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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

LESLI ANN MCCLUNG, Plaintiff and Appellant, v. EMPLOYMENT DEVELOPMENT DEPARTMENT et al., Defendants and Respondents.	C034110 (Super. Ct. No. 98AS00092)

APPEAL from a judgment of the Superior Court of Sacramento County, Joe S. Gray, J. Affirmed in part and reversed in part.

Guy D. Loranger for Plaintiff and Appellant.

Bill Lockyer, Attorney General, James M. Schiavenza, Lead Supervising Deputy Attorney General, Louis R. Mauro, Supervising Deputy Attorney General, Barton R. Jenks and Diana L. Cuomo, Deputy Attorneys General, for Defendant and Respondent Employment Development Department.

Matheny, Sears, Linkert & Long, Michael A. Bishop and Roger Yang, for Defendant and Respondent Manuel Lopez.

Plaintiff Lesli Ann McClung (McClung) worked as an auditor for defendant Employment Development Department (EDD) in Sacramento. On a trip to San Diego to conduct an audit, another

EDD auditor, defendant Manuel Lopez (Lopez), made sexual remarks to her and groped her thigh. McClung sued EDD and Lopez, alleging claims of hostile work environment and failure to remedy a hostile work environment under the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.[1]) (FEHA), as well as a common law claim for intentional infliction of emotional distress. The trial court granted summary judgment for defendants.

We shall affirm the judgment for EDD, but shall reverse the judgment for Lopez.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *EDD auditors and EDD organization*

McClung and Lopez were coworkers in the EDD division that audits departmental programs -- such as the program that distributes unemployment insurance -- to verify compliance with federal and state requirements and to identify opportunities for improvement. They had the same job classification, associate management auditor.

EDD auditors work in units managed by an administrative supervisor. The units are organized into sections supervised by a section chief. Above sections are divisions under a division chief, and above divisions are branches headed by a branch chief. Thus, McClung and Lopez worked in a unit of an audit

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[1] Unless otherwise designated, all further statutory references are to the Government Code.

section within the Audit and Evaluation Division of the Program Review Branch.

EDD auditors work on auditing "projects." When a project arises, the Audit and Evaluation Division chief consults with the section chiefs regarding the nature of the project, its complexity and duration, and the number of staff required. The section chiefs in turn consult with the administrative supervisors. Management decides what staff auditors will be assigned to the project. An audit plan is developed for each project. Some audits require extended travel outside Sacramento.

Each project has a project supervisor, who directs and manages the auditing project and supervises the auditing team. EDD auditors therefore have two supervisors, an administrative supervisor who manages their unit and a project supervisor who supervises the particular project they are working on (though both roles can be filled by the same supervisor).

B. *Lunch invitations*

Lopez's interaction with McClung began with two lunch invitations. In September 1996, Lopez invited McClung out to lunch on an upcoming Friday. She initially accepted but cancelled on the appointed day, because she felt Lopez was making too much of the occasion. Lopez appeared to McClung to be angry at the rejection.

A couple of weeks later, in early October 1996, Lopez suggested lunch in advance of another Friday. McClung's response was equivocal, but, growing nervous that Lopez would

ask her again, she sent him an e-mail on October 18, 1996: "Manny – I need to be honest with you. I'm sure you didn't mean to, but your lunch invitations have made me really uncomfortable. It appears that I upset you when I turn them down, and so I would prefer that you not ask me again. I do not wish to be unfriendly to you, but as with any colleagues, I would prefer to keep a professional, business-only relationship. I enjoy your office friendship and don't want this misunderstanding to interfere. Thanks."

McClung copied the message to her project supervisor, Marilyn Pruitt (Pruitt), and also to either her administrative supervisor, Paul Yee, or her section chief, Forrest Boomer. Lopez sent a return message: "It's okay. Don't lose sleep over it." The following week McClung asked Pruitt what she thought of McClung's message to Lopez. Pruitt said that "men need to ask women out to lunch sometimes" and "[i]t makes them feel good," a response McClung found unsupportive.

McClung, however, did not ask Pruitt to take any further action. McClung later found out that Pruitt had spoken to Lopez about the message. Lopez did not invite McClung to lunch again.

McClung did not regard Lopez's lunch invitations as sexual harassment: it was just an uncomfortable situation that she wanted to stop.

C. *Lopez as lead auditor of the San Diego audit*

In January 1997, Pruitt was looking for an auditor to work as a temporary replacement on an ongoing project in San Diego. Pruitt asked McClung, who said she was happy to go because she

was not as busy as usual. McClung's policy was to accept any assignment management gave her.

McClung knew when she accepted the assignment that Lopez was a member of the audit team. Despite her prior experience with Lopez, McClung did not feel uncomfortable about the situation.

Lopez was the "lead auditor" on the San Diego project. The lead auditor is usually the most experienced auditor on a project team. McClung herself had acted as a lead auditor on a project.

With the assistance and approval of the project supervisor, a lead auditor formulates an audit plan and instructs the other auditors about their jobs and responsibilities. The lead auditor implements the audit plan, ensures the audit is conducted according to the plan, and is the liaison with the project supervisor regarding the progress and completion of the audit. In sum, a lead auditor is the most experienced auditor on a team who guides the team to completion of the audit. The relationship between a lead auditor and a non-lead auditor is essentially that of coemployees, but the lead is conferred with authority to head up the project.

A lead auditor has no authority over the compensation, benefits, or terms of employment of the auditors on the team, and does not evaluate their performance. Project supervisors, by contrast, have the authority to discipline auditors on the team, including the lead auditor, and review and evaluate their work.

On the San Diego project, Lopez, like McClung, was supervised by Pruitt, the project supervisor. Lopez guided McClung on the project, but he could not make decisions without the project supervisor's approval. Lopez could not remove McClung from the audit team. If Lopez had any concerns about McClung's performance, he would have had to address them with Pruitt. The only responsibilities Lopez had that McClung did not involved ensuring the audit plan was implemented correctly.

McClung, nonetheless, testified that Lopez was an "on-site supervisor while in the field."

D. *The trip to San Diego*

On Monday, January 13, 1997, McClung and Lopez traveled to San Diego, worked on the audit, and returned to Sacramento on Thursday, January 16, 1997. It was on this trip that the conduct at the heart of this case took place.

On Monday, January 13, as they were getting on the plane, Lopez asked McClung if she was glad she came. Driving from the San Diego airport, Lopez brought up his divorce and asked McClung if she had ever been married. At lunch, Lopez told McClung he thought she was cute. Later that day, while touring a facility, Lopez three times put his hand on McClung's lower back just above her buttocks to guide her through a doorway, until she stopped short the third time to indicate her displeasure. At dinner, Lopez asked McClung what was the difference between their having dinner and the earlier lunch invitations, saying, "This is much more serious." Driving back to the hotel after dinner, McClung wanted to buy a bottle of

wine to drink in her room over the week, but Lopez insisted on paying for it, and they ended up sharing it in the hotel lobby. While doing so, Lopez said next time they should drink a bottle of wine in one of their hotel rooms and watch television, but "no monkey business."[2]

On Tuesday, January 14, while driving to dinner, Lopez and McClung drove past a nude dancing establishment and Lopez suggested they have dinner there. McClung declined. Lopez said, "Men have urges, and I'm sure women do, too." After dinner elsewhere, Lopez repeatedly suggested they get another bottle of wine.

On Wednesday, January 15, at lunch, Lopez said, "I'm a Latin lover," and asked, "You don't like oral sex, is that your problem?"

That evening, Lopez and McClung went for dinner and drinks at a restaurant and blues club, sitting at the bar. During the evening, Lopez asked McClung if she knew what cunnilingus and fellatio were. He asked, "How are you in bed?" With Lopez seated to her left, McClung talked to a man on her right. Lopez asked McClung about her dating life. Later, McClung felt Lopez put his hand on her left knee, slide it up to her thigh, squeeze, and then take his hand away. McClung decided to pretend this had not happened. While driving back to the hotel,

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[2] Although we do not detail her responses, throughout the trip, McClung discouraged all the sex-related comments Lopez made.

Lopez asked, "Did you want to fuck that guy sitting next to you?"

At the hotel, Lopez called McClung in her room and asked to talk about the situation in one of their rooms. McClung said no, but later changed her mind, went to Lopez's room, and berated him for his conduct. Lopez said, "Fine. You go back and tell [acting chief of audits, Gary Bogolea] and [project supervisor, Pruitt] about this, and I'm out of there." Lopez also asked, "What is going to happen when your looks are gone?" He again said, "Did you want to bring that guy home [from the restaurant] and fuck him?"

E. *Complaint and investigation*

On Tuesday, January 21, 1997, McClung's next day at work after returning from San Diego, she told her section chief, Forrest Boomer, she had been sexually harassed, describing some of Lopez's comments. Boomer arranged a meeting that afternoon with division chief of evaluations, John Billington. At the meeting, McClung told Billington and Boomer what had happened. Billington asked McClung to write a summary of the events. McClung asked Billington to take her off the San Diego audit, and he agreed. She also asked that Lopez's workstation be moved because she was uncomfortable with him near her. His workstation was approximately 15 to 20 feet from McClung's, directly across the hall. Billington said, "[W]e'll have to look into that," and told her to complete the summary.

The EDD has an Equal Employment Opportunity Office (EEO Office) whose employees internally investigate sexual harassment

complaints. At the January 21 meeting, Billington told McClung she could file a complaint with the EEO Office but she declined.

After McClung completed the summary, Billington met with Pruitt, Pruitt's section chief, and McClung's administrative supervisor, Yee. Billington gave the summary to Pruitt and Yee and instructed them to investigate. The EEO Office, however, took over the investigation and contacted McClung. On January 23, 1997, two days after reporting Lopez's conduct to Boomer, McClung filed a written complaint with the EEO Office.

In the complaint, McClung requested as a "corrective action/remedy" that (1) documentation of the EEO Office's findings be placed in Lopez's file; (2) Lopez's workstation be relocated away from hers; and (3) she have no future assignments with Lopez.

