Filed 4/17/18 Foulks v. County of Los Angeles CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| DEBORAH FOULKS<br><br>Plaintiff and Appellant,<br><br>v.<br><br>COUNTY OF LOS ANGELES et al.,<br><br>Defendants and Respondents. | B277119<br><br>(Los Angeles County Super. Ct. No. BC531838) |

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Alan Goodman, Judge. (Retired Judge of the Los Angeles Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Law Office of Alaba Ajetunmobi, Alaba S. Ajetunmobi, for Plaintiff and Appellant.

Kessel & Associates, Elizabeth M. Kessel and Alexis N. Cirkinyan, for Defendant and Respondent.

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Plaintiff Deborah Foulks appeals from the summary judgment entered in favor of her former employer, the County of Los Angeles (County), and a County staff psychiatrist, Dr. Phani Tumu (collectively, defendants). We reject plaintiff's claim that the trial court abused its discretion in sustaining defendants' objections to most of her exhibits. Reviewing the record de novo, we agree summary judgment was proper and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff began working for the County's Department of Mental Health in 2007 as a patient advocate and peer counselor. By 2013, she held the position of community worker and health navigator. Plaintiff herself was a mental health patient, having been diagnosed with schizophrenia several years before she began working for the County. She received psychiatric treatment during her entire tenure as a County employee. The parties agree plaintiff's last day of work with the County was July 23, 2013.

Plaintiff was hospitalized in a psychiatric facility on July 25, 2013 and discharged from there August 7, 2013. In a letter dated August 16, 2013, the County advised that as a result of plaintiff's absence from work and failure "to submit medical documentation substantiating [her] absence" as requested in the County's July 31, 2013 letter, she was "deemed to have resigned

from [her] position and . . . released from County Service." Plaintiff, who was still hospitalized when the County said it mailed the July 31, 2013 letter, denied ever receiving that communication.

On October 28, 2013, after her separation from County employment, plaintiff filed a dual administrative complaint with the state Department of Fair Employment and Housing (DFEH) and the federal Equal Employment Opportunity Commission (EEOC).[1] DFEH issued a right-to-sue notice the same day; the EEOC rights letter followed on November 25, 2013, and advised plaintiff had 90 days from that date to file a lawsuit.

The administrative complaint checked the boxes for discrimination based on race, sex, age, disability, and retaliation. At the end of the document, plaintiff added she was also discriminated against because she is Christian. In terms of the factual allegations, plaintiff claimed she was "physically and verbally assaulted by" the County's Mental Health director in November 2009 and, as a consequence, transferred to another County facility. In June 2010, two female Hispanic employees called her a "Nappy Haired [Expletive]," and she filed an internal complaint with Human Resources (HR). In August 2012, plaintiff refused to sign a petition calling for the removal of the Mental Health Director, Dr. James Coomes, which prompted a series of intimidations by Tumu. On July 20, 2013, while in Tumu's office to collect recyclable materials, she "found a racially offensive picture of [herself]" and complained once more to HR. Two days later, a female coworker "inappropriately showed [plaintiff] her private area." Plaintiff alleged she was hospitalized July 25,

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[1] Plaintiff filed the administrative complaint under the "'aka" Sweetz O. Skyebluspeaks.

2013, and fired by the County effective August 16, 2013, "while on leave."

Plaintiff timely initiated this lawsuit on December 30, 2013, two months after filing the administrative complaint. Plaintiff, an African-American, contended her termination was racially motivated and in retaliation for her complaints of misconduct against her by other County employees. The operative pleading was the third amended complaint, filed July 22, 2015. It included six causes of action.

