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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MELISSA ROUTH,

Plaintiff and Appellant,

v.

KERN COUNTY PROBATION  
DEPARTMENT,

Defendant and Respondent.

F061156

(Super. Ct. No. CV-267645)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Nordman Cormany Hair & Compton, Meghan B. Clark, Brook J. Carroll and Danielle R. Everson; Law Offices of Nicolas C. Vrataric and Nicolas C. Vrataric for Plaintiff and Appellant.

Theresa A. Goldner, County Counsel, and Mark L. Nations, Deputy County Counsel, for Defendant and Respondent.

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Melissa Routh appeals from a summary judgment in favor of Kern County Probation Department (Department) on her claims (1) under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940) for sexual harassment,

discrimination and retaliation, (2) wrongful termination in violation of public policy, (3) intentional infliction of emotional distress, (4) defamation, (5) intentional interference with prospective economic advantage, and (6) violation of Labor Code section 1050. We hold that triable issues of material fact exist with respect to Routh's FEHA claims for retaliation and discrimination, as well as her claims for wrongful termination and intentional infliction of emotional distress, and therefore reverse the judgment and orders on those claims. We agree with the trial court's ruling on the claims of sexual harassment, defamation, intentional interference with prospective economic advantage and violation of Labor Code section 1050. On those claims, we direct the court to grant the Department's alternative motions for summary adjudication.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Routh began working for the Department in July 1999. During her tenure there, she received various promotions, finally being promoted to a Deputy Probation Officer (DPO) III in July 2006. Up until 2006, Routh received standard ratings on her evaluations.

In 2006, the Department had three main bureaus: Field Services, Institutions, and Administration. When Routh was promoted to DPO III, she was working as a juvenile investigator in the Juvenile Services Division, where she was responsible for receiving court referrals regarding juveniles who violated the law, investigating those referrals, and preparing a dispositional court report containing recommendations regarding punishment. After her promotion to DPO III, Routh remained in Juvenile Services for several weeks to close out some of her cases. The remainder of her open cases were reassigned to other DPOs.

Kern County has adopted a Civil Service System by which discipline of County employees is carried out. Disciplinary actions within the Department were handled pursuant to the rules of the Civil Service Commission. An employee who was disciplined by the Department had a right to appeal the discipline to the Civil Service

Commission and if an employee was dissatisfied with the Commission's decision, had a right to seek court review of that decision by means of a petition for writ of administrative mandamus.

*Camp Erwin Owen*

In August 2006, Routh was transferred to a position at Camp Erwin Owen (Camp Owen), a part of the Institutions Bureau, where she worked as a DPO III for a total of four days: August 19, 20, 22, and 29, 2006. On the days Routh was absent from Camp Owen, she was either off duty, attending trainings, or on vacation. Her duties were the same as her DPO III co-workers and she worked at a satisfactory level. Routh's direct supervisor at Camp Owen was its assistant director, Matt Fontaine.

Because the commute to and from Camp Owen was lengthy, Routh carpoled to work with her co-worker Glen Pruett, who was also a DPO III; they commuted together two or three of the days Routh worked there. According to Pruett, during one of their commutes Routh, who said she was a reserve officer with the Bakersfield Police Department (BPD), told him a story about being groped by a fellow reserve officer while at a bar. Routh said that a fellow officer approached her from behind, grabbed her buttocks and spun her around. Placing a hand on one of her breasts, he said "Are these real or are they Memorex?" Pruett asked Routh what she did and Routh said she punched the officer and knocked him "on his ass."

On August 23, 2006, a day Routh was off duty, Pruett and Jason Hillis, who also worked at Camp Owen as a DPO III, were talking about Routh in an office at Camp Owen. Hillis asked Pruett if he thought Routh was tough enough to handle her assignment at Camp Owen. Pruett told Hillis he did not need to worry about Routh's toughness and related the story Routh told him. Hillis laughed and said something like "remind me not to talk about her breasts." Jim Traffanstedt, who was also a DPO III as well as a shop steward, was present during this conversation. Traffanstedt, who was Routh's good friend with whom she often socialized outside of work, was personally

offended by the conversation and let the others know he did not want it to continue. Traffanstedt later told Hillis the conversation offended him and he felt his comments were inappropriate; Hillis apologized.

The following day, Traffanstedt reported the conversation between Pruett and Hillis to Fontaine and later to Routh. Fontaine assured Traffanstedt he would handle the matter and told him to report similar problems directly to him. Fontaine informed his immediate supervisor of the report, who instructed him to speak with Pruett and Hillis. Traffanstedt told Routh the conversation included a reference to her breasts as being “bolt-ons.”