Olivia Fonseca, chief of the EEO Office, reviewed the complaint and assigned an investigator. Fonseca also met with EDD management, including Billington, Bogolea, and chief deputy director, Michael Tritz, a few days later at Tritz's request. Tritz discussed the complaint and what management should be doing. Tritz also said he had heard McClung previously had had relationships with coworkers and had made a sexual harassment complaint involving comments and conduct that seemed unlikely to Tritz, based on his knowledge of the person named as a harasser.

Tritz said he himself had been involved in an incident where McClung had made a complaint. She reported to her manager that Tritz was coercing employees to vote for Governor Wilson in the 1994 gubernatorial election. This turned out to be a

misunderstanding by McClung of office banter on election day, and she acknowledged in a meeting with Tritz and her manager that her conclusion was foolish. Based on these two incidents, Tritz questioned McClung's credibility.

The EEO Office sent letters to McClung and Lopez on Thursday, February 6, 1997, stating that it would conduct an investigation of McClung's complaint. On Monday, February 10, 1997, Lopez told Pruitt he was retiring immediately.

The EDD did not relocate Lopez's workstation in the Sacramento office away from McClung's vicinity prior to his retirement. The record, however, while not clear, indicates Lopez was not in the EDD's Sacramento office the entire time. During part of that period, he attended a two-day training class in Rancho Cordova and later continued the audit in San Diego during his final week with the EDD.

Lopez was in the office at least for the week of January 27-30, 1997, because he cancelled the audit that week, based on his view that the replacement auditor for McClung was insufficiently experienced. This action, however, caused Pruitt to counsel him about exceeding his authority. Pruitt met with Lopez on January 27 and explained he did not have authority as lead auditor to cancel field work or assign staff, which were management decisions.

McClung experienced an uncomfortable environment at work in the EDD's Sacramento office because Lopez had not been relocated prior to his retirement. McClung felt nervous when other employees spoke to her in the office in a lighthearted manner,

or asked about her social life, fearing that Lopez would overhear the conversation and become angry. McClung signaled to people to keep their voices down during such conversations. McClung described the circumstances as "three weeks of nerves, and inability to concentrate, paranoia, fear of being overheard by Mr. Lopez having discussions with people about everything and what had happened in San Diego because that was between management and myself and [the] EEO [Office] alone at this point."

Following Lopez's retirement, the EEO Office went forward with the investigation, interviewing multiple witnesses, including McClung and the bartender at the San Diego restaurant (who did not overhear the conversation between Lopez and McClung but confirmed that she did not appear to welcome his attentions). Lopez did not respond to repeated efforts by telephone and certified mail to contact him so that he could be interviewed.

During the investigation, there were rumors circulating in the EDD office about the case, including that McClung had previously had relationships with coworkers. McClung reported to Fonseca that the rumors made her feel isolated from her coworkers and stressed. Fonseca discussed with McClung the need to maintain confidentiality and reassured her that EEO Office employees were not divulging information or compromising confidentiality. McClung, nonetheless, discussed with coworkers her sexual harassment complaint against Lopez, her past complaints, and the rumors circulating about her, and also

showed her summary of the events to a coworker. Fonseca received a telephone call from chief deputy director Tritz saying that he wanted “closure” because of the rumors.

During the investigation, the EEO Office received telephone calls from EDD employees making comments about both Lopez and McClung. Some people provided information that portrayed McClung in a negative light. Fonseca informed Billington of the calls and stated that the people making these calls would probably be interviewed during the investigation. Seven coworkers were interviewed during the investigation as character witnesses. All indicated that Lopez was quiet, stayed to himself, and did not display harassing or inappropriate behavior, and that McClung was friendly and liked to interact with peers. All said that Lopez and McClung were excellent workers and it was surprising to hear of the complaint.

On May 28, 1997, the EEO Office issued a report of findings that supported McClung’s charges of touching and conversation related to sex. The EEO Office recommended that a letter regarding its findings be placed in Lopez’s file, as McClung requested. The EEO Office found that McClung’s “request regarding work assignment and seating arrangement is not a factor” because of Lopez’s retirement.

Overall, McClung said she was satisfied with this decision: the EEO Office had recommended what she asked for in her complaint, given that Lopez was no longer employed by the EDD and there was no further action that could be taken against him.

The EDD advised McClung of her right to appeal the recommendation to the State Personnel Board, but she did not.

The EDD sent a letter to Lopez dated July 1, 1997, stating that "there is evidence that you pursued sexually related conversations and touched Ms. Leslie [*sic*] McClung inappropriately," and placed the letter in his personnel file in the event he sought to return to state employment.

F. *Court proceeding*

McClung filed suit in superior court alleging hostile work environment and failure to remedy harassment claims under FEHA, and a third claim for intentional infliction of emotional distress. She alleged that she had complied with the administrative requirements of FEHA by receiving "right-to-sue" letters against EDD and Lopez. (See § 12965, subd. (b).)

EDD and Lopez each moved for summary judgment, or, alternatively, summary adjudication of issues. The trial court granted both motions and entered judgment for defendants. McClung filed a timely appeal from the judgment.

II

DISCUSSION

A. *Standard of review*

"Under summary judgment law, any party to an action, whether plaintiff or defendant, 'may move' the court 'for summary judgment' in his favor on a cause of action (i.e., claim) or defense (Code Civ. Proc., § 437c, subd. (a)) -- a plaintiff 'contend[ing] . . . that there is no defense to the action,' a defendant 'contend[ing] that the action has no merit'

(*ibid*.). The court must 'grant[]' the 'motion' 'if all the papers submitted show' that 'there is no triable issue as to any material fact' (*id*., § 437c, subd. (c)) -— that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law (see *Riverside County Community Facilities Dist. v. Bainbridge 17* (1999) 77 Cal.App.4th 644, 653; *Kelly v. First Astri Corp.* (1999) 72 Cal.App.4th 462, 470) -- and that the 'moving party is entitled to a judgment as a matter of law' (Code Civ. Proc., § 437c, subd. (c)). The moving party must 'support[]' the 'motion' with evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' (*Id*., § 437c, subd. (b).) Likewise, any adverse party may oppose the motion, and, 'where appropriate,' must present evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' (*Ibid*.) An adverse party who chooses to oppose the motion must be allowed a reasonable opportunity to do so. (*Id*., § 437c, subd. (h).) In ruling on the motion, the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom (*id*., § 437c, subd. (c)), and must view such evidence (e.g., *Molko v. Holy Spirit Assn*. [(1988) 46 Cal.3d 1092,] 1107; *Stationers Corp. v. Dun & Bradstreet, Inc*. (1965) 62 Cal.2d 412, 417) and such inferences (see, e.g., *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1520 [review on appeal];

Ales-Peratis Foods Internat., Inc. v. American Can Co. (1985) 164 Cal.App.3d 277, 280, fn. * [same]), in the light most favorable to the opposing party. [¶] . . . [¶]

"[I]n moving for summary judgment, a 'defendant . . . has met' his 'burden of showing that a cause of action has no merit if' he 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' (Code Civ. Proc., § 437c, subd. (o)(2).) [¶] . . . [¶]

"There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. [¶] . . . [¶]

"Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not -— otherwise, he would not be entitled to judgment *as a matter of law*, but would have to present his evidence to a trier

of fact. By contrast, if a defendant moves for summary judgment against such a plaintiff, he must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not -- otherwise, *he* would not be entitled to judgment as a matter of law, but would have to present *his* evidence to a trier of fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 849, 850, 851, italics in original, fns. omitted.)

"On appeal, we review the record de novo to determine whether the moving party met its burden of proof." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.) We consider "'all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence.'" (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.)

B. *FEHA claims*

McClung argues that the trial court erred in granting summary adjudication for defendants on her two FEHA claims, because triable issues of fact exist as to: (1) "whether Lopez had supervisorial authority of McClung when he harassed her"; and (2) "whether the EDD took immediate and effective remedial action to remedy the hostile work environment." We disagree and affirm the judgment for EDD on these claims. However, we reverse summary adjudication for Lopez on the hostile work environment claim, because an amendment to FEHA (§ 12940, subd.

(j)(3)) operates retrospectively to impose liability on nonsupervisory coworkers who perpetrate sexual harassment.[3]

1. *Hostile work environment*

a. *Supervisor liability*

McClung contends that the evidence "clearly at least creates a triable issue of fact with regard to whether Lopez acted as one of McClung's supervisor [*sic*] when he harassed her." Characterizing Lopez's role is critical, because under FEHA and California case law, employers are strictly liable for the harassing conduct of supervisors, even though the employer did not know, and did not have reason to know, of the conduct. (See former § 12940, subd. (h)(1), now subd. (j)(1); *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 1136 (*Carrisales*) ["Section 12940(h)(1) makes the employer strictly liable for harassment by an agent or supervisor, but liable for harassment by others only if the employer fails to take immediate and appropriate corrective action when reasonably made aware of the conduct"]; *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1046 (*Capital Cities*) [under FEHA's harassment provision, "characterizing the employment status of the harasser is very significant"].) We conclude Lopez did not exercise supervisory authority in his role as "lead auditor" on the San Diego project.

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[3] We requested and received supplemental briefing on the application of section 12940, subdivision (j)(3), to this appeal. (§ 68081.)

The California authority on this issue is limited but not non-existent. In *Matthews v. Superior Court* (1995) 34 Cal.App.4th 598, 599-600, 605-606 (*Matthews*), the court articulated the attributes of supervisorial authority under the FEHA in finding a supervisor personally liable for harassing conduct. The *Matthews* court said "harassment perpetrated by a supervisor with the power to hire, fire and control the victimized employee's working conditions is a particularly personal form of the type of discrimination which the Legislature sought to proscribe when it enacted the FEHA." (*Id.* at pp. 605-606.) The court thus indicated that the basic attributes of supervisory status are the power to hire, fire, and control the working conditions of other employees. (*Ibid.*)

In *Capital Cities, supra,* the court undertook to define the term "supervisor" for purposes of strict liability under FEHA. Since the statute itself did not define the term, the court turned to other sources: "Black's Law Dictionary (6th ed. 1990) page 1438, column 2 first defines a supervisor as 'one having authority over others, to superintend and direct' and then repeats the definition in the National Labor Relations Act which parallels the definition in the California Agricultural Labor Relations Act. That statutory definition recites that a supervisor is 'any individual having authority, in the interest of the employer, to hire, . . . assign [or] reward . . . other employees . . . .' (29 U.S.C. § 152(11); Lab. Code, § 1140.4, subd. (j).)" (*Capital Cities, supra,* 50 Cal.App.4th at pp. 1046-1047.)