The first cause of action for harassment named only Tumu. It was based on the photograph taped to a cabinet in Tumu's office that plaintiff described as depicting her "as a gorilla, pig or monkey" in retaliation for not signing the petition against Dr. Coomes one year earlier. The second through sixth causes of action were against the County alone and also based on the Fair Employment and Housing Act (FEHA): (2) negligent failure to respond to workplace harassment complaints; (3) hostile work environment; (4) racial discrimination, resulting in termination; (5) retaliation, resulting in termination; and (6) failure to provide reasonable accommodations based on race.[2]

Defendants moved for summary judgment or, alternatively, summary adjudication of issues. The parties agreed most of the issues posited by defendants were undisputed. The notable exceptions were the July 31, 2013 letter, the County's compliance with the applicable code provisions to support plaintiff's

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[2] The trial court sustained without leave to amend defendants' challenge on demurrer to plaintiff's claims based on mental disability. Those allegations were not included in the third amended complaint; and on appeal, plaintiff has not challenged the trial court's dismissal of them.

separation from County employment, the identity of the individual depicted in the photograph in Tumu's office, and whether the photograph was "photo-shopped."

## DISCUSSION

### I. Evidentiary Objections

Defendants filed 90 written objections to plaintiff's evidence. As the trial court noted, the first 28 objections were to the separate statement; they were not evidentiary objections and were overruled. The trial court's minutes reflect objections 29 through 51 were directed to plaintiff's exhibits 1 through 21. Defendants cited multiple grounds for each objection. To the extent the objections were directed to plaintiff's exhibit list and the formatting of the exhibits themselves, the trial court clearly and correctly overruled them. But in objections 29 through 51, defendants also asserted exhibits 1 through 21 lacked foundation. The trial court ruled, "'With respect to objections to evidence, plaintiff's counsel improperly authenticate[d] business records: Exhibits 1 [through] 19 . . . and 21.'" The trial court ruled plaintiff's exhibits 20, 22, 23, 24, and 25 were properly authenticated and admissible.

Although the trial court couched its rulings in terms of lack of authentication rather than lack of foundation, we reject plaintiff's assertion the rulings were made sua sponte and without a hearing. The July 1, 2016 hearing on defendants' summary judgment motion was devoted exclusively to the parties' objections.[3]

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[3] On the merits, counsel for each party submitted on the paperwork without argument.

Exhibits 1 through 19 and 21 were County documents produced in discovery. Instead of properly authenticating those discovery documents—as plaintiff did with exhibit 20 (Tumu's interrogatory responses)—plaintiff's counsel simply attached photocopies to his own declaration. This was insufficient to withstand the evidentiary objections. Moreover, plaintiff has neither suggested nor demonstrated prejudice as a result of the trial court's evidentiary rulings. We find no error.

## II. Summary Judgment/Summary Adjudication of Issues

### *A. Applicable Law*

Plaintiff did not prevail in the trial court, and we conduct our de novo review of "the evidence in a light favorable to [her] . . . , liberally construing her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*).) Generally, "[a] defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) The defendant may carry this burden by showing "the plaintiff cannot establish at least one element of the cause of action—for example, that the plaintiff cannot prove element *X*." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).)

FEHA allegations are subject to "two statutory deadlines: [Government Code] section 12960 and [Government Code] section 12965." (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1411 (*Acuna*).) The DFEH administrative complaint must be filed within one year of the alleged wrongful

conduct, although this period may be subject to equitable tolling. (*Id.* at p. 1412*;* Gov. Code, § 12960, subd. (a).) The statute of limitations to file a lawsuit after submission of a DFEH administrative complaint is one year from the date the right-to-sue notice is issued. (Gov. Code, § 12965, subd (d).)

Filing a DFEH administrative complaint and obtaining the agency's notice of the right to sue are "jurisdictional prerequisite[s] to resort to the courts." (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613 (*Okoli*).) Although the failure to exhaust the DFEH "administrative remedy is a jurisdictional, not a procedural, defect" (*ibid.,* internal quotation marks omitted), it may be waived by a defendant's failure to timely raise it (*Keiffer v. Bechtel Corp.* (1998) 65 Cal.App.4th 893, 901) or excused by a court based on equitable considerations. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 813 (*Richards*).)

Plaintiff filed the DFEH administrative complaint on October 28, 2013, after her separation from employment with the County. Accordingly, potentially actionable adverse employment actions and abusive working conditions under FEHA are only those that occurred and existed after October 28, 2012, unless the equitable "continuing violation doctrine" applied to any of plaintiff's claims. (*Richards, supra,* 26 Cal.4th at p. 813; *Yanowitz v. L'Oreal USA Inc.* (2005) 36 Cal.4th 1028, 1056 (*Yanowitz*) ["an employer is liable for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct that occurred within the limitations period"].) Where the DFEH administrative complaint appears untimely "on its face . . . it [is plaintiff's] burden to establish an exception that would deem the administrative complaint to be

timely." (*Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 945.)

