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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

HARRIET COPELAND, Plaintiff and Appellant, v. GOOD SAMARITAN HOSPITAL, et al., Defendants and Respondents.	H039933 (Santa Clara County Super. Ct. 1-11-CV-205964)

Plaintiff Harriet Copeland (Copeland) appeals from the judgment entered after the trial court granted summary judgment in favor of Good Samaritan Hospital (Good Samaritan) and Mary Straley (Straley) (collectively defendants) on Copeland's claims for wrongful termination and other related claims.[1] On appeal, Copeland contends that (1) the trial court improperly overruled her evidentiary objections; (2) the trial court incorrectly dismissed her FEHA (Fair Employment and Housing Act) claim of retaliation for reporting patient abuse; (3) the trial court incorrectly dismissed her FEHA claim of retaliation for requesting a leave of absence by determining that she had failed to exhaust her administrative remedy; (4) the trial court erred in concluding that Straley was not liable for her "inappropriate actions"; and (5) the trial court incorrectly held that her common law claims were barred by the statute of limitations. We affirm the judgment.

[1] Copeland asserts that this is a "whistle blowing case" and that she was terminated from her employment less than four weeks after reporting patient abuse.

Factual and Procedural Background[2]

Good Samaritan employed Copeland as a registered nurse in the cardiovascular intensive care unit from November 2006 until April 13, 2009. On April 13, 2009, Good Samaritan terminated Copeland's employment. According to the termination notice, Copeland was terminated because on March 22, 2009, she left a patient on a commode, gave the patient his breakfast tray while he was on the commode, and left to take her break; on the same day, Copeland subjected a fellow employee to an aggressive and rude tirade that brought the nurse to tears; and when her manager attempted to inform her of a meeting to discuss the aforementioned incidents, Copeland told the manager to " 'back off' " and stated, " 'You don't understand, I have lawyers' "; and when asked if that was a threat, responded, " 'Yes' " and " 'there will be no meeting.' "

One year after her termination, Copeland filed an administrative complaint with the Department of Fair Employment and Housing (DFEH) alleging that she was wrongfully terminated and retaliated against by Good Samaritan for complaining about patient abuse. The DFEH issued a right-to-sue letter on January 25, 2011. The letter indicated that the DFEH was closing the case because Copeland "Elected Court Action."

In her first amended complaint, the operative pleading in this case, filed on September 19, 2012, Copeland alleged four causes of action.[3] Causes of action one and two were for retaliation in violation of the FEHA against Good Samaritan and Straley. (Gov. Code § 12900 et seq.) Copeland's third cause of action was for wrongful termination in violation of public policy against Good Samaritan and the fourth cause of action for intentional infliction of emotional distress was against Good Samaritan and Straley.

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[2] Pursuant to the applicable standard of review discussed below, we state the facts in the light most favorable to plaintiff as the party against whom summary judgment was entered. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

[3] Copeland filed her original complaint on July 27, 2011.

In her complaint, Copeland alleged that in February 2009 she approached her department manager, Straley, about taking personal leave to attend outpatient rehabilitation mandated by her probationary status with the California Board of Registered Nurses due to two DUIs she received in 2006.[4] According to Copeland, Straley told her, " 'why don't you start looking for a new job in your area,' " referring to Marin County, which according to Copeland was where she was going to attend her outpatient rehabilitation. Copeland alleged that Straley retaliated against her because she had requested this leave.

Further, Copeland alleged that on March 16, 2009, a patient in the department to which she was assigned was inadequately medicated during the night by nurse Diana Ricalde, which necessitated that the patient be physically restrained in her bed. The patient, who was on a ventilator and unable to speak, was protesting against the restraints and was in obvious distress based on the vitals alarm history, which, according to Copeland, documents respiration, heart rate, blood pressure readings, and ventilator readings. When Copeland attempted to work with the patient, she was injured by the patient. The doctor in charge was upset by the use of restraints without an order and ordered a morphine pump in order to properly medicate the patient.

When Copeland notified the charge nurse of the patient's distress and her subsequent physical injury, the charge nurse defended nurse Ricalde's actions and said she was too busy to help Copeland. She told Copeland to handle the situation and notify Straley before she filed an incident report.

Copeland alleged that she complained to Straley and told her that the patient would not have required the physical restraints if the patient had been properly medicated through the night; she told Straley the charge nurse had not been supportive of her when

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[4] Copeland said that she had disclosed her situation to Good Samaritan in 2006 when she was hired.

she addressed these public policy concerns of choosing physical restraint over medication for a patient in distress. Straley told Copeland to place her concerns in an e-mail to nurse Ricalde, which she did. Straley told her not to file an incident report. Approximately one week later, nurse Ricalde sent an e-mail to Straley citing "a host of accusations and complaints against" Copeland.

