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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

KEVIN YOO, Plaintiff and Appellant, v. CITY OF SAN FERNANDO et al., Defendants and Respondents.	B282234 (Los Angeles County Super. Ct. No. BC626482)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Affirmed.

Jay S. Rothman & Associates and Timothy E. Kearns and for Plaintiff and Appellant.

Alderman & Hilgers, Daniel S. Alderman and Allison R. Hilgers for Defendants and Respondents.

INTRODUCTION

Plaintiff Kevin Yoo appeals the trial court's order sustaining defendants' demurrer to his second amended complaint without leave to amend. Plaintiff argues that he pleaded sufficient facts to support his disability and race discrimination claims. We affirm because plaintiff failed to allege actionable adverse employment actions or conduct constituting harassment. Plaintiff also failed to exhaust his administrative remedies for the disability-related claims.

FACTS AND PROCEDURAL BACKGROUND

Because this case comes to us on demurrer, we base our recitation of the facts on the operative complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).)

1. Plaintiff's Employment as a Police Officer

Plaintiff is Asian. He worked as a police officer for the Arvin Police department for five years before joining the San Fernando Police Department (SFPD) in 2013.[1] Sergeant Irwin Rosenberg, who is Caucasian, supervised plaintiff during his tenure at the SFPD.

2. Plaintiff Witnessed Racist Remarks Toward Other Asian Officers

In 2014, Sergeant Rosenberg pulled the corners of his eyes and used a mock Asian accent when speaking to Officer Jefferey Pak, an Asian SFPD officer, in front of plaintiff. Officer Pak filed a complaint against Sergeant Rosenberg and plaintiff provided a

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[1] It is unclear if plaintiff has ceased working for the San Fernando police department. His second amended complaint indicated that he was still employed by that police department in December 2016.

statement about the incident to the SFPD investigator in July 2014. For this behavior, Sergeant Rosenberg received a one-week suspension. Sergeant Rosenberg subsequently spoke to plaintiff and confirmed that he knew plaintiff provided a statement to the investigator. Sergeant Rosenberg told plaintiff that he did not intend to offend anyone with his conduct. Sergeant Rosenberg continued to supervise plaintiff following this incident.

Also, on an unspecified date, Sergeant Rosenberg told an unidentified Asian officer at the SFPD station, "I like how you Asians bow and are subservient."

3. Plaintiff Showed Interest in Field Training Officer School

In October 2014, plaintiff emailed an unidentified person that he had an interest in attending Field Training Officer (FTO) school. The FTO position involved supervisory authority and responsibility, and would have been a promotion for plaintiff. Plaintiff received no response from the unidentified recipient of his email. It is unclear whether FTO school was a prerequisite for the promotion. Plaintiff does not allege that he actually applied for the schooling.

4. Plaintiff's Complaint to the Police Chief

In February 2015, Sergeant Rosenberg sent an email to an unidentified recipient criticizing plaintiff about a major incident log. Plaintiff provided no facts about the incident but alleged that the criticism was unwarranted. The next day, while plaintiff was off duty, Sergeant Rosenberg said at the team meeting, "Now we have the all-star team."

On March 1, 2015, members of "Team 4" (it is unclear who is included in Team 4 other than plaintiff) raised concerns about Sergeant Rosenberg's lack of leadership to Sergeant Rosenberg himself and via email to Police Chief Robert Parks. Plaintiff

alleges Sergeant Rosenberg responded to plaintiff's complaint with unspecified retaliatory actions.

On March 5, 2015, plaintiff met with new Police Chief Anthony Vairo and complained that he felt he was being "singled out" and targeted by Sergeant Rosenberg. In response, Chief Vairo ordered Sergeant Rosenberg to have somebody else present when he spoke to plaintiff. The SFPD did not conduct a formal investigation into plaintiff's complaint and did not involve its human resources department.