The next day that Fontaine was on shift with Hillis and Pruett, August 28, Fontaine spoke privately with each man. Pruett and Hillis told Fontaine their versions of the conversation. Fontaine told them their comments were inappropriate and the Department has a zero tolerance policy about sexual harassment, which he directed them to follow. Both men assured Fontaine they would comply and Fontaine said he would be monitoring the workplace to ensure compliance. Fontaine reported to his supervisor what he had done; they concluded admonishment and monitoring of the situation would be the correct course of action.

On August 29, Routh spoke with Fontaine about several matters. She expressed concern that other staff might resent her because she sought and obtained accommodations for child care and other family matters, and disappointment that she was assigned to Camp Owen when she felt she was better suited for field work. She also told Fontaine about the conversation between Hillis and Pruett that Traffanstedt overheard and that she thought the conversation was inappropriate. Fontaine told Routh about the Department’s zero tolerance policy on sexual harassment and asked her what she would like to see happen. Routh responded that she wanted such conversations to stop and did not want a hostile work environment. Fontaine said he would address her concerns. Routh also told Fontaine for the first time that during her commutes to work with Pruett,

he had made comments about her physique which made her uncomfortable, such as that she had a nice physique and he was glad she was in shape given the demands of the job. Fontaine told Routh he would speak to Pruett. According to Routh, when she told Fontaine about the lewd remarks of Hillis and Pruett, he “caustically responded, ‘What do you want me to do?!’”

Fontaine spoke with Hillis and Pruett again on August 31, relaying to them Routh’s concerns and admonishing them to be professional in their interactions with her and to follow policy. Fontaine reported the steps he had taken to his immediate supervisor; the two agreed that admonishment was sufficient under the circumstances and that Fontaine would monitor the situation and check in with Routh regularly to make sure everything was alright. Routh did not report any further incidents of inappropriate comments by either Pruett or Hillis. Pruett had no further contact with Routh at work after Fontaine spoke to him on August 28, 2006. Hillis was promoted sometime after Routh complained of sexual harassment.

While Department policy called for documentation of sexual harassment complaints, which are to be forwarded to the Chief of the Department, Fontaine did not make a written report of Routh’s complaint at the time it was made. According to Traffanstedt, normally he would write a memorandum of such incidents when made aware of them, but he did not do so in this case because Fontaine did not ask him to and he thought the matter was taken care of since he told Routh to file a harassment claim and told Fontaine that Routh would be coming to talk with him. In the opinion of the Department Chief, John Roberts, sexual harassment is a major infraction. Despite the absence of a written report, Roberts was told about Routh’s sexual harassment complaint to Fontaine when it was made and agreed with Fontaine’s decision to admonish Pruett and Hillis.

Roberts had worked with Fontaine for a number of years and never had any problems with his work. The two occasionally socialized outside of work and attended a

college football game in Los Angeles about once a year. According to Traffanstedt, he went to Fontaine once to inform him that he believed a female officer was dressing inappropriately at work, as her bra was showing and she was wearing a translucent top. The female officer told Traffanstedt that as long as her supervisor liked it, she was going to dress that way. Fontaine laughed about her comment and said that while he thought her dress was not inappropriate, he would talk to her about it. Traffanstedt did not believe Fontaine took the matter seriously.

*Routh's Transfer to Juvenile Hall*

Routh requested a transfer from Camp Owen after producing to the Department a doctor's statement dated August 31, 2006 that she was prone to motion sickness and should not be required to drive through the canyons. According to the Deputy Chief of Institutions, Terry Fleming, who met with Routh to discuss her request, Routh never suggested to him that she had been sexually harassed or discriminated against by anyone at Camp Owen. She did not complain to Fleming about Fontaine, Pruett or Hillis, that Pruett made offensive remarks to her during their commute, or indicate she considered the work environment at Camp Owen to be hostile in any way.

The Department granted Routh's request to accommodate her medical condition, and reassigned her to the Juvenile Hall facility, where she began working the next assigned work day after she provided the doctor's note. According to Fleming, the job she was assigned to was identical or very similar to her assignment at Camp Owen, and she was compensated at the same pay level. Routh, however, claimed the transfer was to a "less desirable shift, with less authority and fewer duties," and that Fleming initially refused her request for a transfer, agreeing to it only "after my insistence." In her deposition, however, when asked if she had the same duties at Juvenile Hall as Camp Owen, Routh responded "Yes and no, because they're different facilities, different requirements, but basically the same ideas, just different safety routines, two different

facilities.” She also testified she was transferred to a graveyard shift, for which she was paid more, but did not recall when the transfer occurred.