Copeland claimed that Good Samaritan and Straley retaliated against her for making the complaint to Straley by terminating her employment with Good Samaritan in April 2009.

Defendants moved for summary judgment, or alternatively, summary adjudication. As to Copeland's claim of retaliation based on reporting patient abuse, defendants argued that Copeland's claim failed because she could not establish that she had engaged in any qualifying " 'protected activity.' " Defendants asserted that the FEHA required that Copeland show that she made a report about suspected patient abuse concerning a physical injury to the local police and county health department. Defendants pointed out that Copeland had made no such report and had admitted that she had merely complained to her manager about inadequate pain medication for one patient. Defendants presented evidence that Copeland did not make any report to the county health department until after she was terminated. Further, Copeland's claim for retaliation based on her alleged request for a leave of absence failed as a matter of law because she did not exhaust her administrative remedies on this claim prior to filing her lawsuit, and therefore the claim had to be dismissed.

As to Copeland's claims against Straley for retaliatory termination, defendants asserted that they failed as a matter of law because there is no individual liability for retaliation under the FEHA; and Copeland did not exhaust her administrative remedies against Straley before filing her lawsuit.

Finally, as to Copeland's claims for wrongful termination in violation of public policy and intentional infliction of emotional distress, defendants argued that they were

barred by the two-year statute of limitations. Defendants pointed out that it was undisputed that all the conduct Copeland alleged had occurred on the date of her termination April 13, 2009, and Copeland did not file her complaint until July 27, 2011, two years and three months later.

In her opposition to the motion for summary judgment, Copeland argued that when she reported patient abuse to her superiors she engaged in a protected activity; and she had followed the appropriate procedures to bring the instant action, including exhausting her administrative remedies in relation to her leave of absence request; she asserted she had filed a DFEH claim and received a right to sue letter. Copeland averred that Straley remained liable for retaliating against her because employees are prohibited from discharging nurses for reporting suspected patient abuse, and "personal liability is appropriate when an employee engages in such retaliatory conduct." Copeland contended that Straley's active role in her wrongful termination subjected Straley to liability. Finally, Copeland argued that the statute of limitations was tolled while she waited for her right-to-sue letter.

Following full briefing and oral argument, on April 24, 2013, in a lengthy written order, the trial court granted defendants' motion for summary judgment.

The court found that Copeland's first cause of action for retaliation (based on her reporting the patient abuse) was barred because Copeland had failed to adduce substantial evidence from which the trier of fact could infer that the reasons articulated by Good Samaritan for her termination were untrue or pretextual. As to the second cause of action for retaliation (based on her request to take a leave of absence) the court found that Copeland had failed to exhaust her administrative remedies. Further, as to the first and second causes of action for retaliation, which were alleged against Straley as well as Good Samaritan, the court found that Straley could not be held personally liable. Finally, as to the third cause of action for termination in violation of public policy and fourth

cause of action for intentional infliction of emotional distress, the court found that they were barred by the applicable statutes of limitations.

Discussion

Standard of Review

"On appeal from an order granting summary judgment 'we must independently examine the record to determine whether triable issues of material fact exist. [Citations.]' [Citation.] The question is whether defendant[s] ' " 'conclusively negated a necessary element of the plaintiff's case or demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial.' [Citation.]" [Citation.]' [Citations.] We must 'consider[] all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]' [Citation.] Moreover, 'we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [her] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor. [Citations.]' [Citations.] And a plaintiff resisting a motion for summary judgment bears no burden to establish any element of his or her case unless and until the defendant presents evidence either affirmatively *negating* that element (proving its absence in fact), or affirmatively showing that the plaintiff does not possess and cannot acquire evidence to prove its existence. [Citations.]" (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 106-107.)

In other words, "[a] defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing 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. [Citation.] Once the defendant has made such a showing, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. [Citation.]" (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1216-1217.)

"We review the grant of summary judgment de novo. [Citation.] We make 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' [Citation.]" (*Moser v. Ratinoff, supra,* 105 Cal.App.4th at p. 1216.)

"Summary adjudication is proper if the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to prevail on a cause of action as a matter of law. [Citations.]" (*Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377, 1386-1387.) " '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.' [Citation.]" (*Lidow v. Superior Court* (2012) 206 Cal.App.4th 351, 356.)

"The trial court's stated reasons for granting summary relief are not binding on the reviewing court, which reviews the trial court's ruling, not its rationale. [Citation.]" (*Lidow v. Superior Court, supra,* 206 Cal.App.4th at p. 356.) We may affirm on any legally correct ground, "regardless of the grounds relied upon by the trial court. [Citation.]" (*Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1457.)