With these precepts in mind, we turn to defendants' motion and the supporting and opposing evidence. As noted, defendants moved for summary judgment or, alternatively, summary adjudication of issues. We will analyze the motion and ensuing judgment under the alternative theory, examining the issues and causes of action individually.

### *B. Summary Adjudication of Issues*

"*Issue No. 1: Allegations arising more than one year before plaintiff filed her October 28, 2013 DFEH Complaint and/or which were not included in plaintiff's October 28, 2013 DFEH complaint are barred for failure to timely exhaust administrative remedies under FEHA."*

Defendants correctly note the filing of a DFEH administrative complaint is a jurisdictional prerequisite to the filing of a lawsuit for discrimination, retaliation, and/or harassment. (*Okoli, supra,* 36 Cal.App.4th at p. 1613.) Accordingly, only allegations of misconduct that occurred after October 28, 2012, one year before the DFEH administrative complaint was filed, were actionable unless plaintiff raised a triable issue of fact as to an exception, e.g., the continuing violations doctrine. (*Acuna, supra,* 217 Cal.App.4th at p. 1412.)

But this designated issue itself did not "completely dispose[] of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (§ 437c, subd. (f)(1).) Its utility for our purposes is that facts 1 through 4, 7, 8, and 10 through 15 in

defendant's separate statement, which fairly summarized allegations in the third amended complaint, were not disputed by plaintiff. As this court has previously held, "'A defendant moving for summary judgment may rely on the allegations contained in the plaintiff's complaint, which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues.'" (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324.)

The separate statement for Issue No. 1 included three other evidentiary facts—nos. 5, 6, and 9. Plaintiff agreed with two of them, and they established her last day of work was July 23, 2013, and her DFEH administrative complaint was filed October 28, 2013. Plaintiff disputed only defendants' third evidentiary fact, that she "was deemed to have resigned her employment per Los Angeles County Code Section[s] 5.12.020 and 5.12.030 as of August 16, 2013."

> "*Issue No. 2: Plaintiff's first cause of action for harassment against Dr. Tumu lacks merit because Dr. Tumu did not subject plaintiff to severe or pervasive harassment based on her race or in retaliation for any protected activity.*"

Tumu admittedly was not plaintiff's supervisor.[4] Although the third amended complaint alleged Tumu "started a campaign

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[4] "FEHA imposes two standards of employer liability for . . . harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should

of harassment and intimidation" in August 2012 that became "persistent," plaintiff did not allege in her pleadings that it was ongoing in October 2012. Nor did plaintiff submit evidence in opposition to the summary judgment motion that raised a triable issue of material fact as to a continuing course of harassment by Tumu extending beyond October 28, 2012, to any date within one year of the filing of the DFEH administrative complaint.[5] Accordingly, the continuing violation doctrine did not apply to this aspect of plaintiff's racial harassment claim. (*Yanowitz, supra,* 36 Cal.4th at pp. 1057-1058.)

The single act of harassment allegedly perpetrated by Tumu within the FEHA statute of limitations was his display of the contentious photograph in his office, which plaintiff discovered on July 20, 2013. The parties disputed whether the photograph in Tumu's office was photoshopped and depicted plaintiff or, as defendants suggested, was not photoshopped and depicted another, albeit unidentified, woman.[6]

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have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. ([Gov. Code,] § 12940, subd. (j)(1).) This is a negligence standard. . . . . [B]y implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040-1041.)

[5] Plaintiff's declaration in the clerk's transcript is missing the second page, which would have included paragraphs 1 through 10.

[6] For reasons not apparent from, or explained in, the record, Tumu was not otherwise forthcoming concerning the photograph. Plaintiff submitted Tumu's responses to plaintiff's interrogatories

Although the disagreement presented a fact issue, it was not a material one that precluded summary adjudication of issues on the first cause of action against Tumu. Even if we assume the photocopy depicted plaintiff, we conclude as a matter of law she did not raise a triable issue of material fact for every element of a FEHA harassment and/or hostile work environment. (See *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1040-1041 [trial court assumed allegations of the complaint were true and granted summary judgment for defendant in sexual harassment litigation, finding the alleged statements were neither severe nor pervasive as a matter of law].)

