FAC's allegations that on April 29, 2010, McLaughlin injured her in the school mail room, and that his conduct -- as described in the FAC -- was intended to inflict emotional distress on her. In granting summary judgment on the claims against McLaughlin, the trial court conclude that Mnyandu failed to comply with the California Tort Claims Act (Gov. Code, § 810 et seq.) (the Act). As explained below, we discern no error in the court's determination.

Absent qualifications not relevant here, the Act requires that "one who sues a public employee on the basis of acts or omissions in the scope of the defendant's employment [must] have filed a claim against the public-entity employer pursuant to the procedure for claims against public entities. [Citations.]" (*Briggs v. Lawrence* (1991) 230 Cal.App.3d 605, 613, italics omitted.) The Act also establishes requirements for timely claim presentation, and for relief from tardy claim presentation. A claim relating to a cause of action "for injury to person" must be filed with the pertinent public entity within six months of the accrual of the cause of action. (Gov. Code, § 911.2.) If a claim is not filed within the six-month period, an application for leave to file the claim must be submitted to the public entity no later than one year after the accrual of the cause of action. (Gov. Code, § 911.4, subd. (b).)

Government Code section 910 prescribes the elements of a claim, which include a specification of the amount of damages (if less than $10,000 when the claim is presented) or, if the damages exceed $10,000 when the claim is presented, an indication whether the claim will be a limited civil case. (Gov. Code, § 910, subd. (f).) "Although only substantial compliance, rather than strict compliance, is required" with the statute, "the purported 'claim' must be readily identifiable as such." (*Schaefer Dixon Associates v. Santa Ana Watershed Project Authority* (1996) 48 Cal.App.4th 524, 533.)

Here, the FAC alleges that the City and County of Los Angeles and LAUSD employed McLaughlin, and that in May 2010, Mnyandu filed claims for damages with the City and County of Los Angeles, as well as a "formal [c]omplaint" with LAUSD. In support of the latter allegation, the FAC pointed to an attached LAUSD form document entitled "Special Physical Injury/Alleged Act of Violence Report." The one-page document contains Mnyandu's account of the April 29, 2010 incident and her injuries, but sets forth neither the amount of her damages nor any proposed civil action. In seeking summary judgment, respondents presented evidence that LAUSD employed McLaughlin, and that Mnyandu had acknowledged in her deposition that she was unaware of any claim "for damages" submitted to LAUSD. In response, Mnyandu offered no evidence of any such claim; rather, she argued that her compliance with the Act had been resolved by the trial court's prior denial of McLaughlin's motion for judgment on the pleadings, which attacked the pertinent claims on the basis of the Act.

We conclude that respondents shifted the burden to Mnyandu to raise a triable issue regarding her compliance with the Act, and that she failed to do so. For purposes of the Act, the injury report to LAUSD attached to the FAC does not constitute a claim, as it makes no reference to the amount of damages or an impending civil action. (*Tyus v. City of Los Angeles* (1977) 74 Cal.App.3d 667,

670-671 [under the Act, letter reporting incident of alleged police violence to city was not claim, as it did not request monetary relief].) Nor do Mnyandu's claims for damages to the County and City of Los Angeles constitute the requisite claim in the absence of evidence that either of these entities employed her. (*Gonzales v. State of California* (1972) 29 Cal.App.3d 585, 589-590 [under the Act, school district employee is not state employee merely because the state exercises legal authority over school district].) In view of Mnyandu's deposition testimony and her failure to identify any claim to LAUSD meeting the statutory requirements, there are no triable issues regarding her compliance with the Act.

Mnyandu contends that the trial court, in granting summary judgment on her claims against McLaughlin, improperly reversed its decision on his motion for judgment on the pleadings. We disagree. Generally, a motion for judgment on the pleadings "tests whether the allegations of the pleading under attack support the pleader's cause [of action] if they are true." (*Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (1991) 231 Cal.App.3d 457, 468.) Absent special circumstances, the trial court does not look beyond the pleading in ruling on the motion. (*Ibid*.) In contrast, a motion for summary judgment is ordinarily intended to test whether the pleader has evidence to support the pleading's allegations. (*Ibid*.) Here, the trial court denied judgment on the pleadings on the basis of the FAC's allegations regarding Mnyandu's claims for damages to the City and County of Los Angeles, but granted summary judgment because she provided no evidence that she made a claim to LAUSD, McLaughlin's actual employer. We see no error in these rulings.