I. Evidentiary Objections

In the order granting summary judgment the court ordered that "[t]he evidentiary objections submitted by plaintiff Harriet Copeland ('Plaintiff') are OVERRULED."

Copeland contends the court erred by not providing any explanation for overruling all of her evidentiary objections; she relies on *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 254-257, in support of this proposition. In *Nazir*, the Court of Appeal held that the trial court abused its discretion by issuing a blanket ruling *sustaining* all but one of defendants' 764 evidentiary objections in a summary judgment proceeding. (*Id.* at p. 255.)

Citing *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535, Copeland argues that the trial court's failure to provide any explanation for its overruling of her evidentiary objections requires that this court review her evidentiary objections de novo. However, she fails to identify with appropriate citations to the record any evidentiary objections that she made.

Here, in contrast to *Nazir*, the court did not sustain the evidentiary objections in question; it overruled them. In *Reid v. Google, Inc., supra*, 50 Cal.4th at page 534, the California Supreme Court held that when a trial court ruling on a summary judgment motion "fails to rule expressly on specific evidentiary objections, it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of a summary judgment motion, and the objections are preserved on appeal." Thus, the trial court's blanket ruling overruling Copeland's evidentiary objections left Copeland in no worse a position than she would have been in if the court had failed to issue any ruling at all on her objections. The objections are preserved on appeal and Copeland is free to challenge the trial court's consideration of specific items of objected-to evidence on appeal. Since Copeland has not argued that the admission of any specific evidence constituted prejudicial error, the court's ruling on her evidentiary objections provides no basis to disturb the judgment.

Furthermore, it is well established that in addressing an appeal, the appellate court begins with the presumption that the trial court's ruling is correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 357.) The appellant has the burden of showing reversible error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318 [the burden is on the appellant, not only to show error, but to show injury from the error].) Meeting this burden requires citations to the record to direct the court to the pertinent evidence or other matters in the record that demonstrate reversible error. (Cal. Rules of Court, rule 8.204(a)(1); *Guthrey v. State of California*

(1998) 63 Cal.App.4th 1108, 1115; *Culbertson v. R.D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.) In addition, it requires citation to relevant authority and argument. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.) It is not the responsibility of this court to comb the appellate record for facts, or to conduct legal research in search of authority, to support the contentions on appeal. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768; see also *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1301.) Copeland makes no substantive argument regarding the trial court's evidentiary rulings other than to assert that the trial court improperly overruled her evidentiary objections.[5] " 'A point which is merely suggested by appellant's counsel, with no supporting argument or authority, is deemed to be without foundation and requires no discussion.' [Citation.]" (*Solomont v. Polk Development Co.* (1966) 245 Cal.App.2d 488, 496.)

II. Dismissal of the FEHA Claim for Retaliation

Copeland's first cause of action for retaliation alleged in essence that Good Samaritan and Straley had retaliated against her by terminating her employment because of her complaints about patient care.

Applicable Law

"When a plaintiff alleges retaliatory employment termination either as a claim under the FEHA or as a claim for wrongful employment termination in violation of public policy, and the defendant seeks summary judgment, California follows the burden shifting analysis of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, . . . to determine whether there are triable issues of fact for resolution by a jury. [Citation.]"

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[5] In a footnote, Copeland asserts that it is "unlikely that all of [defendant]s' facts would stand up under scrutiny. For example, [defendant]s' Fact No. 24 is clearly hearsay. It asserts a fact allegedly spoken by a nurse who was not deposed." The fact asserted was that Straley had spoken to another nurse about Copeland's behavior, something that Straley confirmed in her deposition testimony. Plainly, the court did not err in overruling Copeland's hearsay objection.

(*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1108-1109.) However, California has adopted the rule that " 'the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination.' [Citation.]" (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1144 (*Trop*), quoting *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121 (*Trans World*).) The *Trans World* court reasoned that "[t]he shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court *despite* the unavailability of direct evidence.' [Citation.]" (*Trans World, supra,* at p. 121, italics added.) Thus, there is no need to engage in this burden-shifting analysis where there is direct evidence of discriminatory animus. (*Trop*, *supra*, at pp. 1144-1145.) "Direct evidence is evidence [that] proves a fact without inference or presumption. [Citation.]" (*Id*. at p. 1145.)

As noted *ante*, summary judgment may be granted where it is shown that the "action has no merit or that there is no defense" thereto. (Code Civ. Proc., § 437c, subd. (a).) To make this showing, the moving party must set forth admissible evidence establishing "that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Id*., subd. (c).) "A cause of action has no merit if either of the following exists: [¶] (1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded. [¶] (2) A defendant establishes an affirmative defense to that cause of action." (*Id*., subd. (o).) "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (*Id*., subd. (p)(2).)