As it happens, the Legislature amended FEHA in 1999 to adopt the California Agricultural Relations Act definition of "supervisor." (See Stats. 1999, ch. 591, §§ 5.1, p. 11; Stats. 1999, ch. 592, §§ 3.7, p. 16; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1670 (1999-2000 Reg. Sess.) as amended Sept. 3, 1999, p. 2.)

Section 12926, subdivision (r), of FEHA, as amended, now provides: "'Supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The Legislative Counsel's Digest for Assembly Bill No. 1670 states the "bill would provide that the definition of 'supervisor' that it would add is declaratory of existing law." (Legis. Counsel's Dig., Assem. Bill No. 1670 (1999-2000 Reg. Sess.) Stats. 1999, ch. 591, Summary Dig., p. 2.) We need not decide whether the 1999 amendment operates retrospectively (an issue, however, we do consider regarding the personal liability amendment to FEHA, see section II.B.1.b., *post*), because of the

preexisting application of this definition by the court in *Capital Cities.*[4]

There is no evidence that Lopez had the power to hire or fire McClung, or control her working conditions. Rather, EDD submitted evidence we find to be uncontradicted that Lopez had no authority over the compensation or terms of employment of the auditors on the San Diego team, did not evaluate their performance or discipline them, and could not assign them to or remove them from the team.

One court, construing the Agricultural Labor Relations Act definition of "supervisor" now found in section 12926, subdivision (r), found that an employee was not deemed a supervisor merely by virtue of a limited responsibility to direct other employees. In *Babbitt Engineering & Machinery v. Agricultural Labor Relations Bd.* (1984) 152 Cal.App.3d 310, 327-328, the court held that an employee at a nursery business with no power to hire and fire other employees, who worked under the direction of a person with such authority, and whose only job function with indicia of supervision involved supervising the loading of plants, had no supervisory authority. Lopez as a lead auditor played a similar role to the employee in *Babbitt*,

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[4] McClung urges us to employ a similar definition of "supervisory employee" found in section 3513, subdivision (g), of the Meyers-Milias-Brown Act (§ 3500 et seq.), governing public employee unions for local entities. McClung offers no authority for applying this definition to FEHA.

albeit with respect to a more sophisticated task. The result, however, is the same: Lopez lacked supervisory authority.

The evidence shows Lopez's function as lead auditor centered around the audit plan: he helped formulate it, he was to ensure it was implemented and the audit was conducted according to the plan, he guided the team to completion of the audit, he instructed the other auditors what their responsibilities were, and acted as liaison to the project supervisor, reporting on the progress of the audit towards completion. In short, *the audit plan* via Lopez directed the activities of auditors on the team.

Moreover, Lopez did not exercise his narrow authority independently. Lopez could not make decisions without Pruitt's approval. Indeed, a supervisor whose function is to supervise particular audit projects would be unnecessary, if the lead auditor could direct the team independently.

It is significant that Lopez and McClung had the same job classification and both had acted as lead auditors. Who takes on the role of lead auditor for a particular audit thus is essentially a question of seniority. The most senior auditor is designated lead auditor and has the narrow additional responsibilities of keeping the audit going according to the plan and reporting on progress to the project supervisor. This cannot be enough to promote an employee to the position of supervisor over coworkers of the same or similar job classification, lest every senior employee be transformed into the supervisor of every coequal employee he or she guides on the

job. (See *Lamb v. Household Credit Services* (N.D. Cal. 1997) 956 F.Supp. 1511, 1517 ["just because one employee holds a more senior position than another does not necessarily qualify him or her as supervisor or manager whose knowledge or acts can be imputed to the employer"].)

The narrow scope of Lopez's authority was illustrated by management's immediate response to his exceeding it. For the week after his trip to San Diego with McClung, Lopez cancelled fieldwork in San Diego without consulting Pruitt, based on his view that McClung's replacement lacked the requisite experience. Pruitt promptly counseled Lopez, explaining he did not have authority to cancel fieldwork or to assign staff. He could express his views, but these were management decisions.

We conclude Lopez as lead auditor did not have the requisite authority to direct McClung based on his independent judgment, sufficient to be her supervisor. Rather, Lopez worked under the direction of Pruitt and others in EDD management, just as McClung did.

McClung, however, testified Lopez as lead auditor was "an on-site supervisor while in the field." This conclusory statement is insufficient to create a triable issue of fact, in the face of the extensive evidence to the contrary that we have detailed. (See *Lamb v. Household Credit Services*, *supra*, 956 F.Supp. at p. 1517 [granting summary judgment to plaintiff employer in hostile work environment case, court said plaintiff assistant fraud investigator's attribution of "pseudo-title" of "'work flow supervisor'" to senior fraud investigator could not

trump uncontroverted facts showing senior employee had no discretionary control over terms and conditions of plaintiff's employment].)

McClung attempts to bolster her bare testimony with documentary evidence we conclude cannot be considered on appeal. In opposition to summary judgment, McClung submitted two excerpts of documents obtained in discovery, which she designated as exhibits 3 and 4. Exhibit 3 consisted of two pages of an unidentified document, headed "Supervisor vs. Leadworker Responsibilities," and exhibit 4 was a similar three-page excerpt bearing the headings "Leadperson," "Leadworker Responsibilities," and "Suggestions for Accomplishing Responsibilities." (Capitalization and underscoring omitted.)

In what may well have been oversight, EDD filed a written objection to exhibit 3 only, on the ground that the "documents" were unauthenticated, lacked foundation, and constituted hearsay. Lopez raised similar objections but to *both* exhibits 3 and 4. The trial court sustained these objections. McClung does not challenge these rulings on appeal. Therefore, we ordinarily could consider only exhibit 4 only against EDD on appeal. (*Artiglio v. Corning Inc., supra,* 18 Cal.4th at p. 612.)

As it happens, McClung still cannot rely on exhibit 4, because the excerpt is irrelevant on its face. Even where the trial court has not sustained an objection to evidence, "it is presumed that the trial court did not consider irrelevant or incompetent evidence." (*Wyckoff v. State of California* (2001)

90 Cal.App.4th 45, 57; *Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 864.)

Exhibit 4 states that a "leadperson is a working leader" who "performs task substantially similar . . . as the employees under his/her leadership." McClung claims that EDD admitted in interrogatory responses that Lopez was a "'working leader'" and, as such, had "'employees under his leadership.'" McClung, however, did not submit these responses as evidence in opposition to summary judgment (see Code Civ. Proc., § 437c, subd. (b)), so there is no evidence to support her attempt to equate "leadperson" with "lead auditor."

More significantly, the excerpt on its face refers to matters having nothing to do with an audit conducted by EDD. In particular, the excerpt offers the following as one of a number of "SUGGESTIONS FOR ACCOMPLISHING RESPONSIBILITIES: [¶] . . . [¶] Continually ask, 'Does this decision help achieve the goals and objectives of this program and is it aligned with the vision, values, and the principles of *Caltrans*?'" (Italics added.) We are hard pressed to understand (and McClung does not explain) how continually focusing on Caltrans's objectives will aid EDD in completing its audits. We also note that nowhere in the excerpt is there any mention of EDD, an audit, or a lead auditor. Since there is noting to link this excerpt and the functions of EDD's lead auditors, and the document itself refers to another agency, exhibit 4 is irrelevant and we will not consider it. (Evid. Code, §§ 210, 350.)

Based on the evidence that we may consider on appeal, McClung has failed to raise a triable issue of fact that Lopez was her supervisor and that EDD is strictly liable under FEHA for Lopez's conduct.[5]

b. *Nonsupervisory coworker liability*

Since we conclude Lopez was not a supervisor, he would not be personally liable for sexual harassment if it were true -- as he contends McClung has conceded -- that "as a coworker, [he] cannot be held personally liable for harassment in the work place" under FEHA. This argument is based on the Supreme Court's holding to that effect in *Carrisales*. As we will discuss below, the evidence indicates that prior to the ruling in *Carrisales*, coworkers were held personally liable under FEHA as "persons" under former section 12940, subdivision (h)(1), now subdivision (j)(1), prohibiting harassment by "an employer . . . or any other person . . . ." FEHA also did not include an express immunity for coworkers. Nonetheless, the *Carrisales* court determined former section 12940, subdivision (h)(1), did "not impose personal liability for harassment on nonsupervisory coworkers." (*Carrisales, supra,* 21 Cal.4th at p. 1140.)

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[5] Given our conclusion that Lopez was not a supervisor under California law, we need not reach EDD's argument that Lopez failed the test of supervisory status articulated by Judge Manion of the Seventh Circuit in *Parkins v. Civil Constructors of Illinois, Inc.* (7th Cir. 1998) 163 F.3d 1027, 1034: "[T]he essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer or discipline an employee."

The Supreme Court decided *Carrisales* three months after the trial court entered judgment for Lopez. McClung, however, does not dispute that *Carrisales* would have full retroactive effect over this case. (See *People v. Guerra* (1984) 37 Cal.3d 385, 399 & fn. 13; *People v. Garcia* (1984) 36 Cal.3d 539, 549, disapproved on another ground in *People v. Lee* (1987) 43 Cal.3d 666, 676.) Indeed, McClung does not discuss or even mention *Carrisales* in her briefs on appeal, which would waive the issue but for the subsequent enactment of section 12940, subdivision (j)(3). (See *Lewis v. County of Sacramento, supra,* 93 Cal.App.4th at p. 116.)

Following the Supreme Court's action, the Legislature promptly amended FEHA to include an express provision overturning the holding of *Carrisales*, as follows: "An employee . . . is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action." (§ 12940, subd. (j)(3); see also *Plute v. Roadway Package System, Inc.* (N.D. Cal. 2001) 141 F.Supp.2d 1005, 1011 ["The California Legislature has recently . . . overturned *Carrisales* by adding an amendment to FEHA's harassment provision expressly holding individual employees liable for their harassment"].)