Racial harassment and hurtful and demeaning conduct "have no place in the work environment or in any environment." (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 467 (*Etter*).) The law, however, does not recognize "'zero tolerance' for offensive words and conduct. Rather, the law requires the plaintiff to meet a threshold standard of severity or pervasiveness. [And that standard requires] . . . more than 'occasional, isolated, sporadic, or trivial' acts." (*Ibid.*)

Applying the standard, *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 (*Fisher*) described the elements of a cause of action for harassment as follows: "(1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome . . . harassment; (3) the harassment complained of was based on [plaintiff's belonging to a protected group]; (4) the

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concerning the photograph as exhibit 20 in opposition to the summary judgment motion. Tumu objected to every interrogatory and provided only a few "without waiving the objection" answers, even though a majority of the interrogatories were straightforward and benign.

harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (See also *Harris v. Forklift Sys.* (1993) 510 U.S. 17, 21; *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 67 [To constitute an actionable hostile work environment, the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'"].) "In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, [or] sporadic, . . . rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Fisher, supra,* 214 Cal.App.3d at p. 610.) This standard applies to claims of racial harassment. (*Etter, supra,* 67 Cal.App.4th at pp. 465-466.)

Additionally, to be actionable, race-based "harassment must satisfy an objective and a subjective standard. "'[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"'" (*Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 588.) "[A] plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284.) This objective component "must be assessed from the 'perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.'" (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 264.)

The County met its burden on the motion for summary adjudication of issues to show the first cause of action against Tumu had no merit, thereby shifting the burden to plaintiff to demonstrate a triable issue of material fact existed as to each element. (§ 437c, subd. (p)(2).) To defeat Tumu's motion, plaintiff, as a member of a protected class, was required to raise a triable issue that she "was subjected to unwelcome racial harassment; . . . the harassment was based on race; . . . the harassment unreasonably interfered with [her] work performance by creating an intimidating, hostile, or offensive work environment;" and there was a basis for employer liability. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876.)

The two critical elements here are whether plaintiff raised a triable issue of material fact demonstrating the photograph constituted sufficiently pervasive harassment and satisfied both the subjective and objective standards for a harassment claim. For the first question, we turn to *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142 (*Herberg*).

The issue in *Herberg* was whether an original student work of art on public display at a private, postsecondary fine arts institute that depicted a number of institute employees—including a nude 82-year-old Mary Herberg—engaged in sex acts with other employees was "sufficiently severe or pervasive to alter the conditions of the plaintiffs' employment and create a hostile work environment." (*Herberg, supra,* 101 Cal.App.4th at p. 145.) Ms. Herberg did not see the artwork herself, but her daughter and granddaughter, also institute's employees, did. Ms. Herberg suffered an asthma attack that same day, developed additional health problems, and never returned to her job at the

institute. (*Id.* at pp. 146-147.) She, her daughter, and granddaughter all sued the institute for sexual harassment.

The trial court granted summary judgment for the defendant institute, and the Court of Appeal affirmed. Quoting *Fisher, supra,* 214 Cal.App.3d at pages 609-610, the appellate panel held it must examine the "'totality of the circumstances'" to determine whether "'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.'" (*Herberg, supra,* 101 Cal.App.4th at p. 150.) Factors in that analysis included "(1) the nature of the unwelcome . . . acts or words . . . ; (2) the frequency of the offensive acts or encounters; (3) the total number of days over which all the offensive conduct occurred; and (4) the context in which the . . . harassing conduct occurred." (*Ibid.*) When a single act of harassment is alleged, "'it must be severe in the extreme.'" (*Id.* at p. 151.)