5. The FTO Position

In July 2015, plaintiff submitted a memo of interest regarding the FTO position to an unidentified recipient. At this point, plaintiff had satisfied all of the requirements for the FTO promotion except one: four years of experience with the SFPD. Plaintiff alleges that SFPD had repeatedly waived this experience requirement for white, non-disabled applicants. Plaintiff submitted a memo of interest to test for the FTO position, and requested a waiver of the four-year requirement.[2] Plaintiff did not initially receive a response from the SFPD. Plaintiff did not allege that he actually applied to the FTO position.[3]

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[2] It is unclear to whom plaintiff submitted the memo. Like most of plaintiff's allegations regarding complaints and communications, the recipient of the communication is not identified in the pleading.

[3] At oral argument on this appeal, plaintiff's counsel contended that plaintiff's complaint alleged he applied for the FTO position. After our review of the record, we conclude he did not. Plaintiff solely alleged that he submitted a memo of interest for the position.

At a subsequent staff meeting, Chief Vairo stated that no one had applied for the FTO position. Chief Vairo later hand-picked two officers for the position; neither had applied for it. Plaintiff did not identify the race of these officers.

6. Poor Employee Evaluation

On September 9, 2015, plaintiff received his tri-annual employee evaluation from Sergeant Rosenberg. Although other supervisors who had worked with Plaintiff marked his work positively, Sergeant Rosenberg gave plaintiff an unjustified "non-satisfactory" review.

7. Plaintiff's Rebuttal of the Poor Evaluation

Plaintiff prepared a rebuttal to the negative review and spoke with Sergeant Rosenberg about the rebuttal on November 12, 2015. During the conversation, plaintiff received a non-emergency radio call from dispatch about a parked vehicle at a residence. Sergeant Rosenberg told plaintiff to advise dispatch that there would be a slight delay in responding to the call. They continued the conversation. Sergeant Rosenberg did not accept plaintiff's rebuttal. At the end, Plaintiff exited the room and told Sergeant Rosenberg that he was being "hard-headed." Sergeant Rosenberg replied, "get to work." While plaintiff was on his way to the non-emergency call, he received instructions from dispatch (relaying Sergeant Rosenberg's orders) to cancel that call and instead respond to a suspected child abuse investigation. This occurred toward the end of plaintiff's shift.

8. Plaintiff Reprimanded for Using Profanity

On November 20, 2015, Sergeant Rosenberg wrote-up plaintiff for using profanity when speaking with him about the performance review. Plaintiff alleges that he never used profanity during the conversation.

9. Denial of Plaintiff's Request for a Shift Change

In early 2016, plaintiff told his direct supervisor, Sergeant Chiasson, that he had diabetes. Plaintiff then requested a shift change to accommodate his diabetes from Sergeant Rosenberg. Plaintiff never received a reply or a shift change. His supervisors did not engage in an interactive session with plaintiff.

10. Plaintiff's Administrative Complaint

Prior to filing suit, plaintiff filed a complaint with the California Department of Fair Employment and Housing (DFEH) in April 2016, alleging racial discrimination, harassment, and retaliation. The DFEH issued plaintiff a right-to-sue letter in April 2016.

11. Plaintiff's Lawsuit

In July 2016, plaintiff sued the City of San Fernando, SFPD, Sergeant Rosenberg, and Chief Vairo asserting seven causes of action for race and disability discrimination, retaliation, harassment, and other Fair Employment and Housing Act (FEHA) claims. (See Gov. Code, § 12940.)[4] After receiving defendants' meet-and-confer letter and demurrer, plaintiff filed a first amended complaint in September 2016. Defendants again demurrered, and in November 2016, the court sustained the demurrer in its entirety with leave to amend.

Plaintiff filed a second amended complaint against the same defendants in December 2016, alleging: (1) racial discrimination, (2) disability discrimination, (3) harassment based on disability and race, (4) failure to accommodate his disability, (5) failure to engage in the interactive process, (6) retaliation, and (7) failure to prevent discrimination and

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[4] All subsequent statutory references are to the Government Code unless indicated otherwise.

harassment. Plaintiff essentially alleged that he was subjected to racial discrimination, harassment, and retaliation by Sergeant Rosenberg and thus the SFPD. He alleged that the poor performance review, write-up, and denial of the FTO position were racially motivated. He also alleged that SFPD failed to accommodate his diabetes disability.