The effective date of the amendment, January 1, 2001 (Stats. 2000, ch. 1049, § 11, pp. 22-23), was more than a year after the judgment in this case. But the principles governing

retrospective operation of a statutory amendment, which the Supreme Court set forth in *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232 ("*Western Security*"), indicate the amendment nonetheless applies here.

We quote the court's discussion in full because of its direct application to the circumstances of this case:

"A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so. A statute has a retrospective effect when it substantially changes the legal consequences of past events. A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment. Of course, when the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us.

"A corollary to these rules is that a statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. We assume the Legislature amends a statute for a purpose, but the purpose need not necessarily be to change the law. Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. Such a legislative act has no retrospective effect because the true meaning of the statute remains the same.

"One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: '"An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. . . . [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act -- a formal change -- rebutting the presumption of substantial change."'

"Even so, a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. Indeed, there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies. Nevertheless, the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them.

"'[A] subsequent expression of the Legislature as to the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act.' Moreover, even if the court does not accept the Legislature's

assurance that an unmistakable change in the law is merely a 'clarification,' the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute. Thus, where a statute provides that it clarifies or declares existing law, '[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection thereto.'" (*Western Security, supra*, 15 Cal.4th at pp. 243-244, citations and fn. omitted, italics in original.)

There is ample support for the immediate application of section 12940, subdivision (j)(3), to this case under the principles outlined in *Western Security*.

Initially, we note the personal liability provision was inserted into a subdivision of section 12940, which contained a statement that "[t]he provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment." (§ 12940, subd. (j)(2).) An express provision that an amendment is "declaratory of existing law" supports the conclusion that it merely clarifies the meaning of the prior statute. (*Western Security, supra,* 15 Cal.4th at p. 244; *American Psychometric Consultants, Inc. v. Workers' Comp. Appeals Bd.* (1995) 36 Cal.App.4th 1626,

1643.) Although the provision in question here predated the addition of the personal liability amendment, the import of the plain language of the statute is that all provisions of section 12940, subdivision (j), including subdivision (j)(3), are "declaratory of existing law," with the sole exception of "new duties imposed on employers with regard to harassment." (§ 12940, subd. (j)(2)). The Legislature could have further amended the exception to exclude from the subdivision's coverage the personal liability imposed on employees who perpetrate harassment, but it did not. Nor did it place the personal liability provision in a different section that did not include the "declaratory of existing law" provision. This is strong evidence the Legislature used subdivision (j)(3) to clarify its original intent prior to *Carrisales* was to impose personal liability on coworkers.

Moreover, the Supreme Court has found that "even when a statute did not contain an express provision mandating retroactive application, the legislative history or the context of the enactment provided a sufficiently clear indication that the Legislature intended the statute to operate retrospectively" to make "it appropriate to accord the statute a retroactive application." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1210; see also *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338, 1354, 1357 [finding that Legislative Counsel's Digest indicated a different amendment to FEHA was intended to have "the retroactive effect that is allowed to legislation that clarified a statute's true meaning"].)

The legislative history of section 12940, subdivision (j)(3), includes numerous references to the Legislature's intent to clarify after *Carrisales* that FEHA liability extends to nonsupervisory coworkers who engage in prohibited harassment. For example, analysis prepared for the Assembly Committee on the Judiciary states that the amendment "[c]larifies that all employees (whether supervisors or non-supervisors) can be held personally liable under [FEHA] for unlawful harassment perpetrated by the employee. A recent California Supreme Court decision said this was not the case." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1856 (Reg. Sess. 1999-2000) Apr. 11, 2000, p. 1.) The analysis went on to report that "[a]ccording to the author, the bill is intended *only* to clarify that liability for workplace harassment extends to individual employees." (*Id.* at p. 6, italics added.)[6]

The bill's author also was quoted as stating "'before the Carrisales decision came down, most people, including discrimination experts, believed that individual employees may be held liable for harassing conduct under FEHA. AB 1856 ensures that the individual who is personally responsible for the unlawful harassment can also be held personally liable. (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1856, *supra,* pp. 2-3, original underscoring; see also Sen. Rules Com.,

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6 We take judicial notice of the committee analyses of Assembly Bill No. 1856 under Evidence Code section 452, subdivision (c). (See *216 Sutter Bay Associates v. County of Sutter* (1997) 58 Cal.App.4th 860, 878.)

Office of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1856 (1999-2000 Reg. Sess.) as amended Apr. 4, 2000, p. 4 ["Prior to Carrisales, it was generally understood that the FEHA applied to co-workers," original underscoring].)

On that score, the Assembly committee's analysis noted the language of section 12940 prohibits an employer, labor organization, employment agency, training program, or "any other person" from engaging in harassment. (Assem. Com on Judiciary, Analysis of Assem. Bill No. 1856, *supra,* at p. 3; see § 12940, former subd. (h)(1), now subd. (j)(1).) The analysis explained that "[i]t was this language that brought courts to hold and practitioners, scholars, and others to believe that individual employees were included as one of those who could be held liable for harassment under FEHA." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1856, *supra*, p. 3.) This statement was supported by a quote from pre-*Carrisales* commentary in a California employment law treatise, interpreting the statutory language to mean that "'employees may be individually liable for harassing conduct.'" (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1856, *supra*, p. 3, citing 2 Wilcox, Cal. Employment Law (1998 supp.) § 41.81(6)(e), p. 41-280, original underscoring.) The Assembly committee analysis further cited DFEH administrative decisions prior to *Carrisales* that, based on the same construction of FEHA's harassment provision, imposed liability on nonsupervisory coworkers. (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1856, *supra,* pp. 3-4.)

Additionally, the Assembly committee analysis pointed to the Court's statement in *Carrisales* that "policy arguments regarding the most effective way to deter harassment should be directed to the Legislature, 'which can study the various policy and factual questions and decide what rules are best for society. [] If the Legislature believes it necessary or desirable to impose individual liability on coworkers, it can do so.'" (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1856, *supra,* pp. 5-6, quoting *Carrisales,* 21 Cal.4th at p. 1140.) The analysis referred to this statement as an "invitation to clarify legislative intent." (Unnecessary capitalization omitted.) (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1856, *supra,* at pp. 5-6.)

Analysis of Assembly Bill No. 1856 prepared for the Senate Judiciary Committee repeated much of the Assembly committee's commentary, but included another item supporting the view that the amendment was a clarification of existing law. The Senate committee analysis stated that a 1995 bill also would have provided "that an employee or agent is personally liable for harassment of another employee . . . ." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1856 (1999-2000 Reg. Sess.) Aug. 8, 2000, p. 8.) This bill contained a controversial strict liability provision and was not passed. (*Ibid.*) But the Senate committee analysis noted the previous "'provision creating personal liability for harassing employees was [considered to be] declarative of then-existing law,'" based on *Matthews,* 34 Cal.App.4th at pages 605-606. (Sen. Com. on

Judiciary, Analysis of Assem. Bill No. 1856, *supra*, p. 8.) According to the analysis, in *Matthews*, "'the court held that both the statutes and case law clearly find that individual defendants are "persons" subject to individual personal liability [under FEHA] for actions in which they participated.'" (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1856, *supra,* p. 8; see also *Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1212.)[7]

Finally, the Legislature's prompt action in passing the amendment after the *Carrisales* decision indicates a legislative intent to clarify that the FEHA harassment prohibition extends to nonsupervisory coworkers. (*Western Security, supra,* 15 Cal.4th at pp. 243-244.) The Supreme Court decided *Carrisales* in December 1999, and by February 2000 a bill was introduced to overturn the decision. (Assem. Bill No. 1856 (1999-2000) Feb. 7, 2000.) The Governor signed the bill on September 30, 2000.

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[7] Lopez, however, argues that "review of the legislative history surrounding the enactment clearly indicates that the retroactivity was not even discussed, much less intended for this statute. [Fn. omitted.] The language in these records appears forward looking. The bill is described as one that 'would expressly provide' that employees of any entity covered by [FEHA] are personally liable, and 'will send' a clear message, etc." Lopez provides no citation for these fragmentary phrases, which appear to be commonplace expressions of the effect of proposed legislation that are not inconsistent with a legislative intent to clarify a statute's meaning in response to a contrary judicial interpretation. Lopez does not distinguish, discuss, or even mention the numerous statements found in the legislative history that Assembly Bill No. 1856 *clarifies* FEHA after *Carrisales.*

(Stats. 2000, ch. 1047, p. 1.) This quick legislative response strongly suggests an intent to clarify the meaning of the statute after *Carrisales.* (See *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 257-258 [amendment to FEHA regarding disability discrimination clarified legislative intent despite gap of seven years between contrary Supreme Court case and amendment].)

Ultimately, we cannot ignore the numerous references in the legislative history of the amendment to the Legislature's intent to clarify that FEHA harassment liability extends to nonsupervisory coworkers. Whether these statements indicate the amendment merely states the true meaning of the statute or reflects the Legislature's purpose to achieve a retrospective change, the result is the same: we must give effect to the legislative intent that the personal liability amendment apply to all existing cases, including this one. (See *Western Security, supra,* 15 Cal.4th at pp. 243-244; *Huson v. County of Ventura* (2000) 80 Cal.App.4th 1131, 1136-1137.)

Lopez asserts in the absence of judicial interpretations of the preexisting law, we are to look to the federal cases interpreting title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), on which FEHA is based. However, title VII lacks the "any other person" language found in FEHA, and thus the federal courts have unanimously interpreted title VII not to extend personal liability to coworkers. (E.g., *Ball v. Renner* (10th Cir. 1995) 54 F.3d 664, 667; *Miller v. Maxwell's Intern. Inc*. (9th Cir. 1993) 991 F.2d 583, 587-588.) Only when

the FEHA provisions are similar to those in title VII does the state court look to the federal courts' interpretation of title VII as an aid in construing FEHA. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 74.) Title VII cases cannot assist us in resolving this matter.

Lopez argues it is "unfair to change the 'rules of the game' in the middle of a contest," noting that "many persons, including employers, supervisory employees and non-supervisory employees may have reasonably relied on the existing state of the law prior to the recent enactment." We discern no unfairness here, because Lopez could not have relied on *Carrisales*, a decision not issued until well after judgment was entered in this case, to guide his prelitigation conduct or the conduct of this litigation. (See *Mahon v. Safeco Title Ins. Co.* (1988) 199 Cal.App.3d 616, 620-621 ["The point of the rule disfavoring retroactivity is to avoid the unfairness that attends changing the law after action has been taken in justifiable reliance on the former law"].)