*The 2006 Internal Affairs Investigation*

On August 23, 2006, the same day as the conversation between Pruett and Hillis, Lisa Clark, who had been Routh’s supervisor in juvenile investigations, reported to Susan Lerude, the Assistant Division Director of the Juvenile Services Division, that she had found some problems in four cases on which Routh had worked that had been reassigned to other DPOs. On August 31, 2006, Lerude prepared a memorandum with the information Clark provided, which she directed to her supervisors, Elizabeth Gong and Jeanie Lopez. Lopez told Lerude to have Clark perform an audit of additional files on which Routh had worked while in the Juvenile Services Division. In an audit of 12 files, Clark found four cases with significant problems and reported her findings in a September 18, 2006 memorandum. Lerude was unaware of the complaints Routh made while at Camp Owen and had no contact with Fontaine during this time.

Lerude’s supervisors told Lerude the matter would be turned over to Internal Affairs for further handling. Roberts ordered Internal Affairs to investigate after being briefed on the preliminary results. The investigation was performed by lead investigator J. Paul Paris, a supervisor in the Administrative Services Division, assisted by Sonya McCall, a supervisor in the After Care Unit in the Juvenile Services Division. Routh said she was given no initial explanation for why such an in-depth investigation was being launched. Before this, she had no negative performance evaluations or “contentions” from her supervisors about her work product. The investigation was to be entirely confidential to parties outside the investigation.

Paris and McCall reviewed Routh’s case files, as well as the files of other DPOs, and interviewed eight witnesses, including Routh. Three of the witnesses were DPOs who inherited files from Routh. In those files, case assessment forms had not been completely filled out, new rap sheets had not been run, Routh did not interview a minor

in one case, and in another case Routh represented in a report she had submitted a petition to the district attorney when she had not done so. Maricela Rios, a student intern, told investigators Routh often filled out case assessment forms in advance even though the information provided was wrong or incomplete, which Rios then had to correct. Rios also said Routh pre-signed medical authorization forms and required her to provide them to the parents for signature.

Clark told investigators she first became aware of concerns about Routh's case files when she was proofreading one of Routh's reports and noted the case assessment form had not been provided. Routh told Clark that she did not complete the case assessment forms until after she completed her report, which surprised Clark, as in her opinion the report could not be completed properly without the form. Clark gave the report back to Routh and told her to complete the case assessment form and bring the form and report back to her. After Routh's transfer to Camp Owen, Clark realized she had not received the report; she found the case file, which showed supervisor John J. Zahry had approved the case and that problems in the report had not been rectified. Zahry told investigators he signed off on the report after Routh came to him and asked for his signature as having proofed the report. Clark had concerns with other cases, such as Routh failing to contact a minor who had been in custody for three months, failing to complete case assessment paperwork, and failing to have parents sign medical release and authorization forms.

Lerude noted the same problems as Clark. Lerude added that in the case where Routh failed to contact the minor who was in custody, after the minor was released from custody a bench warrant issued as the Department did not have the minor's current address. Lerude also stated that in another case Routh represented in her court report that she had contacted the victim when she had not done so. While the police report noted the victim wanted restitution, the victim said Lerude was the first person from the Department to contact him.

Paris and McCall also interviewed Routh in the presence of her legal counsel. Routh denied the witnesses' concerns and claimed she did not knowingly fail to comply with departmental requests. Routh admitted often not completing case assessments even though she knew it was required by her supervisor and department policy, claiming time limits on employees prevented her from doing so. Routh also admitted pre-filling out medical authorization forms and case assessment plans to save time, but said it was common practice. She had no memory of Clark instructing her to complete the case assessment form. At times, she would copy information from other sources without verifying the accuracy of the information. Routh claimed she did not contact the minor in custody because his case was not progressing through the courts. Routh claimed she forwarded the petition to the district attorney and did not knowingly fail to contact the crime victim. Routh admitted speaking to two other DPOs about the investigation even though she had been ordered in writing not to discuss the investigation with anyone other than her representative.

As part of the investigation, Paris and McCall also audited 100 randomly selected cases of other DPOs to determine whether there was a problem in the entire unit regarding documentation. In nearly every case, the activity on those files was well-documented, case assessment plans were complete and additional supporting documentation present. After interviewing the officers who worked on those files, the investigators concluded that while Routh had a smaller case load than the other officers, her work suffered by comparison and did not represent the Department norm. Paris and McCall concluded that Routh had been dishonest and had engaged in conduct which violated five Civil Service Rules.