Mnyandu also maintains that she was not required to comply with the Act because she asserts her claims against McLaughlin in his capacity as an individual. This contention fails, as the FAC and the evidence submitted in connection with the summary judgment motion unequivocally show that McLaughlin's alleged

misconduct occurred within the scope of his employment. For purposes of the Act, "[a]n employee acts within 'the scope of his employment' when he is engaged in work he was employed to perform or when an act is incident to his duty and was performed for the benefit of his employer and not to serve his own purpose. [Citation.] '[T]he proper inquiry is not "'whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the [employee] which were authorized by the [employer.]'"'" (*Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750-1751.) Under these principles, the term "'scope of employment'" is interpreted broadly to include willful and malicious torts as well as negligence. (*Id*. at p. 1751; see *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 447 [for purposes of the Act, teacher's alleged act of sexual assault on a student was within the scope of his employment].)

Here, both the FAC and respondents' showing demonstrate that McLaughlin's purported misconduct occurred within the scope of his employment.[10] The FAC alleges that McLaughlin, while engaged "in the course of his duties as an employee of . . . LAUSD," grabbed Mnyandu's hand while demanding that she produce certain documents he was seeking, and otherwise acted in a manner intended to inflict emotional distress. Furthermore, although McLaughlin's declaration denies any misconduct, it ascribes his interactions with Mnyandu, including the April 29, 2010 incident, to his role as her supervisor. Accordingly, because the record conclusively demonstrates that McLaughlin's alleged misconduct occurred within the scope of his employment, Mnyandu's failure to file a timely claim with LAUSD bars her action against him. (*Briggs v.*

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[10] Generally, "[w]hether an employee has acted within the scope of his employment is ordinarily a factual issue to be resolved by the trier of fact. [Citations.] [However, w]hen the facts are undisputed and no conflicting inferences possible, the issue becomes one of law. [Citations.]" (*Fowler v. Howell*, *supra*, 42 Cal.App.4th at p. 1751.)

Lawrence, *supra*, 230 Cal.App.3d at p. 612.) In sum, the trial court did not err in granting summary judgment on the basis of the evidence submitted in connection with respondents' motion.

C. *New Evidence*

We turn to Mnyandu's contentions that summary judgment was improper in light of other evidence not presented to the trial court prior to its ruling. The crux of these contentions is that although respondents fabricated their showing in support of the summary judgment motion, Mnyandu was prevented from rebutting their evidence. She maintains that the trial court improperly denied her a continuance to present new evidence in opposition to the summary judgment motion, and that the grant of summary judgment must be reversed because she now possesses evidence raising triable issues of fact. For the reasons explained below, we reject these contentions.

1. *Continuance*

Mnyandu contends she was improperly denied a continuance to submit new evidence in opposition to the summary judgment motion. She maintains that before the hearing on the motion, she discovered evidence favorable to her, but was unable to present it with her opposition. She argues that the court erred in denying her request for a continuance, which she made during the hearing on the summary judgment motion. We disagree.

"The [summary judgment] statute mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary

showing . . . . [Citations.] Thus, in the absence of an affidavit that requires a continuance . . . , we review the trial court's denial of appellant's request for a continuance for abuse of discretion." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254.)[11]

On January 13, 2012, at the hearing on respondents' motion, Mnyandu asked for a continuance after the trial court stated its intention to grant summary judgment. In support of the oral request, Mnyandu maintained that respondents' showing omitted crucial evidence favorable to her, and that she needed two or three days to present all of her evidence. This evidence included McLaughlin's interview in a worker's compensation proceeding. Mnyandu argued that respondents and their counsel were aware of the evidence, and that respondents' counsel had attempted to hide it by filing a motion to quash her subpoenas. In addition, Mnyandu pointed to the withdrawal of her initial counsel, which had occurred in July 2011. The trial court denied the request, noting that attorney Wyatt prepared Mnyandu's opposition, and that the request was untimely.

We see no error in this ruling. Mnyandu's request was unaccompanied by any declarations describing the new evidence or her reasons for not submitting it in connection with her opposition. Nor can this failure to provide supporting declarations reasonably be attributed to the withdrawal of her counsel six months before the hearing or -- as she argues on appeal -- to injuries to her arm and her discovery of a criminal action against her, as an attorney prepared her opposition

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[11] The summary judgment statute provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." (Code Civ. Proc., § 437c, subd. (h).)

and submitted a declaration in support of it.[12] Under these circumstances, the court did not abuse its discretion in denying the continuance. (*Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1353 [trial court properly denied continuance first requested at hearing on summary judgment motion and unsupported by declarations]; *American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1280 [trial court properly denied continuance requested in opposition memorandum to summary judgment, as no declarations were submitted establishing basis for continuance].)