As the moving party, defendants had the initial burden to present admissible evidence showing either that one or more elements of Copeland's prima facie case were lacking or that her termination was based upon legitimate, nondiscriminatory factors.

In this court as in the trial court, defendants suggest that Copeland cannot make so much as a prima facie showing of retaliation because she cannot show that she was engaged in a protected activity.[6] Although a "moving defendant may not shift the burden to the plaintiff to put on a prima facie case simply by pointing out to the court the absence of essential evidence to support plaintiff's case, and that a defendant must make an affirmative showing in support of his or her motion" (*Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 210), we conclude that the defendants did below, and have made a sufficient showing here, to entitle them to summary judgment on the first cause of action for retaliatory termination based on reporting patient abuse.[7]

"[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation. [Citation.]" (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1042.) In order "to meet an employer's sufficient showing of a legitimate reason for discharge the discharged employee, to avert summary judgment, must produce 'substantial responsive evidence' that the employer's showing was untrue or pretextual. [Citation.]" (*Martin v. Lockheed Missiles & Space Co*. (1994) 29 Cal.App.4th 1718, 1735.)

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[6] In her reply brief Copeland does not even address defendants' assertion.

[7] Defendants did not merely "point to" Copeland's lack of evidence to support her claim but rather submitted evidence demonstrating that Copeland could not support her claim.

We reiterate, our review of an order granting summary judgment is de novo, and we must consider all the evidence set forth in the moving and opposing papers except evidence to which objections were made and sustained. (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1037.) We liberally construe the evidence in support of the party opposing summary judgment (*Wiener v. Southcoast Childcare Centers, Inc.*, *supra*, 32 Cal.4th at p. 1142), and assess whether the evidence would, if credited, permit the trier of fact to find in favor of the party opposing summary judgment under applicable legal standards. (Cf. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

In this case, the trial court found that Copeland made a prima facie showing of retaliation. We disagree that Copeland could establish a prima facie case of retaliation under the FEHA at trial; this is so because Copeland would have to show that she engaged in a "protected activity." Copeland portrays herself as a whistleblower for reporting patient abuse. However, it is undisputed that Copeland made a complaint to the county health department in May or June 2009, *after* she was terminated from her employment at Good Samaritan. Below, defendants submitted admissible evidence demonstrating that Copeland could not establish that she engaged in a "protected activity" before she was terminated from her employment. First, defendants submitted undisputed evidence that Copeland was terminated on April 13, 2009; second, she reported patient abuse at Good Samaritan to the county health department in May or June 2009, one or two months after she was terminated from her employment; and she filed her complaint with the DFEH in April 2010.[8]

[8] Defendants produced evidence in the form of the transcript of Copeland's deposition, in which Copeland admitted that she did not file a complaint about patient abuse with the Department of Public Health until after she was terminated. Furthermore, they produced evidence in the form of Copeland's original complaint to the DFEH that Copeland did not file the complaint with the DFEH until April 13, 2010.

At the time Copeland's employment was terminated, Government Code section 12940, subdivision (g), as it does currently, provided that it is an unlawful employment practice "[f]or any employer . . . to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities." (Stats. 2003, ch. 671, § 1.)

In turn, Penal Code section 11161.8, provides: "Every person, firm, or corporation conducting any hospital in the state, or the managing agent thereof, or the person managing or in charge of such hospital, or in charge of any ward or part of such hospital, who receives a patient transferred from a health facility, as defined in Section 1250 of the Health and Safety Code or from a community care facility, as defined in Section 1502 of the Health and Safety Code, who exhibits a physical injury or condition which, in the opinion of the admitting physician, reasonably appears to be the result of neglect or abuse, shall report such fact by telephone and in writing, within 36 hours, to both the local police authority having jurisdiction and the county health department. [¶] Any registered nurse, licensed vocational nurse, or licensed clinical social worker employed at such hospital may also make a report under this section, if, in the opinion of such person, a patient exhibits a physical injury or condition which reasonably appears to be the result of neglect or abuse. [¶] Every physician and surgeon who has under his charge or care any such patient who exhibits a physical injury or condition which reasonably appears to be the result of neglect or abuse shall make such report. [¶] The report shall state the character and extent of the physical injury or condition. [¶] No employee shall be discharged, suspended, disciplined, or harassed for making a report pursuant to this section. [¶] No person shall incur any civil or criminal liability as a result of making any report authorized by this section."

Thus, Government Code section 12940, subdivision (g), and Penal Code section 11161.8 prohibit retaliation against an employee who has made a report pursuant to Penal Code section 11161.8.

A report pursuant to Penal Code section 11161.8 is made "to both the local police authority having jurisdiction and the county health department." According to the allegations of Copeland's complaint and the evidence presented by defendants, she did not make a report to either the local police or the county health department *before* she was terminated. Therefore, she did not make a report pursuant to Penal Code section 11161.8. It follows that she is not protected from adverse employment action by either Government Code section 12940, subdivision (g), or Penal Code section 11161.8.