On January 3, 2007, before the investigation was completed, Routh was returned to her previous classification as a DPO II and assigned to monitoring probationers after Roberts determined, based on results of the investigation to date, that Routh had not successfully completed her six-month probation as a DPO III, which would have expired

in January 2007. Routh claimed this was a low-skilled position, in which she took phone calls from juvenile delinquents who reported to the Department bimonthly.

On January 31, 2007, Routh filed a complaint with the Equal Employment Opportunity Commission (EEOC) for violation of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. After the EEOC complaint was filed, Debbie Kirkendal directed Fontaine to write a report regarding Routh's complaint at Camp Owen.

Following the investigation, Roberts concluded that Routh should be disciplined for violating the Civil Service Rules. Routh was provided with notice of the intended discipline, and she and her lawyer met with Roberts to discuss it. Roberts reached an agreement with Routh and her lawyer about a final discipline, namely five days' suspension without pay. Routh agreed not to appeal her discipline to the Civil Service Commission and the Department agreed to remove the finding of dishonesty from the investigative report and any Notice of Disciplinary Action. As required by the agreement, Paris was instructed to remove the dishonesty finding from the investigation report. Paris modified the report and resubmitted it. The Internal Affairs Investigation Report does not include a finding of dishonesty. As part of her discipline, Routh was temporarily removed from an assignment as a defensive tactics instructor. Roberts, however, eventually reinstated her to that position.

On April 23, 2007, the Department released its official Notice of Disciplinary Action, which states Routh was charged with conduct unbecoming an employee in public service, incompetency or inexperience, insubordination, neglect of duty, and violation of a reasonable order given by a superior officer. While Routh was informed that any mention of dishonesty would be redacted from the investigation's findings, she claimed that dishonesty was not removed from "the report" and her personnel file stated she had been found to have been dishonest during her employment. According to Roberts, while information about dishonesty was redacted from the "order letter" and "Internal Affairs

report,” it was not redacted from the original *Skelly*<sup>1</sup> letter, which remained in her personnel file. Roberts thought this was an oversight and was not done intentionally. The redacted documents had been sent to Routh’s attorney to review and he also did not mention the *Skelly* letter.

When Routh worked at Camp Owen, Fontaine was unaware of any investigation into Routh’s work as a DPO in the Field Services Division. Fontaine was not consulted about that investigation, did not participate in it, and did not tell anyone in the Field Services Division that Routh had complained to him about the conversation between Hillis and Pruett.

According to Paris and McCall, their findings were based exclusively on the evidence they obtained and they did not conduct their investigation to retaliate against Routh for her sexual harassment complaint or because of her gender. No one from the Department led Paris to believe the investigation was retaliatory. Paris was not provided any information regarding Routh’s work at Camp Owen or complaints she may have made while working there. McCall was not aware of Routh’s sexual harassment complaint at Camp Owen through most of the investigation; she did recall hearing something about it towards the end of the investigation, but asserted it had no bearing on the investigation. Fontaine did not contact either Paris or McCall regarding Routh during the investigation.

According to Roberts, his decision to discipline Routh was based solely on the findings of the internal affairs investigation and it was not in retaliation for the complaint Routh made to Fontaine at Camp Owen or because she is female. Roberts did not ask either Clark or Lerude to start the investigation into Routh’s case files. He discussed the specifics of Routh’s dishonesty with his management team, which was comprised of 14 other individuals, including Lerude, Fleming, Chief Deputy Dave Kuge, Fontaine, Paris

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<sup>1</sup> (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*).)

and Rob Williams, but most of his conversations on this topic were with the executive management team comprised of himself, Jeanie Lopez, Debbie Kirkendal and Fleming.

*Routh Seeks Other Employment*

Around the time of her demotion to DPO II, Routh interviewed for a position with the State Parole Board. The State Parole Board informed her she was disqualified from a position with them because of the internal affairs investigation.

In May 2007, Routh interviewed for a position with the California Department of Corrections and Rehabilitation (CDCR) and was offered a position subject to a background check. Department policy and procedure dictate that employees are not allowed to disclose information from a personnel file to persons not employed by the County unless the employee authorized the release of such information. Even then, except in unusual circumstances, the release of information is done by making the personnel file available for review and not by oral communication.

Routh executed an authorization to release information to the CDCR. On June 14, 2007, Peter F. Howell from the CDCR came to the Department to review Routh's personnel records. After Howell produced the release, Barbara Ansolabehere, a DPO III assigned to the Administrative Services Division, made Routh's personnel file available to him. Included with the file were all of Routh's employee performance reports, as well as the April 23, 2007 Notice of Disciplinary Action signed by Roberts. After reviewing the personnel file, Howell returned it to Ansolabehere. Ansolabehere did not orally provide Howell any information about Routh. In conjunction with Howell's review of Routh's personnel file, Ansolabehere completed an Employment Reference Questionnaire regarding Routh, basing her answers solely on information from Routh's personnel file.