The court heard argument on the demurrer to the second amended complaint in February 2017. The trial court issued a detailed ruling sustaining defendants' demurrer to the entire second amended complaint without leave to amend. The court explained that plaintiff "has based his entire complaint on the premise that if an employment supervisor makes an ethnic or racial slur or bad racial joke directed at one or possibly two employees at some point in the past—but with no evidence of discriminatory actions by the supervisor toward those individuals or anyone else in connection therewith—then it is to be presumed that any and all subsequent actions thereafter by that supervisor, and even by extension, the company he represents as well as the supervisors above him, are motivated by bias and discriminat[ion] when it comes to all dealings with other members of that same racial group." The court stated that "plaintiff essentially alleges nothing more than that he is a member of the same group as these earlier individuals and that various run of the mill contacts occurred between himself and . . . Sergeant Rosenberg, all of which, no matter how completely innocuous on their face, ought to be deemed discriminatory solely because of . . . prior remarks made by Sergeant Rosenberg to others. . . . He then tries to tar the entire police department for which they both work with the same brush by saying that the bias and discrimination of all others is demonstrated by again, run of the mill experiences."

The court did not grant leave to amend because "the court in oral argument . . . repeatedly asked that the plaintiff provide further facts, and as the defendants have argued in their moving and reply papers, what plaintiff has provided in the last amended pleading has been essentially nothing more than more claims and conclusory statements. . . . This court will not speculate, but is of the view that the opportunity has been afforded, and that the defendants should not have to go through an additional round of pleadings, especially when, as plaintiff could have done, he has not sought another opportunity to amend in his opposition papers or made a proffer of 'proof' as to what facts he might add if given the opportunity."

The court entered judgment for defendants in March 2017. Plaintiff appeals the judgment in favor of Sergeant Rosenberg on his claims for disability discrimination, race discrimination, and harassment. Defendant appeals his claims against Sergeant Rosenberg, SFPD, and the City of San Fernando for failure to accommodate, failure to engage in meaningful interactive process, retaliation, and failure to prevent discrimination and harassment. Plaintiff does not appeal his claims against Chief Vairo.

DISCUSSION

We review de novo the court's order sustaining the demurrer. (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 486.) "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.' Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in

their context. When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action." (*Blank, supra,* 39 Cal.3d at p. 318 [citations omitted].) "To establish that [they] adequately pleaded even one of [the] causes of action, [plaintiffs] must show that [they] pleaded facts sufficient to establish every element of that cause of action. . . . [Plaintiffs] bear[] the burden of overcoming all of the legal grounds on which the trial court sustained the demurrer[]." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 880 (*Cantu*).)

1. Plaintiff Failed to Allege An Actionable Adverse Employment Action to Support His Race-Based Discrimination and Retaliation Claims

To state a prima facie case for discrimination or retaliation based on race, the employee-plaintiff must allege that he suffered an adverse employment action. (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*) [elements of unlawful discrimination under FEHA]; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476 [elements of retaliation]). The adverse employment action must "materially affect[] the terms, conditions, or privileges of employment." (*McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 386 (*McRae*).) " 'A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient.' " (*Ibid.*) The employer's actions must have a substantial and detrimental effect on the plaintiff's employment. (*Ibid.*)

Plaintiff's second amended complaint identifies the following as adverse employment actions: SFPD's failure to respond to his email about FTO class, SFPD's failure to waive the experience requirement for the FTO position, plaintiff not

receiving the FTO promotion despite not applying for it, a February 2015 email from Sergeant Rosenberg criticizing plaintiff regarding a "major incident log," the September 2015 negative performance review by Sergeant Rosenberg, the November 12, 2015 task reassignment to investigate a child abuse call at the end of his shift, and the November 20, 2015 write-up for using profanity. Despite plaintiff's conclusory assertions otherwise, not one of these actions constituted an *actionable* adverse employment action.

In *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028 (*Yanowitz*), the Supreme Court addressed the "appropriate standard for determining whether an employee has been subjected to an adverse employment action." (*Id.,* at p. 1049 [discussing the standard in the context of a retaliation claim]; see *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1161 [applying this standard to discrimination claim].) *Yanowitz* adopted the "materiality" standard, holding that "an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable." (*Yanowitz*, at p. 1052.) "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511.)

"Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and

are not actionable. . . ." (*Yanowitz, supra,* 36 Cal.4th at p. 1054.) " '[A] mere offensive utterance or . . . a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of [the FEHA]. . . .' " (*Ibid*.)

Here, the failure of unnamed persons to respond to plaintiff's inquiry emails about the FTO position and school do not amount to adverse employment actions.[5] The complaint indicated that plaintiff never actually applied for the FTO position and never applied for a waiver of the experience requirement – he merely brought these topics up in a conversation or email. Had he applied for the job and been

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[5] Plaintiff alleges that "[i]n July or August 2015, [p]laintiff raised the issue regarding the FTO promotion to Chief Vairo, and explained that he (Plaintiff) was qualified for the FTO position and was eligible for the waiver of the four-year requirement, as other officers with the SFPD had received. Chief Vairo responded to Plaintiff's remarks by saying, 'Good luck with that. Not in my time.' Later, Chief Vairo stated, 'You can keep trying but that doesn't mean you're gonna [sic] get it.' " Plaintiff characterized these statements in his complaint, asserting: "In other words, the Police Chief for the SFPD specifically denigrated Plaintiff, an experienced and motivated officer with a good service record for the SFPD and whose only 'sin' was confirming Rosenberg's racist comments and behavior."

Not only is it unclear what Chief Vairo's statements meant as there is insufficient context for the comments in the complaint, but plaintiff never alleges he actually requested the waiver from Chief Vairo. Plaintiff's allegations amount to an unclear conversation about the waiver. As to the choice of other officers for the position, plaintiff does not allege their race, nor does he describe whether those officers had the requisite four years of service with SFPD to apply to the FTO position.

denied, perhaps the denial of the promotion could have had a detrimental, substantial effect on his employment. But that was not the case here. Plaintiff simply appears dissatisfied by the SFPD's decision to promote other officers to a job to which plaintiff never applied.

Likewise, Sergeant Rosenberg's single email from February 2015, criticizing plaintiff in relation to a major incident log, does not rise to the level of an adverse employment action. There are no allegations to support the conclusion that the email would materially affect the terms and conditions of plaintiff's employment. That the email upset plaintiff does not make it actionable.

Similarly, plaintiff's reassignment on November 12, 2015 from a simple parked car matter to a child abuse investigation is not an adverse employment action. Responding to a child abuse call, even towards the end of a work shift, was an inherent part of plaintiff's job as a police officer. The order did not alter the terms of his employment.

Plaintiff also alleges that he received a negative performance review by Sergeant Rosenberg in September 2015 and a write-up in November 2015 for using profanity, and that neither were warranted. Yet, plaintiff fails to allege any facts showing that these two incidents materially affected his job. Plaintiff does not allege demotion, termination, receipt of less pay or benefits, being stripped of responsibilities, or that he has applied for and been denied promotions or advancement.

Even if these two incidents could rise to the level of an adverse employment action, plaintiff failed to allege circumstances that suggest Sergeant Rosenberg had a discriminatory motive for the negative write-up and performance review. (*Guz, supra,* 24 Cal.4th at p. 355 [one element of a

discrimination claim is that "some other circumstance suggests discriminatory motive" for the adverse employment action].) Plaintiff's sole allegation showing discriminatory motive is that Sergeant Rosenberg made two racially offensive remarks to two other Asian officers, one of which plaintiff observed. One remark occurred more than a year before the performance review and the other was given no specific date. These remarks, while offensive, were unconnected to the performance review and write-up at issue, and are insufficient to show Rosenberg's discriminatory motive for later conduct. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 867 [discussing the stray remarks doctrine].)

We are also mindful of our Supreme Court's declaration in *Yanowitz* that each alleged retaliatory act need not constitute an adverse employment action in and of itself, and of *Yanowitz*'s holding that we should consider an employer's actions collectively. (*Yanowitz, supra,* 36 Cal.4th at p. 1055.) Nevertheless, this approach does not negate the requirement that the employer's actions materially and adversely affect the employee's terms and conditions of employment, job performance, or prospects for advancement. (*Id.* at p. 1060.) Plaintiff does not allege facts showing that the collective effect of plaintiff's grievances rose to this level.