When Copeland was terminated, the FEHA made it unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Gov. Code, § 12940, subd. (h), Stats. 2003, ch. 671, § 1.) At the time, the practices forbidden under "this part" were for an employer to discriminate against an employee "because of [his or her] race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation . . . ." (Gov. Code, § 12940, subd. (a), Stats. 2003, ch. 671, § 1.)[9] Section 7287.8, subdivision (a) of title 2 of California's Code of Regulations clarifies what kinds of proceedings are contemplated by Government Code section 12940, subdivision (h). "It is unlawful for an employer . . . to demote, suspend, reduce, . . . adversely affect working conditions or otherwise deny any

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[9] Currently, Government Code section 12940, subdivision (a) provides that it is unlawful for an employer to discriminate against an employee, "because of [his or her] race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status . . . ." (Stats. 2012, ch. 287, § 2.)

employment benefit to an individual because that individual . . . has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the [Fair Employment and Housing] Commission or Department [of Fair Employment and Housing] or their staffs. [¶] . . . [¶] (2) Assistance with or participation in the proceedings of the Commission or Department includes, but is not limited to: (A) Contacting, communicating with or participating in the proceedings of the Department or Commission due to a good faith belief that the Act has been violated; or (B) Involvement as a potential witness which an employer or other covered entity perceives as participation in an activity of the Department or the Commission."

"We find no California state decision to have identified the limits of 'any proceeding under this part' in Government Code section 12940, subdivision (h)." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1526 (*McGrory*).)

However, as this court has explained before, " 'In interpreting California's FEHA, California courts often look for guidance to decisions construing federal antidiscrimination laws, including title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (Title VII). [Citation.] But federal court interpretations of Title VII are helpful in construing the FEHA only when the relevant language of the two laws is similar.' [Citation.]" (*McGrory*, *supra*, 212 Cal.App.4th at p. 1527.)

"Federal courts have determined that the activities protected by 42 United States Code, section 2000e–3(a),[10] are limited to participation in official administrative proceedings by the Equal Employment Opportunity Commission and do not extend to

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[10] Title 42 United States Code section 2000e–3(a) states: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter]."

private internal investigations by employers. [Citations.]" (*McGrory, supra*, 212 Cal.App.4th at p. 1527.)

Copeland did not complain to Straley that she (or another employee) was being discriminated against because of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation." Nor did she complain to or participate in any manner in a proceeding or hearing conducted by the Fair Employment and Housing Commission or (DFEH) *before* she was terminated.

"To establish a prima facie case of retaliation, a plaintiff must show that she engaged in a protected activity, that she was *thereafter* subjected to adverse employment action by her employer, and there was a causal link between the two. [Citation.]" (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614, italics added.) As to the FEHA claim for retaliatory termination based on her reporting patient abuse to Straley, on appeal, there is no evidence showing that Copeland engaged in any protected activity *that triggered a retaliatory action*; plainly the undisputed facts establish that Copeland did not make a qualifying report pursuant to the FEHA *before* she was terminated by Good Samaritan. Simply put, Copeland cannot show that she engaged in protected activity—filing a complaint concerning patient abuse with the county health department—or participating in a proceeding or hearing conducted by the Fair Employment and Housing Commission or DFEH and that she was *thereafter* subjected to an adverse employment action—in this case terminated from her employment at Good Samaritan.

In sum, we hold that Copeland's first cause of action for wrongful termination fails because defendants' evidence shows that Copeland was not engaged in a protected activity before she was terminated from her employment at Good Samaritan.

III. Failure to Exhaust Administrative Remedies

Copeland's second cause of action for retaliatory termination was based on her request for a leave of absence. Copeland alleged that Good Samaritan retaliated against her and terminated her employment because she requested personal leave to attend outpatient care to conform to a judgment on two DUIs that occurred in 2006. The court found that Copeland had failed to exhaust her administrative remedies on this cause of action.