In August 2007, the CDCR informed Routh she failed the background check because of "the findings of [the Department]'s investigation report." Routh examined her personnel file and found a letter stating she was dishonest and had falsified records,

which was not supposed to be there. Routh was told “the letter” was put in the file by mistake. Routh did not consent to “the document” being in her file or to its dissemination to others within the Department.

*The 2008 Internal Affairs Investigation*

In February 2008, Routh was transferred to the high risk adult offender unit (HRAOU), which McCall and others in the Department considered a prestigious assignment. Prior to Routh’s reassignment, Zahry was her supervisor. He was transferred to HRAOU at the same time as Routh and continued to be her direct supervisor. On January 4, 2008, before the transfer to HRAOU, Zahry prepared a written evaluation of Routh’s job performance, in which he rated her overall performance as standard and recommended she receive a salary increment raise. In April 2008, Fontaine was promoted to adult probation as a director. As director, Fontaine had little interaction with Routh.

In May 2008, Zahry noticed what he felt was a discrepancy on one of Routh’s time cards. The entry indicated Routh had worked until 9 p.m. on a Friday evening. Zahry remembered Routh had been at an out-of-town training that day and asked an employee who attended the training with her, Terry Morris, when they returned from the program. Morris said they returned between 6 and 6:30 p.m. Zahry spoke with Routh about the time card entry. At first Routh said they returned a little earlier than 9 p.m., but she had to drop off some people and equipment, and work on a computer presentation. Twenty minutes later, she contacted Zahry; she was visibly upset and defensive, and said he could change the time if he wanted, but she had worked the hours. Zahry told her he was just doing his job and trying to make sure the entry was accurate. Based on her reaction to his inquiry, Zahry felt she was not being honest with him.

While Zahry’s supervisor, Fontaine, initially told him to have Routh prepare a memorandum explaining her time entry, Fontaine’s supervisor, Chief Deputy Dave Kuge, later told Zahry not to have Routh prepare the memorandum. After conferring with

Kuge, Roberts ordered an internal affairs investigation into the timekeeping issue because Zahry had received conflicting stories on what time the employees had returned from training. Roberts was not aware of any problems with Routh's employment between the two internal affairs investigations, and was not aware of any other probation officer being investigated by internal affairs regarding a time card issue.

The second internal affairs investigation was conducted by Sherry Jones with assistance from Theresa Yanez and Gail Villalovos. In conducting the investigation, Jones reviewed documents, including time records and a memorandum from Morris and Greg Bittle, the other employee who attended the training with Routh. Eight individuals were also interviewed. Following the investigation, Jones concluded, based on the evidence, that Routh had violated Civil Service Rules by engaging in dishonesty and conduct unbecoming an employee in public service.

Jones prepared a report, which she submitted to Roberts. Jones concluded that based on Routh's statements to Morris, Bittle, Zahry and the interviewers, Routh had been dishonest throughout the investigation. Jones noted Routh contradicted herself several times during her interview, provided disparate justifications for the time card entry, and created a fictitious timeline of events for the night in question in an attempt to justify the time entry. Jones further believed that Routh provided the timeline with the intent to confuse the investigators and administration, and purposely changed her story when the investigators questioned her knowing the new account could not be verified. Routh, however, contended she was able to account for all of her time and although she offered to remove any time her supervisors felt was excessive, she was nonetheless found to have falsified records.

According to Roberts, upon receipt of the investigation results he determined Routh should be terminated for dishonesty and instructed Fontaine to notify her of the intent to terminate her employment. According to Fontaine, however, he and Kuge were the ones who determined that Routh's employment should be terminated because she

engaged in dishonesty. Kuge instructed Fontaine to place Routh on paid administrative leave; Fontaine did so by delivering, on September 12, 2008, a letter authored by Roberts. In October 2008, Fontaine informed Routh, through a Notice of Proposed Disciplinary Action, that he recommended that her employment be terminated and the reasons for that decision, and advised her of her right to meet with Roberts regarding the proposed discipline. In November 2008, before any imposition of discipline, Routh resigned her position, stating she was no longer able to cope with the stress and anxiety.

Zahry did not speak to his supervisor about the time card discrepancy because of Routh's gender or because he wanted to retaliate against her. Instead, he concluded based on what Morris told him and Routh's explanation of her entry and her demeanor that she was not being honest about how long she had worked on the day in question.