At oral argument, Lopez asserted the case of *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828 (*Myers*) required us to disregard the legislative intent discussed above because the personal liability amendment imposed new and distinct liabilities on harassment defendants. *Myers* does not apply here. There, the Supreme Court determined a statute repealing a statutory immunity granted to tobacco companies was not retroactive to claims arising when the immunity existed. Subjecting companies to liability for past conduct that was

lawful when it occurred was an impermissible retroactive application unless there was an express intent of the Legislature to do so. (*Id.* at p. 840.)

The court determined the repeal statute had no express language showing the Legislature intended to make the statute retroactive or to clarify existing law. (*Myers, supra*, 28 Cal.4th at p. 842.) The statute's legislative history also showed no intent of retrospective application. (*Id.* at pp. 844-845.) Moreover, applying the statute retroactively raised constitutional concerns because it would have exposed tobacco companies to huge monetary damages for conduct that occurred when the conduct carried no tort liability. (*Id.* at pp. 845-846.)

Lopez's use of *Myers* here only begs the question, because, as we have explained, prior to *Carrisales* and at the time the harassing activity occurred, there was no express immunity for coworkers, resulting in widespread acceptance of the view that the then-current version of FEHA imposed liability on nonsupervisory coworkers who committed harassment. Also, as we have already shown, the Legislature expressed its intent to make the personal liability amendment govern cases such as this by placing the amendment in a statute which declared the amendment was to clarify existing law, and by stating throughout the legislative process the amendment's purpose was to clarify the state of pre-*Carrisales* law. The speed with which the Legislature acted after the Supreme Court decided *Carrisales*

also discloses the Legislature's intent. *Myers* simply does not address this situation.

On that score, it is disturbing that Lopez, in moving for summary judgment, cited *Carrisales v. Department of Corrections* (1998) 65 Cal.App.4th 1492 as his sole authority to the contrary. Since the Supreme Court had granted review, that case was depublished at the time, as Lopez conceded in his moving papers. (Cal. Rules of Court, rule 976(d).) Lopez, however, failed to adhere to the corollary rule that a depublished case "shall not be *cited or relied on* by a court or a party in any other action . . . ." (Cal. Rules of Court, rules 977(a), italics added.)[8] In light of this rule, Lopez cannot

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[8] On appeal, Lopez's counsel continues this unfortunate practice in his supplemental brief by relying heavily on *Colmenares v. Braemar Country Club, Inc.* (2001) 89 Cal.App.4th 778 (*Colmenares*). Lopez again states candidly that this case has been depublished pending review by the California Supreme Court. Although Lopez argues that *Colmenares* is "logical" and "should be followed," he misses the point. To the extent Lopez is relying on *Colmenares*, he has *no* supporting authority for the point he urges. (See *Ramirez v. Moran* (1988) 201 Cal.App.3d 431, 437, fn. 4 [court cannot consider depublished case and it should not have been cited as authority in party's brief].) The evil of citing depublished authority is not just the violation of the rule and possibility of sanctions. (See *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 885-886 [assessing sanctions in part for citing and relying extensively on depublished case]; *Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 518-519, fn. 2 [difficult to excuse error of citing multiple depublished cases].) This practice gives a party the illusion of having supporting legal authority where there is none (so far as the reviewing court is concerned) and degrades the motivation to make a more thorough search for legitimate authority.

legitimately claim that he relied on *Carrisales* or its appellate court precursor for any purpose. For Lopez, the Supreme Court's interpretation of individual liability under FEHA can be said to have come and gone.[9]

The remaining question regarding application of the amendment is whether Lopez "perpetrated" the conduct McClung alleged was harassment prohibited by FEHA. The term "perpetrated" in this context plainly connotes the commission of harassment. (See Merriam Webster's Collegiate Dict. (10th ed. 2001) p. 864 ["perpetrate . . . to bring about or carry out . . . COMMIT"]; American Heritage Dict. (3d. ed. 1992) p. 1349 ["perpetrate . . . To be responsible for; commit . . . to accomplish . . . to bring about"].) The record contains uncontradicted evidence that Lopez made sexual remarks to McClung and touched her on the knee and thigh during the San Diego trip, as alleged in the complaint. Therefore, Lopez committed acts within the ambit of section 12940, subdivision

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Moreover, the Supreme Court has since reversed the appellate court's decision in *Colmenares*, and determined the statute at issue in that case clarified the Legislature's original intent and thus applied to the facts. (*Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1027-1028.)

[9] At oral argument, Lopez also cited to *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal.App.4th 218, where the appellate court determined an amendment limiting a religious entity's exclusion from the terms of FEHA could not apply retroactively on essentially the same grounds relied upon in *Myers*. The case is inapplicable here for the same reasons *Myers* is inapplicable.

(j)(3), *if* such conduct constitutes sexual harassment, the question we take up next.

c. *Severe or pervasive harassment*

"There are two recognized categories of sexual harassment claims. The first is quid pro quo harassment where a term of employment or employment itself is conditioned upon submission to unwelcome advances. The second . . . is hostile work environment, 'where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive environment.'" (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 516-517 (*Beyda*), citations omitted.) McClung alleges only the hostile work environment type of harassment.

California courts have adopted the federal standard for evaluating hostile work environment claims. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130.) Under this standard, "'[f]or [hostile work environment] sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."'" (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609 (*Fisher*), quoting *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 67 [91 L.Ed.2d 49, 60]; see also *Beyda, supra,* 65 Cal.App.4th at p. 517; *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21-22 [126 L.Ed.2d 295, 301-302] (*Harris*).)

"'[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its

severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' [Citation.]" (*Beyda, supra,* 65 Cal.App.4th at p. 517; see also *Fisher, supra,* 214 Cal.App.3d at p. 610 [factors considered in evaluating the totality of the circumstances are: "(1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of offensive encounters; (3) the total number of days over which all the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred"].) In addition, the conduct is evaluated from "'the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances."' [Citation.]" (*Beyda, supra,* 65 Cal.App.4th at p. 517; *Harris, supra,* 510 U.S. at p. 21 ["Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview"].)

Lopez contends McClung's hostile work environment claim fails because McClung cannot establish "the harassment [was] sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive work environment." Lopez argues McClung's evidence indicates, at most, that Lopez "touched her one time on the leg" at a bar one night after work, "placed his hand on her back to guide her through a doorway in an office building," and made "comments [McClung] deems

inappropriate or 'weird.'" Moreover, Lopez observes that the "entire solitary period of claimed harassment lasted from Monday afternoon through a Wednesday night," most of the harassment occurred while Lopez and McClung "were dining, drinking, or traveling in the car," and "[n]one of the inappropriate conduct alleged occurred during actual working hours." Lopez concludes that even if the allegations are true, "the purported harassment cannot be deemed pervasive enough to constitute a FEHA violation."

We disagree with Lopez's summary of his conduct, as well as his conclusion that this conduct was insufficient to raise a triable issue that McClung was subjected to a hostile work environment. The evidence shows Lopez engaged in a campaign of harassment, using an out-of-town business trip with McClung as his opportunity to do so. He began making inappropriate remarks as he and McClung were getting on the plane and continued to do so several times a day throughout the trip, escalating to comments that were suggestive and then blatantly offensive. These included: the suggestion they drink wine in one of their hotel rooms and have dinner at a strip club; telling McClung that "men have urges, and I'm sure women do, too"; describing himself as a "Latin lover"; asking McClung, "You don't like oral sex, is that your problem?"; inquiring if she knew what cunnilingus and fellatio were; and asking, "How are you in bed?"

The remarks culminated in, but did not conclude with, an inappropriate touching incident: while McClung was talking to the man seated next to her at the bar, Lopez put his hand on her

knee, slid it up to her thigh, and squeezed. Later, as they drove back to the hotel, Lopez asked, "Did you want to fuck that guy sitting next to you?", a remark he repeated when McClung came to confront him in his hotel room about his behavior.

Considering the totality of the circumstances, there is little significance in the circumstance that Lopez waited until he and McClung were alone at meals or between appointments to make suggestive or offensive comments in light of the fact that this occurred on a business trip. Two colleagues on a business trip would be naturally thrown together on such occasions, presenting Lopez with an opportunity unavailable in the ordinary course of business to engage in harassing conduct. While the fact that the conduct occurred mainly outside the workplace and working hours bears on whether such conduct alters the conditions of the victim's employment (*Fisher, supra,* 214 Cal.App.3d at p. 610), it is not necessarily conclusive under the circumstances here. (See *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1143-1144, 1147 [evidence of hostile work environment included two incidents occurring at lunches].)

By the same token, repeated harassment is not rendered inactionable because it occurs over a relatively short period. In *Weeks v. Baker & McKenzie, supra*, the Court of Appeal determined evidence of five acts of harassing conduct occurring over a one-week period supported a jury finding of hostile work environment. (63 Cal.App.4th at p. 1147.) These acts -- defendant's reaching into plaintiff's breast pocket, gesturing as if to cup her breasts, touching her buttocks, asking what was

the wildest thing she had ever done, and pulling back her shoulders to see which breast was bigger -- are not distinguishable in terms of severity or pervasiveness from Lopez's conduct in San Diego. (*Ibid.*) To be sure, "occasional, isolated, sporadic, or trivial" acts of harassment do not constitute "'sufficiently pervasive'" harassment to create a hostile work environment; 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.) But "'[t]here is neither a threshold "magic number" of harassing incidents that gives rise, without more, to liability as a matter of law, nor a number of incidents below which a plaintiff fails as a matter of law to state a claim.'" (*Richardson v. New York State Dept. of Corr. Ser.* (2d Cir. 1999) 180 F.3d 426, 439; see also *Harris, supra,* 510 U.S. at p. 22 [hostile work environment analysis by its nature cannot be "a mathematically precise test"].)