Government Code section 12960 provides that an employee bringing a claim under the FEHA must exhaust his or her administrative remedy by filing an administrative complaint with the DFEH within one year after the alleged unlawful action occurred. (Gov. Code, § 12960, subd. (d); see *Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412; *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613 (*Okoli*).) "To exhaust his or her administrative remedies as to a particular act made unlawful by the [FEHA], the claimant must specify that act in the administrative complaint, even if the [administrative] complaint does specify other cognizable wrongful acts." (*Martin v. Lockheed Missiles & Space Co., supra,* 29 Cal.App.4th at p. 1724.) "[I]n the context of the [FEHA] . . . '[t]he failure to exhaust an administrative remedy is a jurisdictional, not a procedural, defect,' and thus that failure to exhaust administrative remedies is a ground for a defense summary judgment. [Citation.]" (*Ibid.*)

The scope of the written DFEH charge defines the permissible scope of the subsequent civil complaint. (*Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1121-1123.) However, the FEHA requires that its procedural requirements "be construed liberally for the accomplishment of [its statutory] purposes." (Gov.Code, § 12993,

subd. (a).) As a result, California courts, as well as numerous federal courts,[11] have endorsed the "like or reasonably related" standard for exhaustion of administrative remedies. (See, e.g., *Okoli, supra,* 36 Cal.App.4th at p. 1614; *Sandhu, supra*, 26 Cal.App.4th at pp. 858-859; *Oubichon v. North American Rockwell Corp*. (9th Cir.1973) 482 F.2d 569, 571.) Under this standard, the allegations in a civil action are within the scope of the administrative charges if the civil allegations fall within the scope of the administrative investigation that could reasonably be expected to grow out of the original charges. (*Sandhu, supra,* at pp. 858-859.) Thus, where an administrative investigation would likely have encompassed the claim alleged in the civil complaint, there is no exhaustion of remedies bar. (See *Okoli, supra,* at p. 1616; *Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057, 1065 (*Baker*).)

As noted, any person aggrieved by the action or actions of his or her employer must file a written charge with DFEH within one year of the alleged unlawful practice. (Gov. Code, § 12960, subds. (b) & (d).) The charge consists of a verified complaint, in writing, that states the particulars of the alleged unlawful practice and includes the names and addresses of the persons alleged to have committed the complained-of unlawful practice. (*Id*., subd. (b).) The " 'crucial element' " is the factual statement included in the charge filed with DFEH. (*Sandhu, supra,* 26 Cal.App.4th at p. 858.)

The resolution of this issue turns on a comparison of the language of the DFEH charge and the allegations of the civil complaint.

It is undisputed that Copeland filed an administrative complaint with the DFEH alleging that she was wrongfully terminated by Good Samaritan for complaining of

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[11] "FEHA has its federal counterpart in title VII of the Federal Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). Since the antidiscrimination objectives and public policy purposes of the two laws are the same, we may rely on federal decisions to interpret analogous parts of the state statute. [Citations.]" (*Sandhu v. Lockheed Missiles & Space Co*. (1994) 26 Cal.App.4th 846, 851 (*Sandhu*).)

"patient abuse."[12] However, in Copeland's first amended complaint she alleged in the second cause of action for retaliatory termination that it was based on her request to take family leave. Specifically, Copeland alleged that "In or about February, 2009, [she] requested to be allowed to take personal leave in May, 2009 so that she could attend outpatient care to be in conformity with her judgment on her two DUIs from 2006. The California Board of Nurses mandated this outpatient care"; and "Good Samaritan discriminated against, retaliated against and harassed [her] because of her physical and mental disabilities, and her request to be allowed to take personal leave to attend outpatient care to conform with her judgment on her two DUIs in 2006."

Any investigation by the DFEH into Copeland's allegations that she was terminated for reporting patient abuse would not have uncovered her allegation that she was terminated for requesting a leave of absence. So far as the record shows the DFEH never did learn of Copeland's assertion that, in addition to the alleged wrongful termination based on her reporting patient abuse, i.e., being a whistleblower, as originally complained, she had been a victim of unlawful retaliation because of her physical and mental disabilities. A reasonable investigation of Copeland's administrative charge would not have focused on anything beyond Copeland's claims of retaliation for being a whistleblower.

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[12] The record contains a copy of the complaint that Copeland filed with the DFEH. In the complaint, in the section entitled "CAUSE OF DISCRIMINATION BASED ON" Copeland checked the box for "OTHER" and specified "RETALIATION"; directly above the box for "OTHER" is a box labeled "DENIAL OF FAMILY/MEDICAL LEAVE" no check mark appears in this box. Copeland explained that she was terminated on April 13, 2009, from her registered nurse position and that Straley told her it was for violating the conduct code. However, Copeland stated that she believed she was terminated in retaliation for "complaining of patient abuse." She based this belief on two facts—she complained to her manager of patient abuse on March 16, 2009, and shortly after she complained she was terminated from her nursing position.

" '[W]hen the difference between the charge and the complaint is a matter of adding an entirely new basis for the alleged discrimination,' " or in this case retaliation, the court has no jurisdiction to consider the newly alleged claim. (*Okoli, supra,* 36 Cal.App.4th at p. 1615.)

Accordingly, we determine that the lower court did not err in concluding that the second cause of action was barred because Copeland had failed to exhaust her administrative remedies.