Fontaine was not involved in conducting the internal affairs investigation. Jones did not consult with him and he did not give her directions. According to Jones, no one from the Department's administration tried to influence her investigation or dictate to her what its conclusions should be, and her conclusions were based solely on the evidence she located. While Jones knew Routh had complained two years before regarding inappropriate behavior at Camp Owen and was transferred due to a medical problem, Jones claimed those events did not figure into her investigation or conclusions. Jones was not retaliating against Routh either on her own or for someone else. Jones was not privy to the consequences that resulted from the investigation.

Fontaine claimed the investigation into the time card discrepancy had nothing to do with Routh's oral complaint made to him two years before at Camp Owen. He relied solely on the findings of the two investigations to support his recommendation that Routh be terminated for dishonesty. He concluded, based on the investigators' findings, that Routh had engaged in dishonest practices while working as a DPO. Roberts also claimed that his decision to notify Routh of her proposed termination had nothing to do with Routh's complaints at Camp Owen. Instead, Roberts based his decision solely on the

findings of the internal affairs investigation and not on Routh's gender. Roberts, however, could not recall any other internal affairs investigations into other officers for time card irregularities like Routh's or for false information being put into case reports.

Routh believes the investigations undertaken against her were a direct result of her complaints of sexual harassment, request for medical accommodation, and complaints that she filed with the EEOC. Routh worked in constant fear of losing her job and being disciplined regardless of fault.

In Traffanstedt's experience, he had seen officers with issues similar to Routh's who had not been investigated by internal affairs. Traffanstedt believed that male officers in field units were investigated more often than female officers, but in the institution, where there are more male than female officers, the investigations are equal between male and female officers. Traffanstedt did not know and had not ever drawn a conclusion from the pattern he observed regarding whether females working in institutions were being disproportionately subjected to investigations. He believed, however, that most of the serious allegations that went to full internal affairs investigations involved more women than men, and all EEOC complaints filed had been from women. Traffanstedt believed other officers had falsified their time cards, yet had not been subjected to an internal affairs investigation. He was aware of two cases where there was systematic time card abuse.

According to Routh, shortly after her resignation the BPD learned of her "forced resignation" "by means unbeknownst" to her, and released her as a volunteer police officer. According to the Department, the BPD contacted Zahry and requested permission to review Routh's personnel file. Zahry referred the request to the personnel division. On December 5, 2008, Bryon Sandrini and Rene Chow of the BPD came to the Department to review Routh's personnel file. After they produced a signed and notarized Personal Inquiry Waiver, Ansolabehere made Routh's personnel file available to them, including her employee performance reports and information pertaining to discipline.

After reviewing the file, Sandrini and Chow returned the file to Ansolabehere.

Ansolabehere did not orally transmit any information to them regarding Routh.

Persons familiar with the investigation into Routh's workplace conduct or the imposition of discipline, namely Paris, McCall, Zahry, Jones, Lerude, Ansolabehere, Fontaine and Fleming, did not communicate with the BPD or the CDCR about Routh, other than information Ansolabehere released; neither did they speak to anyone about Routh that they understood to be a prospective employer.

*This Lawsuit*

In March 2009, Routh filed a complaint with the California Department of Fair Employment and Housing, alleging she was sexually harassed and terminated because of her sex and in retaliation for engaging in protected activity. The case was closed because Routh requested an immediate right-to-sue notice. She also submitted a claim to the Kern County Board of Supervisors, which it rejected.

On June 25, 2009, Routh filed a complaint in Kern Superior Court, naming the Department as the sole defendant. The complaint alleges that Routh was sexually harassed and then subjected to discrimination and retaliation when, after reporting the sexual harassment, her complaint was ignored, one of the harassers was given a job promotion, and she was subjected to the internal affairs investigations and demoted. Routh further alleges her termination was a pretext for retaliating against her reports of sexual harassment and requested reassignment, and that the Department's actions caused her emotional distress. Routh's claims for defamation, intentional interference with prospective economic advantage and violation of Labor Code section 1050, are all based on allegations that the Department published the findings from her internal affairs investigations, including a finding of dishonesty, to third persons, including the CDCR, BPD, Kern County employees and the community, which led to the CDCR withdrawing its employment offer and her termination from the BPD.