In sum, the actions plaintiff alleged were all one-time events and were not accompanied by facts that show both a substantial and detrimental effect on his employment. (See *Thomas v. Department of Corrections, supra,* 77 Cal.App.4th at p. 512.) The trial court properly sustained the demurrer on the racial discrimination and retaliation claims because plaintiff failed to allege a prima facie case for either.

2. Plaintiff Failed to State a Claim for Harassment

To make a prima facie case for harassment, plaintiff must allege threatening, humiliating, or offensive conduct that is sufficiently severe or pervasive to alter the conditions of his employment. (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465-467.) "The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that she was actually offended." (*Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 609-610 [affirming order sustaining demurrer on environmental sexual harassment FEHA claim because none of the harassing acts were directed at plaintiff].) "In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Id.* at p. 610.) A plaintiff "who is not personally subjected to such [harassing] remarks . . . , must establish that [he] personally witnessed the harassing conduct and that it was in [his] immediate work environment." (*Id.* at p. 611.)

Here, plaintiff alleged two incidents involving offensive conduct: (1) Sergeant Rosenberg "pulled at the corners of his eyes and used a mocking Asian accent when speaking to" another Asian officer in plaintiff's presence, and (2) Sergeant Rosenberg told another Asian officer, "I like how you Asians bow and are subservient." As reprehensible as these communications were, plaintiff was not the target of either of Sergeant Rosenberg's remarks. Plaintiff alleged only that he witnessed the first incident; the second incident appears to have occurred outside of

plaintiff's presence. Plaintiff's allegations of harassment amount to a single racial slur made to Officer Pak. As a matter of law, this single, isolated incident, which did not involve plaintiff directly, is not sufficiently pervasive to support a harassment claim. Plaintiff failed to allege a concerted pattern of harassment of a repeated, routine or a generalized nature.

Plaintiff cites *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 32, for support of the proposition that a single act committed by a supervisor can create a hostile work environment. That case is distinguishable, as it involved more than a single act of harassment and the acts were all directed at the plaintiff. There, the supervisor directed a racial slur at the plaintiff, regularly cursed at the plaintiff, instructed the plaintiff to lie and steal, and threatened the plaintiff's job. (*Id.* at pp. 36-37.)

To the extent plaintiff argues that Sergeant Rosenberg's negative write-up, performance review, work communications, and threat of a demotion constitute allegations of harassment, we disagree. In *Reno v. Baird* (1998) 18 Cal.4th 640, 646-647, the Supreme Court has explicated that such personnel management conduct does not constitute harassment but rather lies solely in the realm of FEHA discrimination claims. There, the Supreme Court approvingly quoted the Court of Appeal, stating: " 'harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification. . . . Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job.' " (*Id.* at pp. 645-646.) The Court stated " 'the Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments,

promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment.' " (*Id.,* at pp. 646-647.) We therefore do not consider allegations of personnel management conduct in analyzing plaintiff's harassment claim.

3. Claim for Failure to Prevent Discrimination, Harassment, and Retaliation Fails for the Same Reasons

Plaintiff's seventh cause of action was for SFPD's failure to prevent discrimination, retaliation, and harassment. An actionable claim for failure to prevent discrimination, harassment, or retaliation depends on a valid claim that the predicate conduct actually occurred. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1021.) "Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289.)

As we have explained, plaintiff failed to allege claims for discrimination, harassment, or retaliation. His failure to prevent such discrimination, harassment, and retaliation claim likewise fails.

4. Plaintiff Failed to Exhaust Administrative Remedies for the Disability-Related Claims

Plaintiff alleges disability discrimination, failure to accommodate his disability (diabetes), and failure to engage in a meaningful interactive process regarding his accommodation. Yet, as defendants point out, plaintiff failed to exhaust his administrative remedies for such claims. Exhaustion of administrative remedies is a jurisdictional prerequisite to bringing a civil action pursuant to FEHA in the trial court. (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613 (*Okoli*).) Because it is a jurisdictional prerequisite, the failure to exhaust administrative remedies supports the sustaining of a demurrer without leave to amend. (See *Page v. Los Angeles County Probation Dept.* (2004) 123 Cal.App.4th 1135, 1141-1144.)