IV. Straley's Liability

With respect to the first and second causes of action for retaliatory termination under the FEHA, Copeland alleged these claims against Straley as well as Good Samaritan. The lower court granted summary adjudication of these causes of action against Straley on the ground that under California Supreme Court precedent (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158 (*Torrey Pines*)), although employers may be liable for retaliation under the FEHA, nonemployer individuals working for the employer, including supervisors, may not be held personally liable.

Torrey Pines extended the holding of *Reno v. Baird* (1998) 18 Cal.4th 640,[13] to cases of retaliation brought under the FEHA. The court reached this conclusion even though other subdivisions taken literally would impose liability on all persons responsible for the misconduct. In *Torrey Pines, supra,* 42 Cal.4th at page 1164, the court held that the "rationale for not holding individuals personally liable for discrimination applies equally to retaliation." The multiple reasons for not imposing liability on "nonemployer individuals" for discrimination or retaliation—although they can be held personally liable

[13] In *Reno v. Baird, supra*, 18 Cal.4th at page 663, the Supreme Court held that a supervisor whose conduct renders the employer liable for employment discrimination under Government Code section 12940, subdivision (a) cannot be held personally liable for the discrimination.

for harassment under Government Code section 12940, subdivision (j)(1)[14]—were summarized concisely in *Torrey Pines* as follows: "[S]upervisors can avoid harassment but cannot avoid personnel decisions, it is incongruous to exempt small employers but to hold individual nonemployers liable,[15] sound policy favors avoiding conflicts of interest and the chilling of effective management, corporate employment decisions are often collective, and it is bad policy to subject supervisors to the threat of a lawsuit every time they make a personnel decision." (*Torrey Pines*, *supra*, at p. 1167.)

Copeland argues that her complaint alleged that Straley had harassed her, including engaging in verbal harassment. We remind Copeland that the pleadings define the issues to which a summary judgment motion must be directed. (*Hejmadi v. AMFAC, Inc*. (1988) 202 Cal.App.3d 525, 536.) Copeland's first amended complaint simply alleges as the first and second causes of action "Retaliation–Violation of Fair Employment and Housing Act, Government Code § 12940 et seq."; and as noted, the factual basis of her DFEH complaint is that she was wrongfully terminated. Copeland did not plead as a cause of action harassment by Straley; she pleaded causes of action for retaliation. As such the lower court correctly determined that Copeland could not be held personally liable under the FEHA.

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[14] At the time of the alleged conduct in this case, Government Code section 12940, subdivision (j)(1) made it an unlawful employment practice "For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract." (Stats. 2003, ch. 671, § 1.)

[15] An "employer" subject to liability under the FEHA is defined in part as "any person regularly employing five or more persons." (Gov. Code, § 12926, subd. (d); but see Gov. Code, § 12940, subd. (j)(4)(A) [defining employer for purposes of a claim for harassment in part as any person regularly employing one or more persons].)

V. Common Law Claims

Copeland's third cause of action was for wrongful termination and her fourth cause of action was for intentional infliction of emotional distress. In granting summary adjudication of these causes of action, the trial court found that Copeland's claims were barred by the two-year statute of limitations. (Code of Civ. Pro. § 335.1.)

Wrongful Termination

As to the cause of action for wrongful termination, Copeland alleged that her termination by Good Samaritan was "in violation of public policy." As to the fourth cause of action for intentional infliction of emotional distress Copeland alleged that defendants' conduct "was so negligent as to constitute a breach of duty to [her] to provide a work environment where [she] could voice a legitimate concern about patient care."

California law recognizes a tort cause of action for wrongful termination in violation of public policy. (*Tameny v. Atlantic Richfield Co*. (1980) 27 Cal.3d 167, 172, [an employer's traditional authority to discharge an at-will employee may be limited by statute or by considerations of public policy].)

In California, a cause of action accrues and the statute of limitation begins to run when a suit may be maintained. (*Howard Jarvis Taxpayers Ass'n v. City of La Habra*, (2001) 25 Cal.4th 809, 815.) In other words, a cause of action accrues upon the occurrence of the last element essential to the cause of action. (*Ibid.*) To put it another way, the applicable statute of limitations does not begin to run until the cause of action accrues, that is, " 'until the party owning it is entitled to begin and prosecute an action thereon.' [Citation.]" (*Spear v. California State Auto. Assn*. (1992) 2 Cal.4th 1035, 1040.) The Code of Civil Procedure makes this explicit: "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute." (Code Civ.Proc., § 312.)

To establish a claim for wrongful termination in violation of public policy, a plaintiff must prove: (1) an employer-employee relationship, (2) termination, (3) a nexus between the termination and the employee's engagement in protected activity, (4) causation, and (5) damages. (*Holmes v. General Dynamics Corp*. (1993) 17 Cal.App.4th 1418, 1426, fn. 8; Judicial Council of California Civil Jury Instructions (CACI) No. 2430, p. 1305.)