Thus, the fact that harassment is limited to a short business trip does not preclude a finding that a hostile work environment existed. In *Moring v. Arkansas Dept. of Corrections* (8th Cir. 2001) 243 F.3d 452 (*Moring*), the Eighth Circuit affirmed denial of defendant supervisor's motion for judgment as a matter of law, or, alternatively, a new trial, after the jury returned a verdict for the plaintiff on a hostile work environment claim based on a single, overnight business trip. (*Id*. at pp. 456-457.) On that trip, defendant supervisor, inter alia, engaged in conversation about his drinking, using drugs,

womanizing in college on the drive; appeared at the door to plaintiff's adjoining hotel room in his boxer shorts; and later the same night in her room, albeit fully dressed, said she owed him her job, would not leave when she requested him to, and then sat on the bed, put his hand on her thigh, and leaned over as if to kiss her. (*Id.* at p. 454.)

The court concluded that a reasonable jury could find that "the incident at the hotel was severe enough to alter the terms and conditions of [plaintiff's] employment." (*Moring, supra,* 243 F.3d at p. 457.) While Lopez was not plaintiff's supervisor, his comments were continuous, more numerous, and more offensive than those described in *Moring*, and there was a similar thigh-groping incident in this case, albeit it was less severe than in *Moring,* because it took place in public, not in a hotel room, and without an attempted kiss.[10]

Like the court in *Moring*, we cannot say as a matter of law the Lopez's conduct did not constitute sexual harassment.

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10 In response to Lopez's argument that "the behavior was not sufficiently severe to alter the terms and conditions of employment, because it was one isolated incident," the *Moring* court said, "[W]e are unaware of any rule of law holding that a single incident can never be sufficiently severe to be hostile-work-environment sexual harassment." (*Moring, supra,* 243 F.3d at p. 456.) However, as noted above, the Court of Appeal in *Fisher* emphasized that an isolated act of harassment will not support a hostile work environment claim. (*Fisher, supra,* 214 Cal.App.3d at p. 610.) We need not dispute that conclusion here because in this instance, the conduct in evidence was not isolated. The record discloses numerous acts of harassment, both verbal and physical, occurring regularly throughout the three-day trip.

(*Moring, supra,* 243 F.3d at p. 457.) We conclude McClung has raised a triable issue of fact that Lopez's conduct in San Diego created a hostile work environment for her.

2. *Failure to remedy harassment*

a. *Transferring harasser*

In her second FEHA cause of action, McClung contends EDD "breached its legal duty to take immediate and appropriate action after receiving notice of the harassing conduct." This claim is based solely on EDD's failure to move Lopez's workstation from McClung's vicinity for the three-week period from January 21, 1997, the date she reported his conduct to EDD management, until February 10, 1997, the date of his resignation. It is undisputed that McClung requested this action. It is likewise undisputed that, when McClung reported Lopez's conduct in San Diego, EDD immediately took her off the San Diego project, as she requested, and commenced an investigation, which resulted in a letter documenting the findings being placed in Lopez's personnel file, also as McClung requested. We conclude McClung has failed to raise a triable issue that EDD's corrective action was inadequate, simply because it did not take all the steps she requested.

Section 12940, subdivision (j)(1) (former subd. (h)(1)), provides in relevant part that "[h]arassment 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." In *Carrisales, supra,* 21 Cal.4th at pages 1136-1137, the high court

said: "Section 12940(h)(1) makes the employer strictly liable for harassment by an agent or supervisor, but liable for harassment by others only if the employer fails to take immediate and appropriate corrective action when reasonably made aware of the conduct [or when it had reason to know of the conduct]." (See also *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1328; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476 [FEHA "*requir*[*es*] that supervisors 'take immediate and appropriate corrective action' when harassment is brought to their attention," original italics].)[11]

No California case has analyzed the remedial obligation in any detail, but, the Ninth Circuit did so in *Fuller v. City of Oakland, Cal.* (9th Cir. 1995) 47 F.3d 1522 (*Fuller*), as follows: "Once an employer knows or should know of harassment, a remedial obligation kicks in. [Citations.] That obligation will not be discharged until action –– prompt, effective action –– has been taken. Effectiveness will be measured by the twin purposes of *ending the current harassment* and *deterring future harassment* –– by the same offender or others. [Citation.] If 1) no remedy is undertaken, or 2) the remedy attempted is ineffectual, liability will attach. Our prior cases stand for the proposition that an employer's actions will not necessarily shield it from liability

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[11] Although McClung's second cause of action does not specify the defendants against whom it is directed -- as required by California Rules of Court, rules 201(i), 312(g)) -- logically, Lopez is not a defendant to a claim that the EDD failed to remedy *his* conduct.

if harassment continues. [Citation.] It does not follow that the employer's failure to act will be acceptable if harassment stops." (*Id.* at pp. 1528-1529, italics added; see also *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 875 ["'remedies [for sexual harassment] should be "reasonably calculated to end the harassment,"'" citations omitted]; *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882 (*Ellison*) ["the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment"]; cf. *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1007 [applying *Fuller* analysis to retaliation claim].)

McClung does not argue EDD is liable for failing to take any action at all, or because the harassment continued. Rather, she maintains EDD's corrective action was ineffective, because, notwithstanding the other measures taken, EDD "did not take the simple, immediate and appropriate act of separating McClung and Lopez to remedy the environment." We disagree.[12]

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[12] Courts have recognized transferring the harasser is one of a number of remedial options open to an employer, which also include: disciplinary action, scheduling different shifts for the individuals involved, putting a written warning or reprimand in personnel files (an option EDD pursued), or placing the harasser on probation. (See *Hathaway v. Runyon* (8th Cir. 1997) 132 F.3d 1214, 1224; *Knabe v. Boury Corp.* (3d Cir. 1997) 114 F.3d 407, 409, 413-414 (*Knabe*); *Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773, 780 & n. 9; *Ellison, supra,* 924 F.2d at pp. 881-882; see also *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1193 ["The most significant immediate measure an employer can take in response to a sexual harassment complaint

The undisputed facts demonstrate EDD took sufficient immediate and *appropriate* corrective action which ended the harassment and deterred future harassment, even if it did not pursue the option of transferring Lopez prior to his retirement. After EDD acted, including taking McClung off the San Diego audit, the harassment ceased. As the court in *Knabe, supra,* observed in rejecting the plaintiff's objection to remedial action on the ground the harasser should have been transferred or fired, "if the remedy chosen by the employee is adequate [to stop the harassment], an aggrieved employee cannot object to that selected action" or "dictate that the employer select a certain remedial action." (114 F.3d at pp. 413-414.) Here, EDD immediately removed McClung from the San Diego project -- the action most clearly and directly designed to prevent Lopez from further harassing McClung. The record contains no evidence of further harassment after McClung was removed from the San Diego audit team, or of even contact between Lopez and McClung. (See *Dornhecker v. Malibu Grand Prix Corp.* (1987) 828 F.2d 307, 309-310 [employer took prompt remedial action where company president reassured plaintiff she would have no contact with harassing consultant after business trip].)

Indeed, since Lopez's current assignment involved fieldwork in San Diego, immediately transferring his workstation in Sacramento would have little additional corrective effect.

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is to launch a prompt investigation to determine whether the complaint is justified"].)

Despite McClung's vigorous argument to the contrary, the evidence indicates Lopez was not at his workstation in the Sacramento office during a significant portion of the three-week period prior to his resignation. If the harassment had continued, one might infer that a remedy that did not include transferring Lopez's workstation was ineffective. But where an employer takes corrective action with respect to a non-supervisory employee, the non-supervisory employee is on notice and suggests he may be resigning, and the harassment ends, there is no triable issue of fact that the remedy was inadequate. (*Knabe, supra,* 114 F.3d at pp. 413-414.)

Moreover, the evidence indicates EDD's actions were effective in deterring future harassment, because Lopez promptly resigned after McClung was replaced on the San Diego project and he received notice of the investigation. (See *Fall v. Indiana University Bd. of Trustees* (N.D.Ind. 1998) 12 F.Supp.2d 870, 881 [no triable issue of fact that employer failed to act promptly to correct sexual harassment where immediate investigation resulted in harasser's resignation].) In fact, upon learning McClung had been replaced on the San Diego audit, Lopez informed a supervisor on January 27 he was considering quitting his job. This occurred more than a week before Lopez received formal notification of the investigation. EDD's actions immediately began deterring future harassment by Lopez against McClung.

Thus, although we do not discount the distress McClung experienced from the harassment, the harassment was confined to a three-day business trip in San Diego, the alleged harasser

indicated he would be resigning and was not present much of the remainder of his employment, and the harassment was not as aggressive as found in some hostile work environment cases involving similar circumstances. (See, e.g., *Jones v. Flagship Intern.* (5th Cir. 1986) 793 F.2d 714, 719-720 [employee propositioned by supervisor on two separate business trips]; *San Juan v. Leach* (2000) 717 N.Y.S.2d 334, 336 [on business trip supervisor entered employee's room while she slept, climbed into her bed, and attempted to kiss and touch her; while driving her home on another occasion supervisor exposed and fondled his genitals, and attempted to make her touch him; and supervisor made inappropriate comments in the workplace].) The Ninth Circuit has recognized that "in some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment." (*Ellison, supra,* 924 F.2d at p. 883.) In such circumstances, transfer may be the most effective remedy. (*Id.* at p. 883, fn. 19.) But, in this instance, the record does not suggest Lopez's misconduct reached such a level of severity or pervasiveness that notice of the charge and termination of the coworker relationship pending an investigation was insufficient, particularly in light of Lopez's stated intention to resign.

McClung relies heavily on a decision by the DFEH, (1) concluding that an investigation that began three months after the victim first reported harassment and took more than five months after the victim's first complaint to complete was "neither prompt nor effective," and (2) faulting a county agency

because it “did not take adequate steps to protect” the victim by separating her from the harasser. (*Dept. Fair Empl. & Hous. v. Lake County Dept. of Health Services* (July 22, 1998) No. 98-11, FEHC Precedential Decs. 1998-1999, CEB 1, pp. 26-27 (*Lake County*).) In *Lake County*, the complainant talked to management about her harassment in April, June and July 1995, but the investigation did not begin until July 1995, and it was not complete until October 1995. (*Id.* at pp. 6-14.) During that five-month period, the complainant was left to work in the same office as the harasser, sometimes alone, despite her stated fear of him and repeated requests to be transferred or otherwise separated. The harasser, a felon on parole from a murder conviction, exhibited openly hostile and intimidating behavior towards the complainant and conveyed his desire to retaliate against her. (*Id.* at pp. 7-8.)