Mnyandu's reliance on *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, and *Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242 is misplaced. In the first three decisions, the appellate courts held that continuances were improperly denied to parties opposing summary judgment because they submitted declarations adequately establishing good cause for a continuance, that is, the prospect of new evidence or the incapacity of their counsel as the result of illness. (*Dee v. Vintage Petroleum, Inc.*, *supra*, 106 Cal.App.4th at pp. 34-35; *Lerma v. County of Orange*, *supra*, 120 Cal.App.4th at pp. 714-716; *Bahl v. Bank of America*, *supra*, 89 Cal.App.4th at pp. 395-400.) In the fourth decision, the appellate court reversed the partial denial of the plaintiff's ex parte application for a continuance of discovery and trial, concluding that the plaintiff had demonstrated an adequate basis for the continuance, namely, the death of his attorney. (*Hernandez v. Superior Court*, *supra*, 115 Cal.App.4th at pp. 1245-1248.) Here, Mnyandu was assisted by

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[12] Although Mnyandu suggests that her initial counsel should not have been permitted to withdraw, the limited record that she has provided does not disclose the basis for the withdrawal. For this reason, she has forfeited any contention of error regarding it.

counsel, and submitted no declaration or other evidence demonstrating grounds for a continuance.[13]

Mnyandu also contends that the trial court was obliged to grant a new trial and a continuance under Codes of Civil Procedure section 657, subdivision (4), section 473, subdivision (b), and section 1008. However, these statutes require an evidentiary showing establishing the basis for relief, which Mnyandu never provided to the trial court. Although subdivision (4) of Code of Civil Procedure section 657 authorizes a motion for a new trial on the basis of "[n]ewly discovered evidence," the motion "must be made upon affidavits" (Code. Civ. Proc., § 658).[14] Furthermore, to obtain relief under subdivision (b) of Code of Civil Procedure section 473, the moving party "must show, by affidavit or other proof, a reasonable excuse" for the party's failure to submit the pertinent evidence, or submit an attorney declaration establishing grounds for relief.[15] (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, §§ 144, 179, pp. 736, 779.)

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[13] *California Automobile Ins. Co. v. Hogan* (2003) 112 Cal.App.4th 1292, 1305, upon which Mnyandu also relies, is inapposite. There, the appellate court affirmed the denial of a continuance to parties opposing summary judgment, even though they submitted a declaration in support of the requested continuance. (*Id.* at pp. 1305-1306.)

[14] A party seeking a new trial on this basis must show that "(1) the evidence is newly discovered; (2) he or she exercised reasonable diligence in discovering and producing it; and (3) it is material to the . . . party's case." (*Plancarte v. Guardsmark* (2004) 118 Cal.App.4th 640, 646.)

[15] Under the discretionary provisions of Code of Civil Procedure section 473, subdivision (b), "[t]he court may, upon any terms as may be just, relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect," provided that application for relief is "made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." Furthermore, under the separate mandatory provisions of subdivision (b), the court must vacate a "default judgment or dismissal" resulting from an attorney's "mistake, inadvertence, surprise, or neglect" in defined circumstances.

Similarly, to secure reconsideration of an order under Code of Civil Procedure section 1008, the moving party must submit an affidavit adequately establishing "new or different facts, circumstances, or law." (*G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 622.) Because Mnyandu made no evidentiary showing in requesting a continuance, the statutes in question do not afford her relief.[16] In sum, the trial court did not err in denying a continuance.

2. *No Consideration of New Evidence on Appeal*

Mnyandu also maintains that she possesses evidence that renders the grant of summary judgment improper. She argues that after the trial court ruled on the summary judgment motion, she obtained additional evidence, including testimony from McLaughlin and other LAUSD employees in a criminal action against her. According to Mnyandu, the testimony contradicts respondents' showing in connection with the summary judgment motion. Although the record does not contain any of the new evidence, Mnyandu argues that it mandates the reversal of the summary judgment. For the reasons explained below, she is mistaken.

Generally, "[a]ppellate review of summary judgment is limited to the facts contained in the documents presented to the trial court." (*Continental Ins. Co. v. Superior Court* (1995) 37 Cal.App.4th 69, 79.) For this reason, "[w]e may consider only those facts which were before the trial court, and disregard any new factual allegations made for the first time on appeal. Thus, unless they were factually presented, fully developed and argued to the trial court, potential theories

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[16] In a related contention, Mnyandu suggests that she was entitled to a continuance under Code of Civil Procedure section 2033.300, subdivision (c) which permits the trial court to extend the time for discovery when a party withdraws its admissions. However, that statue is inapplicable here, as no admissions were withdrawn in connection with respondents' summary judgment motion.

which could theoretically create 'triable issues of material fact' may not be raised or considered on appeal. [Citations.]" (*Sangster v. Paetkau*, *supra*, 68 Cal.App.4th at p. 163.) To attack a grant of summary judgment on the basis of new evidence, a party must ordinarily seek a new trial or similar relief from the trial court. (*Aguilar*, *supra*, 25 Cal.4th at pp. 858-859; see *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 470.) This Mnyandu did not do.