On February 25, 2010, the Department filed a motion for summary judgment or summary adjudication. It asserted it was not liable for sexual harassment because any harassment was not severe or pervasive, and Fontaine took immediate corrective action. With respect to the discrimination claim, the Department asserted it took corrective action on Routh's harassment complaint and there was no evidence the internal affairs investigations were initiated, or discipline imposed, because of Routh's gender. The Department contended it did not retaliate against Routh for her complaint of sexual harassment, or wrongfully terminate her, because there were legitimate reasons for the internal affairs investigations and resulting discipline that were unrelated to her sexual harassment complaint. With respect to her claim of intentional infliction of emotional distress, the Department asserted the conduct of its employees was not extreme and outrageous, and the claim was barred by the exclusivity provisions of the Workers' Compensation Act. Finally, the Department contended Routh's remaining claims failed because any statements made were absolutely privileged under Civil Code section 47, subdivision (b).

In her opposition, Routh argued triable issues of fact precluded summary judgment. She also submitted 25 written objections to various statements in the declarations the Department submitted in support of the motion. In reply, the Department submitted 22 written objections to Routh's evidence.

Following oral argument, the trial court took the matter under submission. It later issued a written ruling granting summary judgment. The trial court also ruled on each of the parties' evidentiary objections. On Routh's objections, the court sustained one objection and overruled the others, while on the Department's objections, it sustained 13 objections, partially sustained two others, and overruled the remainder. A written order granting summary judgment in favor of the Department and judgment was filed on August 2, 2010.

## DISCUSSION

### *Standard of Review*

A defendant “may move for summary judgment . . . if it is contended that the action has no merit.” (Code Civ. Proc., § 437c, subd. (a).)<sup>2</sup> The defendant bears the burden of showing that a cause of action has no merit because the plaintiff cannot establish an element of the claim or because the defendant has a complete defense. If the defendant makes this showing, the burden shifts to the plaintiff opposing the summary judgment motion to establish that a triable issue of fact exists as to these issues. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; § 437c, subds. (a), (p)(2).)

As the moving party, the Department “bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) If the Department meets this burden, then the burden of production shifts to Routh “to make a prima facie showing of the existence of a triable issue of material fact.” (*Ibid.*) “[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he [or she] is entitled to judgment as a matter of law.” (*Ibid.*)

Significant to the case presently before us is the principle that on summary judgment or summary adjudication “the court may not weigh the plaintiff’s evidence or inferences against the defendants’ as though it were sitting as the trier of fact . . . .” (*Aguilar, supra*, 25 Cal.4th at p. 856.) The court may, and in fact “must . . . determine what any evidence or inference could show or imply to a reasonable trier of fact.” (*Ibid*, italics omitted.) To state this a bit differently, the court does not determine whether an opposing plaintiff’s evidence is credible, but rather determines what inference a

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<sup>2</sup> Subsequent statutory references are to the Code of Civil Procedure unless otherwise stated.

reasonable trier of fact could draw from that evidence if the trier of fact were to believe that evidence. (See *Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153-1155 (*Colarossi*).

We review an order granting summary judgment de novo. (*Aguilar, supra*, 25 Cal.4th at p. 860.) We independently review the record and apply the same rules and standards as the trial court. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925.) The trial court must grant the motion if “all the papers submitted show 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.” (§ 437c, subd. (c).) In ruling on a summary judgment motion, the court must “consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court.” (§ 437c, subd. (c); *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039; *Weil v. Federal Kemper Life Assurance Co.* (1994) 7 Cal.4th 125, 149, fn. 9.) “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.” (*Aguilar, supra*, 25 Cal.4th at pp. 850-851.) We view the facts in the light most favorable to the nonmoving party and assume that, for purposes of our analysis, her version of all disputed facts is correct. (*Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 159 (*Sheffield*).

Citing *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255, Routh contends we should disregard the trial court’s evidentiary rulings and review all of the evidence the parties submitted on the motion. The court in *Nazir*, however, did not hold that a trial court’s evidentiary rulings should be disregarded in all summary judgment cases. Instead, the appellate court concluded that it would consider all of the plaintiff’s admissible evidence because the trial court abused its discretion when it made a blanket ruling sustaining all but one of the defendants’ 764 objections, stating that this was “hardly a ruling” and failed to conform to the requirement that the court expressly rule on

individual objections—a failing made all the more egregious because many of the objections stated no grounds at all. (*Nazir, supra*, 178 Cal.App.4th at pp. 255-257.) Here, in contrast, the trial court expressly ruled on each objection presented by the parties, which were based on specific grounds. Accordingly, there is no basis to disregard the trial court’s evidentiary rulings.