McClung argues her “situation is almost identical to the complainant” in *Lake County.* We disagree. McClung does not challenge the adequacy of EDD’s investigation of her complaint, which it is undisputed began immediately after her complaint. To be sure, the investigation was delayed by Lopez’s retirement and refusal to be interviewed, and not completed for some five months. But with Lopez gone from EDD, there was no need to expedite the investigation and cut short the interviewing process (which included a key interview of the bartender in San Diego who observed Lopez and McClung in the restaurant on the last night of the trip).

Beyond this, we find inapt the comparison with *Lake County* as it bears on the transfer option. First, while Lopez's conduct was highly offensive, there is no evidence he threatened or intimidated McClung or was as menacing a figure as a convicted murderer. Second, in *Lake County*, the harasser and his victim worked together, sometimes alone, in a county office in Clear Lake for *five months*. Here, McClung neither worked nor was alone with Lopez in the EDD's Sacramento office for the *three weeks* before he retired (plus Lopez was out of the office for more than a week of that period). McClung's citation of *Lake County* thus serves only to highlight the differences between circumstances where transfer is a necessary corrective action, and this instance where it is not.

We conclude McClung has not raised a triable issue of fact that EDD failed to take immediate and appropriate corrective action in response to her sexual harassment complaint based on EDD's failure to transfer Lopez to another area of the office.[13]

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13 In her reply brief, McClung argues that EDD's failure to separate her from Lopez creates a triable issue in part because the "history between the two is well documented." McClung refers to the lunch invitations in October 1996, and the e-mail she sent declining the second invitation, copied to EDD management. She does not argue, however, that the invitations created a hostile work environment in 1996 or that EDD was required to take corrective action then (albeit she faults EDD's response, even though Pruitt spoke to Lopez and the invitations ended). Rather, McClung (somewhat grudgingly) acknowledges that EDD "received notice of the hostile environment no later than January 21, 1997," triggering "a duty to take immediate and appropriate action to remedy the environment." Even assuming, as McClung does, that the invitations were a precursor to the

b. *Spreading rumors*

McClung contends "the EDD not only failed to remedy the environment, but [EDD] added to the hostile environment by spreading false rumors about [her]." According to McClung, she raised "a triable issue of fact with regard to the EDD's failure to remedy the hostile environment" by submitting evidence that chief deputy director Tritz, at a meeting with managers to discuss her sexual harassment complaint, falsely accused her of filing a complaint against him and of making false complaints against other employees. McClung asserts Tritz called her credibility into question at the meeting, and his "false allegations were spread throughout the office. Further, the EEO Office received calls, presumably from Tritz, that reflected negatively upon [her]."

As an initial matter, McClung cannot oppose summary judgment with conjecture about calls received by the EEO Office. (*Lewis v. County of Sacramento, supra,* 93 Cal.App.4th at p. 116.) As McClung openly acknowledges, she presumes, but has no evidence, to support the improbable theory that Tritz somehow made multiple calls to the EEO Office disparaging McClung. What minimal evidence there is in the record indicates the calls were

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harassment in San Diego, there is no suggestion in the record that Lopez's transfer to another area was warranted or required to deter future unwelcome invitations. The lunch invitations in October 1996 therefore add nothing significant to our assessment of the corrective action taken in January 1997, when the circumstances had changed dramatically.

made by multiple individuals, none of whom was identified as Tritz.

Otherwise, the defects in the argument are that (1) the claimed rumors are not actionable because they are not based on gender, and (2) there is no evidence Tritz or anyone in EDD management spread such rumors, though McClung herself talked with coworkers about her complaint and the underlying events.

Rumors in which gender is a substantial factor can create a hostile work environment. (See *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 346-349 (*Accardi*) [harassment plaintiff alleged included "spreading untrue rumors about her abilities" and "that she had slept with superior officers in order to receive favorable assignments"], disapproved on other grounds in *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823-824); *Howley v. Town of Stratford* (2d Cir. 2000) 217 F.3d 141, 154-155 [evidence sufficient to overcome summary judgment on hostile work environment claim included public comment by male fire lieutenant that female fire lieutenant gained her rank by performing fellatio and his subsequent spreading of untrue rumors that she gave assignments that jeopardized lives of older firefighters]; *Spain v. Gallegos* (3rd Cir. 1994) 26 F.3d 439, 451 [rumors suggesting plaintiff was involved with superior (perpetuated by superior's conduct) caused plaintiff to be shunned and evaluated poorly for advancement, and "management personnel did not take remedial action to eliminate the rumors"]; *Rahn v. Junction City Foundry, Inc.* (D.Kan. 2001) 161 F.Supp.2d 1219, 1234 [evidence of hostile work environment

included that “co-workers spread rumors about [plaintiff’s] sexual activity”]; *Jew v. University of Iowa* (S.D. Iowa 1990) 749 F.Supp. 946, 958 [false rumors suggested that plaintiff used sexual relationship to influence head of university department and that plaintiff’s professional accomplishments rested on sex, not merit].)

Conversely, rumors that are gender neutral fail to create an actionable hostile work environment. (See *Accardi, supra,* 17 Cal.App.4th at p. 348 [to claim hostile work environment, “it is ‘only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff “had been a man she would not be treated in the same manner”’”]; *Pasqua v. Metropolitan Life Ins. Co.* (7th Cir. 1996) 101 F.3d 514, 517 [no evidence that rumors of relationship between plaintiff and female coworker were spread because plaintiff was a male]; *Winsor v. Hinckley Dodge, Inc.* (10th Cir. 1996) 79 F.3d 996, 1001, fn. 1 [district court finding that rumors of relationship between female plaintiff and male sales manager were gender neutral not clearly erroneous, where strong evidence of relationship and its contribution to plaintiff’s success existed, and rumors would have occurred even if plaintiff were male]; *Snoke v. Staff Leasing, Inc.* (M.D.Fla. 1998) 43 F.Supp.2d 1317, 1326-1327 [rumors that female plaintiff was having an affair with male manager did not show harassment based on sex because both were the subject of the rumors and both men and women were discussing them]; *Huffman v. City of Prairie Village, Ks.* (D.Kan. 1997) 980 F.Supp. 1192, 1197-1198 [rumors that

female police dispatcher was dating male sergeant not based on sex since rumors were directed at, and designed to embarrass, both].)

McClung makes no attempt to explain how questions about her credibility were based on her sex, i.e., that if she were a man, she would not have been treated in the same manner. (*Accardi, supra,* 17 Cal.App.4th at p. 348.) Nor does the record disclose any hint that Tritz found McClung's credibility suspect because of her gender. Tritz explained the underlying circumstances for his skepticism, involving a complaint against him for improperly attempting to influence employees' voting and a false complaint against another employee for sexual harassment. Even the latter circumstance does not implicate McClung's gender, because both sexes are involved in office relationships, both can experience sexual harassment, and both file complaints. There is no evidence Tritz suggested that women, as opposed to men, make false harassment charges. Rather, the evidence is clear that Tritz questioned McClung's credibility as an individual based on what he perceived to be her history of questionable complaints of various types. These facts present a sharp contrast with actionable rumors suggesting that an employee gained advancement or influence through sexual activity. (*Accardi, supra,* 17 Cal.App.4th at p. 346; *Spain v. Gallegos, supra,* 26 F.3d at p. 451; *Jew v. University of Iowa, supra,* 749 F.Supp. at p. 958.)

Furthermore, argument will not substitute for evidence that Tritz, or anyone in management, communicated Tritz's views to anyone outside the meeting or the EEO Office investigating her

complaint. (Cf. *Mitchell v. Peralta Community College Dist.* (N.D.Cal. 1991) 766 F.Supp. 834, 839 [no evidence that selection committee members harassed unsuccessful applicant by spreading rumors].) McClung simply leaps from the meeting to the rumors circulating in the office without making any connection between the two. This approach not only ignores McClung's burden to present evidence on which a reasonable jury could determine EDD spread the rumors (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849), but also the reality that, in situations such as the one McClung unfortunately found herself in, rumors spread "for any number of reasons having nothing to do with gender discrimination," including the "fascination with the prurient" that so often motivates gossip. (*Pasqua v. Metropolitan Life Ins. Co., supra,* 101 F.3d at p. 517.) Furthermore, the record contains uncontradicted evidence that management kept McClung's complaint, and the underlying circumstances, confidential, while McClung freely discussed all these matters, as well as her past complaints, with a number of coworkers, indicating that McClung as likely as anyone else started the rumor mill or kept it going.

We conclude McClung has not raised a triable issue of material fact that EDD created a hostile work environment or failed to remedy it, based on evidence of rumors circulating at EDD after she filed a sexual harassment complaint.[14]

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[14] Because McClung does not claim EDD is responsible for failing to stop the rumors, even if it did not add to them, we

C. *Intentional infliction of emotional distress claim*

1. *Tort Claims Act*

The trial court granted summary adjudication for defendants on McClung's third cause of action for intentional infliction of emotional distress, on the ground McClung failed to file a written claim with the State Board of Control before bringing suit, as required by the Tort Claims Act (§ 810 et seq.). McClung argues she satisfied the Tort Claims Act by filing a FEHA administrative claim with the DFEH.[15]

Under the Tort Claims Act, a plaintiff may not file suit for "money or damages against the state" unless a written claim has been timely presented to the state Victim Compensation and Government Claims Board (formerly the State Board of Control), and the claim either is acted upon or rejected. (§§ 900.2, 905.2, 911.2, 945.4.) The Tort Claims Act further provides that "a cause of action against a public employee or former public employee for injury resulting from an act or omission *in the scope of his employment* as a public employee is barred" unless a claim has been filed against the employing public entity. (§

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do not decide whether a hostile work environment claim can be based on such an omission. (See *Spain v. Gallegos, supra,* 26 F.3d at p. 451.) We note, however, that EDD submitted evidence that chief deputy director Tritz asked the EEO Office for "closure" with respect to its investigation of McClung's claim, in order to put a stop to the rumors.