Pointing to Code of Civil Procedure section 909, Mnyandu contends that we must consider her new evidence on appeal. However, absent extraordinary circumstances, an appellate court will not examine evidence never submitted to the trial court. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 334, p. 385.) No such circumstances are present here.

Under Code of Civil Procedure section 909 "[t]he reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require." As the court explained in *Monsan Homes, Inc. v. Pogrebneak* (1989) 210 Cal.App.3d 826, 830, "[t]he boundaries of [this] section were defined in *Tupman v. Haberkern* (1929) 208 Cal. 256, and the principles set forth in that decision have stood unchanged since then. [Citation.] . . . The power to invoke the statute should be exercised sparingly, ordinarily only in order *to affirm the lower court decision and terminate the litigation*, and in very rare cases where the record or new evidence *compels a reversal with directions to enter judgment for the appellant* [citation]." (Italics added; see also 9 Witkin, Cal. Procedure, *supra*,

Appeal, § 313, pp. 362-363.) Mnyandu does not suggest the evidence meets these stringent standards.[17]

Mnyandu also contends that under subdivision (m)(2) of Code of Civil Procedure section 437c, we must consider her new evidence. We disagree. That provision states in pertinent part: "Before a reviewing court affirms an order granting summary judgment or summary adjudication *on a ground not relied upon by the trial court*, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefing may include an argument that additional evidence relating to that ground exists, but that the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based upon the supplemental briefing to allow the parties to present additional evidence or to conduct discovery on the issue." (Italics added.) In view of the italicized clause, the provision is inapplicable here, as our affirmance of the grant of summary judgment is predicated on the trial court's grounds for its

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[17] *In re Elise K.* (1982) 33 Cal.3d 138, to which Mnyandu directs our attention, is factually distinguishable. There, a mother appealed from a dependency court order terminating her parental rights with respect to her daughter. (*Id*. at p. 139.) During the pendency of the appeal, the daughter became unadoptable due to her age, and the parties to the appeal stipulated to a reversal based on that fact. (*Id*. at pp. 139, 145.) Our Supreme Court held that a reversal was proper, in view of the stipulation. (*Id.* at p. 139.) In a concurring opinion, Chief Justice Bird stated that Code of Civil Procedure section 909 permitted the Supreme Court to consider the post-judgment events that rendered the child unadoptable, as the situation implicated none of the limitations on the power conferred under that statute. (*In re Elise K.*, *supra*, at pp. 149-150.) On this matter, we note that because the daughter's unadoptability left her "without a family or the prospect of a family," the reversal amounted to a judgment in the mother's favor, as it effectively restored her parental rights. (See *id*. at pp. 145, 148-150.) Here, the parties have not stipulated to the existence or veracity of Mnyandu's new evidence, and nothing before us suggests that it compels a judgment in her favor.

decision. (See *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2011) 198 Cal.App.4th 1366, 1378.)

D. *Remaining Contentions*

In a supplemental brief, Mnyandu challenges summary judgment on the basis of the doctrines of judicial and collateral estoppel. As explained below, these contentions fail on the limited record before us.

Mnyandu maintains that the doctrine of judicial estoppel requires the reversal of the judgment because respondents "play[ed] fast and loose with the court." Generally, the doctrine of judicial estoppel prohibits a party from abandoning a position upon which the party prevailed in prior proceedings. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) Here, Mnyandu argues that respondents, in seeking summary judgment, advocated views inconsistent with their positions in a criminal action against her and in her pending worker's compensation action. However, Mnyandu's argument relies exclusively on allegations in her briefs, as the record establishes neither the outcome of those actions nor respondents' positions in them. Because the allegations are unsupported, we may not consider them. (*Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361.) Furthermore, even if we were to credit the allegations, her contention would fail, as she does not suggest that respondents secured summary judgment by urging views contrary to those on which they *prevailed* in other actions.

For similar reasons, we reject Mnyandu's contention based on the doctrine of collateral estoppel, which prevents a party from relitigating issues that were "raised, actually submitted for determination and determined" in another action. (*Barker v. Hull* (1987) 191 Cal.App.3d 221, 226.) She argues that her exoneration in the criminal action potentially establishes the existence of triable issues material

to her claims in the FAC. However, as noted above, the record does not reveal the nature or outcome of the criminal action. Furthermore, even if the record had disclosed that she was found not guilty of criminal charges, her contention would be incorrect, as an acquittal in a criminal action does not constitute a final determination in a civil action, for purposes of collateral estoppel. (*In re Sylvia R.* (1997) 55 Cal.App.4th 559, 563.) In sum, we conclude that summary judgment was properly granted on the FAC.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.