Also instructive is *Bennett v. Corroon & Black Corp.* (5th Cir.1988) 845 F.2d 104, a Fifth Circuit Court of Appeals opinion cited in *Herberg*. The *Bennett* plaintiff sued after learning "obscene cartoons bearing her name [had been] posted in the public men's room" at her workplace, where they were viewed by other employees and clients. (*Id.* at p. 105.) The Court of Appeals concluded, "Any reasonable person would have to regard these cartoons as highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse. This is a perfect matrix to grow the hostile environment subjecting a woman to the discriminatory intimidation, ridicule, and insult which Title VII protects against." (*Id.* at p. 106.) Nonetheless,

the reviewing court affirmed summary judgment in the employer's favor, finding as a matter of law the cartoons were not "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive environment.'" (*Ibid.*)

That is the conclusion we reach here. The only photograph in the record before us is of poor quality. When taped to the cabinet in Tumu's office, it did not bear plaintiff's name and there was no evidence anyone other than plaintiff herself believed it was a distorted photograph of her. Although the photograph was in an office in a public building, it was not on display in a common public area. Plaintiff presented evidence of her subjective perceptions, but failed to raise a triable issue of material fact as to the objective component. As a matter of law, the photograph did not meet the threshold standard of severe or pervasive harassment.

> *"Issue No. 3: Plaintiff's second cause of action against the County for negligent failure to adequately respond to harassment lacks merit because plaintiff was not subject to any actionable harassment and in any event, County conducted full investigation regarding plaintiff's claims."*

Government Code section 12940, subdivision (j)(1) provides in part, "Harassment of an employee . . . shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. . . . An entity shall take all reasonable steps to prevent harassment from occurring. . . ." According to the second

cause of action in the third amended complaint, plaintiff was subjected to race-based harassment and hostile working conditions over an almost five-year period, from November 2009 to July 2013. She alleged the County knew of the harassment and hostile working conditions because she reported 11 harassing events, all at the time they occurred. Nevertheless, the County failed to "adequately train its supervisory employees to properly respond to complaints of harassment [and] racial discrimination" or "take appropriate remedial action once it knew or should have known that its employees were mishandling complaints of harassment [and racial discrimination."[7]

Plaintiff's DFEH administrative complaint, however, documented only one internal report in June 2010 and another in July 2013. It did not fault the County for failing to appropriately and promptly investigate either of them. The DFEH administrative complaint did not mention the nine additional harassment reports plaintiff detailed in the lawsuit, although the administrative filing did note the 2009 incident that resulted in the granting of her request for a transfer to another facility and the July 22, 2013 incident where a female coworker flashed her "private area."

The June 2010 internal complaint predated the actionable FEHA time period by more than two years; there was no triable issue of material fact concerning that report. Plaintiff failed to exhaust her administrative remedies as to the nine harassment

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[7] Although plaintiff labeled this as a negligence cause of action, it necessarily sought redress under FEHA. A common-law negligence theory pursuant to which plaintiff sought damages would have required her to file a Government Claims Act claim. (Gov. Code, §§ 905, 945.4.)

reports she omitted from the DFEH administrative complaint; the trial court had no jurisdiction to consider them. (*Okoli, supra,* 36 Cal.App.4th at p. 1613.) The July 2013 complaint concerning the photograph in Tumu's office was within the actionable period and timely reported in the DFEH administrative complaint. But plaintiff's opposition to the summary judgment motion admitted the County's Equity Oversight Panel "conducted a confidential investigation into [p]laintiff's DFEH charge, and . . . each of [p]laintiff's allegations were unsubstantiated, including, without limitation, that Dr. Tumu engaged in any conduct toward plaintiff which was motivated by any discriminatory or retaliatory animus [or] that [a coworker] showed plaintiff her private parts."

We have determined as a matter of law that, accepting plaintiff's allegations as true, the photograph did not constitute severe or pervasive harassment. For the same reasons, accepting that the flashing incident occurred, it also did not constitute severe or pervasive harassment. As a matter of law, plaintiff was not subjected to any actionable racial harassment by Tumu or the female coworker, and summary adjudication was properly granted in the County's favor on the second cause of action.

> *"Issue No. 4: Plaintiff's third cause of action against County for offensive and hostile work environment lacks merit because it is duplicative of her first and second cause[s] of action and because plaintiff was not subject to any actionable harassment."*

The third cause of action in the third amended complaint expressly sought redress under FEHA. For the reasons discussed above in connection with Issue No. 3, the County was also entitled to judgment on this cause of action as a matter of law.