[15] Lopez argues for the first time that no evidence in the record demonstrates McClung filed a complaint with the DFEH and received a right-to-sue letter. Having failed to raise this point below, Lopez waives the argument here. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.)

950.2, italics added; *Williams v. Horvath* (1976) 16 Cal.3d 834, 838.) The claims presentation requirements are mandatory, and failure to comply with them is fatal to a cause of action against a public entity or its employees. (See *Nguyen v. Los Angeles County Harbor/UCLA Medical Center* (1992) 8 Cal.App.4th 729, 732.) However, if the injury arises from an employee's act or omission occurring outside the scope of employment, no claim need be filed to pursue the employee, but the employer cannot be held vicariously liable. (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 932.)

Courts have held the Tort Claims Act presentation requirements do not apply to FEHA claims, even where emotional distress is alleged as a damage component. (*Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 869-870 (*Snipes*); *Garcia v. Los Angeles Unified School Dist.* (1985) 173 Cal.App.3d 701, 711-712 (*Garcia*).) The California Supreme Court has also held a plaintiff need not exhaust the FEHA administrative remedy before filing an action for damages alleging related but non-FEHA causes of action such as intentional infliction of emotional distress arising out of sexual harassment in the workplace. (See *Rojo v. Kliger* (1990) 52 Cal.3d 65, 71, 88.)

Citing *Snipes* and *Garcia*, McClung argues "[c]ase law holds that [a Tort Claims Act] filing is unnecessary when a party has filed an [*sic*] FEHA complaint with the DFEH. The notice requirement and intent of the Govt [*sic*] Tort Claims Act is satisfied" by the DFEH filing. What McClung refers to is dicta in *Snipes* and *Garcia* that the FEHA administrative claim

procedures perform a similar function as the claim presentation requirements of the Tort Claims Act. The *Snipes* court wrote: "The purposes of the general claims presentation requirement are to give the governmental entity an opportunity to settle claims before suit is brought, to permit early investigation of the facts, to facilitate fiscal planning for potential liabilities and to avoid similar liabilities in the future. [Citation.] The provisions of the FEHA for filing of a complaint with the department, administrative investigation, and service of the complaint on the employer serve a similar function." (*Snipes, supra,* 145 Cal.App.3d at p. 869; accord *Garcia, supra,* 173 Cal.App.3d at p. 712.)

As mentioned, *Snipes* and *Garcia* held only that the Tort Claims Act did not apply to FEHA claims. Thus, in *Snipes*, the court said it need not discuss whether filing a FEHA claim constituted substantial compliance with the Tort Claims Act for other tort causes of action arising from the same incident. (*Snipes, supra,* 145 Cal.App.3d at pp. 870-871, fn. 7.) Nonetheless, the court noted "the FEHA procedures discussed above adequately serve the purposes of the Tort Claims Act; to require appellant to follow both statutory schemes for notice and settlement would be a duplication of processes." (*Id.* at p. 871, fn. 7.) *Garcia* includes similar dicta. (*Garcia, supra,* 173 Cal.App.3d at p. 712.)[16]

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[16] McClung also relies on the statement in *Snipes* that "[b]ecause appellant's complaint states a cause of action under

While FEHA claims are not necessarily subject to the Tort Claims Act, we are aware of no California case holding that compliance with FEHA procedures satisfies the Tort Claims Act's claim presentation requirement for purposes of tort claims brought in addition to FEHA claims.

However, we may affirm the judgment on any legally correct theory, provided the parties were given an opportunity to address it below. (*Kramer v. State Farm Fire & Casualty Co.* (1999) 76 Cal.App.4th 332, 335.) At oral argument, we discussed with the parties the California Supreme Court's announcement, post-*Snipes* and *Garcia,* that "the respondeat superior doctrine would *not* subject an employer to vicarious liability for sexual harassment *exceeding the scope of employment* . . . ." (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1020 (*Farmers*), italics added.) As a result of this holding, under the Tort Claims Act, a public employer cannot be vicariously liable for an employee's acts of sexual harassment so long as the acts are outside the scope of the employee's employment.

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the FEHA, we hold *no portion* of appellant's complaint is subject to the claims presentation requirements of . . . sections 905 and 945.4." (*Snipes, supra,* 145 Cal.App.3d at p. 870, italics added and fn. omitted.) The sentence ends the *Snipes* court's discussion of the plaintiff's contention that a FEHA claim is not a suit for "money or damages" subject to the Tort Claims Act, which the court agreed with because the "action under the FEHA basically is nonpecuniary, the claims for damages and back pay being incidental to the claim for injunctive relief." (*Id.* at p. 869.) We understand the court only to have specified that the portion of a complaint seeking damages and back pay on a FEHA claim, incidental to the equitable relief available thereunder, is not subject to the Tort Claims Act.

(*Id.* at p. 997.) The employee remains personally liable, but because the harassment occurred outside the scope of employment, the employer is immune. The victim may proceed against the employee without filing a tort claim with the employer, and the employee enjoys none of the immunities the Tort Claims Act provides. (§ 820, subd. (a); *Vivell v. City of Belmont* (1969) 274 Cal.App.2d 38, 41.)

Whether an employee's tortious act was committed within the scope of employment is ordinarily a question of fact. When the facts are undisputed and no conflicting inferences are possible, the question of whether the employee was acting within the scope of employment is one of law. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213.)[17]

The *Farmers* court explained the concept of scope of employment as follows: "'[A]n employer is liable for risks "arising out of the employment." [Citations.] [¶] A risk arises out of the employment when "*in the context of the particular enterprise* an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. [Citations.] In other words, whether the question is one of vicarious liability, the inquiry should be whether the risk was one 'that may fairly be regarded as typical of or broadly

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[17] The *Farmers* court "decline[d] to adopt a bright line rule that all sexual harassment falls outside the scope of employment as a matter of law under all circumstances." (*Farmers*, *supra*, 11 Cal.4th at p. 1019, fn. 18.)

incidental' *to the enterprise undertaken by the employer*. [Citation.]" [Citation.] Accordingly, the employer's liability extends beyond his actual or possible control of the employee to include *risks inherent in or created by the enterprise*.' [Citation.]" (*Farmers, supra,* 11 Cal.4th at p. 1003, italics in original.)

The *Farmers* court found the following test useful: "'One way to determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was *a generally foreseeable consequence of the activity*. However, "foreseeability" in this context must be distinguished from "foreseeability" as a test for negligence. In the latter sense "foreseeable" means a level of probability which would lead a prudent person to take effective precautions whereas "foreseeability" as a test for *respondeat superior* merely means that *in the context of the particular enterprise* an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. [Citations.]' (Italics [in original].) We find [this test] useful because it reflects the central justification for respondeat superior: that losses fairly attributable to an enterprise -- those which foreseeably result from the conduct of the enterprise -- should be allocated to the enterprise as a cost of doing business. [Citations.]" (*Farmers, supra*, 11 Cal.4th at pp. 1003-1004.)

Although the scope of employment has been interpreted broadly, it does have limits. *Farmers* noted one:

"Significantly, an employer will not be held vicariously liable for an employee's malicious or tortuous conduct if the employee *substantially* deviates from the employment duties for personal purposes. [Citations.]" (*Farmers, supra,* 11 Cal.4th at pp. 1004-1005, italics in original.) Reviewing this concept as other courts had applied it to sexual harassment in the workplace, *Farmers* noted: "[Several decisions] hold that, except where sexual misconduct by on-duty police officers against members of the public is involved [citation], the employer is not vicariously liable to the third party for such misconduct [citations]. In those decisions, vicarious liability was rejected *as a matter of law* because it could not be demonstrated that the various acts of sexual misconduct arose from the conduct of the respective enterprises. In particular, the acts had been undertaken solely for the employees' personal gratification and had no purpose connected to the employment. Moreover, the acts had not been engendered by events or conditions relating to any employment duties or tasks; nor had they been necessary to the employees' comfort, convenience, health, or welfare while at work." (*Farmers, supra*, 11 Cal.4th at pp. 1006-1007, italics added.)

Applying these principles, the *Farmers* court determined a county deputy sheriff's propositioning and offensively touching other female deputy sheriffs were acts outside the scope of his employment, and thus he was not entitled under the Tort Claims Act to indemnification and defense costs from his employer in

the ensuing sexual harassment suit. (*Farmers, supra*, 11 Cal.4th at pp. 997, 1007-1012.)

Applying the same principles here, we conclude as a matter of law Lopez's undisputed acts of sexual harassment were outside the scope of his employment. No evidence in the record indicates acts such as Lopez's are typical of or broadly incidental to the particular enterprise here -- operating EDD and auditing its programs. Lopez's conduct was so unusual from the purposes and operations of EDD that it would be unfair to hold EDD liable as a cost of doing its business. Lopez undertook his acts solely for his own gratification. His acts had no purpose connected to his employment. His acts were not engendered by conditions relating to his job duties or tasks, nor had they been necessary to his comfort, convenience, health, or welfare while performing his work.

Because Lopez's acts were outside the scope of his employment, EDD cannot be held vicariously liable and is immune from McClung's tort cause of action. We will affirm the trial court's award of summary judgment in favor of EDD on McClung's tort cause of action on this basis.

However, our decision necessitates we reverse summary judgment granted in favor of Lopez on McClung's tort cause of action. Because Lopez's actions occurred outside the scope of his employment, the Tort Claims Act does not apply to McClung's action against Lopez. She thus was not required to file a tort claim in order to prosecute her tort cause of action against Lopez.

2. Workers’ compensation exclusivity rule

Because we conclude EDD is immune from vicarious liability on McClung’s claim for emotional distress, we need not reach EDD’s remaining argument on the application of the worker’s compensation exclusivity rule to this matter.

DISPOSITION

Summary judgment is affirmed in part and reversed in part as follows: Judgment in favor of EDD on each of McClung’s causes of action is affirmed; and judgment in favor of Lopez on each of McClung’s causes of action is reversed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 27(3).) (*CERTIFIED FOR PUBLICATION*.)

NICHOLSON, J.

We concur:

DAVIS, Acting P.J.

KOLKEY, J.