"[T]he cause of action recognized in *Tameny*, *supra*, 27 Cal.3d 167, is defined primarily as a limitation imposed by law on the employer's power of dismissal[;] *dismissal* on improper grounds is a breach of duty. Accordingly, when an employee alleges that his or her employment has been terminated in violation of public policy, a cause of action will accrue at the time of dismissal for the purpose of the statute of limitations." (*Romano v. Rockwell Internat., Inc*. (1996) 14 Cal.4th 479, 501.)

According to the facts before the court, each element of Copeland's wrongful termination claim, even if she had a meritorious one, had occurred by the end of Copeland's last day of service at Good Samaritan in April 2009. Copeland did not file her complaint until July 27, 2011. The statute of limitations for a claim of wrongful termination in violation of public policy is governed by the two-year statute of limitations for personal injury claims. (*Barton v. New United Motor Manufacturing, Inc*. (1996) 43 Cal.App.4th 1200, 1208-1209 [explaining that a wrongful termination action is the violation of some personal right]; Code Civ. Proc., § 335.1 [the statute of limitations for an action for injury to an individual caused by the wrongful act or neglect of another is two years].)

On appeal, Copeland claims that the FEHA claims for wrongful termination may include more than the termination itself. Copeland claims that Good Samaritan's refusal to rehire her until she had satisfied her probation prevented her advancing and this was in essence a continuing injury.

California law applies the " 'materiality' " test for defining an adverse employment action for purposes of the FEHA retaliation lawsuits. (*Yanowitz, supra*, 36 Cal.4th at p. 1036.) The test requires an adverse employment action to "materially affect[] the terms, conditions, or privileges of employment" to be actionable. (*Id*. at p. 1051.) Further, "the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace . . . ." (*Id*. at p. 1054.) It protects a plaintiff against not only " 'ultimate employment decisions,' " such as terminations and demotions, but also "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance *or opportunity for advancement in his or her career*." (*Ibid*., italics added.) Seizing on the italicized language, Copeland argues that this logic is equally applicable in a common law claim for wrongful termination. Here, Copeland asserts that Good Samaritan's "refusal to rehire her injured [her] at least until she satisfied probation two years later." Copeland alleges that refusing to rehire her prevented her from advancing or even maintaining the same career status because prospective employers refused to hire a candidate on probation. Copeland contends this continuing injury is a material fact that could affect a statute of limitations calculation. Copeland is mistaken.

There were no allegations in Copeland's amended complaint that Good Samaritan refused to rehire her or gave her negative references that prevented her from obtaining other employment. Even if she had made such allegations they would not have given rise to a common law wrongful termination claim, which required Copeland to show that she was terminated from her employment, not that she could not get re-hired or find a new job. We reiterate that a wrongful termination in violation of public policy claim accrues at the time of discharge. (*Romano v. Rockwell Internat. Inc., supra,* 14 Cal.4th at p. 501.)

In sum, the trial court did not err in determining that Copeland's common law claim for wrongful termination was barred by the statute of limitations.

Intentional Infliction of Emotional Distress

Copeland's cause of action for intentional infliction of emotional distress incorporated all the paragraphs in the first amended complaint and then concluded that defendants' conduct was "so negligent as to constitute a breach of duty to" Copeland "to provide a work environment where [Copeland] could voice a legitimate concern about patient care."

The elements of a cause of action for intentional infliction of emotional distress are: (1) the defendant engaged in extreme and outrageous conduct with the intent to cause, or with reckless disregard for the probability of causing, emotional distress; (2) the plaintiff suffered extreme or severe emotional distress; and (3) the defendant's extreme and outrageous conduct was the actual and proximate cause of the plaintiff's extreme or severe emotional distress. (*So v. Shin* (2013) 212 Cal.App.4th 652, 671.) " '[O]utrageous conduct' is conduct that is intentional or reckless and so extreme as to exceed all bounds of decency in a civilized community. [Citation.]" (*Ibid.*; CACI No. 1602, p. 807.)

Copeland's fourth cause of action for intentional infliction of emotional distress is governed by a two-year statute of limitations. (Code Civ. Proc., § 335.1; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1450.) The claim accrues when the tortfeasor's conduct first causes severe emotional distress. (*Kiseskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, 232 [tort complete when effect of defendant's conduct results in severe emotional distress].) Copeland based her cause of action for intentional infliction of emotional distress on the treatment she received while employed by Good Samaritan; plainly, her complaint filed more than two years after she was terminated is barred by the statute of limitations.

Disposition

The judgment is affirmed. The parties are to bear their own costs on appeal.

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ELIA, J.

WE CONCUR:

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PREMO, Acting P. J.

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MIHARA, J.