> "*Issue No. 5: Plaintiff was not 'terminated' because of her race, or in retaliation for protected activity, and therefore her fourth and fifth causes of action for discrimination and retaliation, respectively, lack merit."*

In the fourth and fifth causes of action of the third amended complaint, plaintiff alleged her termination was based on racial discrimination and retaliation. The County moved for summary adjudication of issues as to these two causes of action without directly addressing plaintiff's discrimination and retaliation claims. Instead, the County presented evidence that plaintiff's separation from employment was based on the undisputed evidence that she was "absent from work without authorization from . . . July 25, 2013 to . . . August 16, 201[3]." Plaintiff also did not dispute that the employment separation "letter outlined the history of [p]laintiff's unexcused absence, the County's request for documentation,, Los Angeles County Code

Section 5.12.020 and 5.12.030, [and] how [p]laintiff can request reinstatement."

As the Supreme Court has held, an employer's "true reasons [for terminating an employee] need not necessarily [be] wise or correct. [Citations.] 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*. Thus, "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*." (*Guz v. Bechtel National In*c. (2000) 24 Cal.4th 317, 358.)

The County's evidence included the declaration of Susan Moser, HR manager for the County's Department of Mental Health. It demonstrated a legitimate reason for plaintiff's termination—plaintiff's unexplained absence from work for three weeks—"which, if true, would thus preclude a finding *of discrimination*." (*Guz, supra,* 24 Cal.4th at p. 358.) The declaration was sufficient to shift the burden to plaintiff to raise a triable issue of fact in rebuttal, but plaintiff proffered no opposing evidence. (Code Civ. Proc., § 437c, subd. (p)(2).) Instead, her response to the County's statement of undisputed facts did not dispute the pertinent statements. And neither she nor her daughters averred in their declarations under penalty of perjury that they ever submitted to the County medical documentation for her absence from work.[8] The County was

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[8] Pursuant to our request at oral argument, the County's attorney confirmed the July 31, 2013 letter was not included in the record. Plaintiff's appellate arguments concerning the letter were not fully developed (*Benach v. County of Los Angeles* (2007)

entitled to judgment on the fourth and fifth causes of action as a matter of law.

> "*Issue No. 6: Plaintiff's fourth and fifth causes of action for employment discrimination and retaliation, respectively, lack merit for the additional reason that plaintiff concedes she is unable to work due to her mental health problems.*"

As we have already determined the County was entitled to summary adjudication of the fourth and fifth causes of action, this issue is moot.

> "*Issue No. 7: Plaintiff's sixth cause of action for failure to provide reasonable accommodation in violation of FEHA lacks merit because A) plaintiff failed to timely exhaust her administrative remedies and B) plaintiff's request for [accommodation] in the form of a transfer on August 12, 2012 was based on her race, which is not for reasonable [accommodation].*"

Plaintiff's sixth cause of action failed as a matter of law. Her DFEH administrative complaint did not charge the County

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149 Cal.App.4th 836, 852) and could not overcome the lack of admissible evidence to raise a triable issue of material fact. (*Aguilar, supra,* 25 Cal.4th at p. 856; Code Civ. Proc., § 437c, subd. (c).)

with failing to provide her with a reasonable accommodation. On that basis, plaintiff did not exhaust her administrative remedies. Even if the DFEH administrative complaint included that allegation, however, the claim was not actionable as a matter of law. FEHA provides an employee is entitled to a "reasonable accommodation for [her] known physical or mental disability." (Gov. Code, § 12940, subd. (m)(1).) FEHA does not provide for reasonable accommodations based on an employee's race. (See, e.g., *Wallace v. County of Stanislaus* (2016) 245 Cal.App,4th 109, 122 [a disability discrimination claim is "fundamentally different from the discrimination claims based on the other factors listed in [Government Code]section 12940, subdivision (a)"].) Summary adjudication in the County's favor on plaintiff's sixth cause of action was properly granted.

## DISPOSITION

The judgment in favor of defendants Tumu and the County is affirmed. Defendants are awarded costs on appeal.

DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, 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.