"FEHA creates an administrative agency, the DFEH, whose task it is to receive, investigate and conciliate complaints of unlawful employment discrimination (§§ 12930, 12963 et seq.)." (*Okoli, supra,* 36 Cal.App.4th at p. 1613.) "To exhaust his or her administrative remedies as to a particular act made unlawful by [FEHA], the claimant must specify that act in the administrative complaint, even if the complaint does specify other cognizable wrongful acts." (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724.)

In the second amended complaint, plaintiff alleged that he "exhausted his administrative remedies by filing a complaint with the [DFEH] and receiving his right to sue on April 27, 2016. (See, DFEH complaint and right-to-sue notification, attached as Exhibit 'A.')" Plaintiff attached the right to sue letter and his complaint to the DFEH as Exhibit A to the second amended complaint.

Plaintiff's DFEH complaint made the general allegation that "On or around January 27, 2016, complainant alleges that respondent took the following adverse actions against complainant: Discrimination, Harassment, Retaliation Denied a work environment free of discrimination and/or retaliation, Denied promotion, Other, Subjected to unfounded and false criticism and write-up by a sergeant who had racist motives and behavior, and who in fact was disciplined for racist behavior. Complainant believes respondent committed these actions because of their: Association with a member of a protected class, Disability, Engagement in Protected Activity, Medical Condition - Including cancer or cancer related medical condition or genetic characteristics, Race."

The DFEH complaint then provided detailed allegations about racial discrimination but stated no facts supporting a claim for disability discrimination. The DFEH complaint scarcely touched on the subject of plaintiff's health. It merely stated: "Complainant mentioned during an interview that his health has gone bad due to stress, . . . lack of creating energy and sugar building in the bloodstream and slow process of glucose in his body. Complainant had no previous medical problems and was hired at the SFPD in perfect health. Furthermore, the Complainant now has." The complaint ended in this incomplete sentence.

In sum, the DFEH complaint never expressly raised plaintiff's claim of diabetes disability, plaintiff's request for a shift change to accommodate the diabetes, or the interactive process. Plaintiff's failure to specify acts of disability discrimination in the administrative complaint bars him from bringing a civil suit pursuant to FEHA on such acts. (See *Okoli, supra,* 36 Cal.App.4th at p. 1617 ["Since Okoli's complaint added

claims that were neither like nor reasonably related to his DFEH claim and were not likely to be uncovered in the course of a DFEH investigation, his retaliation claim is barred by the exhaustion of remedies doctrine."].)

Plaintiff argues that his complaint alleges he exhausted his administrative remedies and "[f]or purposes of the demurrer, that allegation must be accepted as true, and the contention by [plaintiff] that he exhausted his administrative remedies fulfills the requirement to plead any cause of action arising under FEHA." We do not quarrel with plaintiff's statement of the general rule that we accept his allegations as true when reviewing a demurrer. However, it is well established that "facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence." (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627; *Bank of New York Mellon v. Citibank, N.A.* (2017) 8 Cal.App.5th 935, 943.) Here, the exhibit to plaintiff's complaint shows that plaintiff did not actually exhaust his administrative remedies for the disability claims. Therefore, the trial court lacked jurisdiction over this aspect of plaintiff's case and properly dismissed these claims.

5. The Court Properly Denied Leave to Amend

We review the decision to deny leave to amend for abuse of discretion. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 971.) When the demurrer "is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Cantu, supra,* 4 Cal.App.4th at p. 880.)

We conclude that the trial court did not abuse its discretion in denying leave to amend. The disability-related claims are barred by the exhaustion doctrine and the exhibit attached to the complaint precludes plaintiff from alleging otherwise. On appeal, plaintiff has provided no explanation as to how he could amend the race-based discrimination, harassment, and retaliation claims to make them viable.

DISPOSITION

We affirm the judgment. Defendants City of San Fernando, San Fernando Police Department, and Irwin Rosenberg are awarded costs on appeal.

RUBIN, Acting P.J.

WE CONCUR:

GRIMES, J.

ROGAN, J.*

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