With respect to the trial court’s evidentiary rulings, Routh asks us to review them on a de novo basis. We will review the objections only to the extent Routh specifically challenges particular evidentiary rulings with meaningful argument and authority, and demonstrates an abuse of discretion. (See § 437c, subd. (c) [court shall consider all evidence set forth in summary judgment papers except that to which objections have been made and sustained]; *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122 [acknowledging de novo standard of review of summary judgments but applying abuse of discretion standard to court’s final rulings on evidentiary objections]; see also *Reid v. Google* (2010) 50 Cal.4th 512, 535 [declining to “decide generally whether a trial court’s rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo”].)

With these principles in mind, we turn to Routh’s contentions.

#### *Sexual Harassment*

The trial court granted summary adjudication on Routh’s sexual harassment claim after finding the undisputed facts showed the alleged conduct was insufficient to constitute severe or pervasive conditions, or altered any condition of her employment. On appeal, Routh argues there are triable issues of material fact on her sexual harassment claim.

The FEHA prohibits an employer from harassing an employee on the basis of sex. (Gov. Code, § 12940, subd. (j).) Routh’s sexual harassment claim was based on a hostile work environment. To state a prima facie claim for hostile work environment sexual

harassment, a plaintiff must establish that: (1) he or she was subjected to unwelcome sexual advances, conduct, or comments; (2) the harassment complained of was based on sex; and (3) the harassment was sufficiently severe or pervasive as to alter the conditions of his or her employment and create an abusive working environment. (*Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 279.) Occasional, isolated, sporadic, or trivial incidents are not enough; rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature. (See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610 (*Fisher*)). “The working environment must be evaluated in light of the totality of the circumstances: ‘[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.’” (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.)

Routh’s sexual harassment claim is based on: (1) comments Pruett made about Routh’s physique during their commutes, such as that she had a nice physique and he was glad she was in shape; and (2) the conversation between Pruett and Hillis, in which Hillis said he should be reminded not to talk about Routh’s breasts, which were referred to as “bolt-ons.” These comments were not severe and were not physically threatening; at best they were offensive utterances. Pruett and Routh commuted together only two or three times. According to Pruett, Routh never made him aware that anything he said during the commutes was offensive or inappropriate. Routh did not present any evidence suggesting the words Pruett used, how often he used them, or how long any given incident lasted. Routh was not present during the conversation between Pruett and Hillis, only hearing about it from Traffanstedt. Once Routh and Traffanstedt brought Pruett’s comments and the conversation between Pruett and Hillis to Fontaine’s attention, he spoke to the two men and told them to stop. No further incidents occurred.

These incidents alone do not show a sufficiently severe or pervasive work environment, and are insufficient to support a claim of hostile work environment based on sex. Moreover, there is no evidence that Routh's conditions of employment were altered by the harassment. She performed satisfactorily while at Camp Owen and presented no evidence that her work performance suffered as a result of the harassment.

Relying on *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, Routh contends her sexual harassment case should be reserved for a jury, as “[o]ne person’s bad day at work is another’s ‘severe and pervasive’ conditions.” In *Weeks*, the court found substantial evidence supported a jury finding of sexual harassment based on five acts of harassing conduct that occurred over a one-week period, where the plaintiff’s supervisor “reached into [her] breast pocket, gestured as if to cup her breasts in his hands, touched her buttocks[,] quizzed her about the wildest thing she had ever done, [and] pulled [the plaintiff’s] shoulders back to ‘see which breast [wa]s bigger.’” (*Id.* at p. 1147.) There is nothing remotely approaching that type of conduct here.

Routh’s reliance on *Birchstein v. New United Motor Mfg., Inc.* (2001) 92 Cal.App.4th 994 (*Birchstein*), and *Sheffield, supra*, 109 Cal.App.4th 153, are also misplaced. In *Birchstein*, a co-worker made overt passes at the plaintiff until she complained to her foreman. Thereafter, the co-worker’s conduct involved staring at her at least five times a day for between five seconds and ten minutes at a time. (*Birchstein, supra*, 92 Cal.App.4th at p. 998.) The appellate court reversed summary judgment entered in the employer’s favor on the plaintiff’s sexual harassment and retaliation claims after concluding that staring at a fellow employee can constitute actionable sexual harassment. (*Id.* at pp. 996-997, 1000.) The court explained the plaintiff’s reaction and complaints to management transmuted the “overt acts of sexual harassment” into an allegedly daily series of retaliatory acts – “the prolonged campaign of staring at plaintiff – acts that were directly related to, indeed assertedly grew out of, the antecedent unlawful harassment.” (*Id.* at p. 1002, italics omitted.) In contrast here, there was no

prior history of harassment that transmuted Pruett's comments or the conversation he had with Hillis into actionable sexual harassment.

In *Sheffield*, where insufficient time had passed for the harasser's conduct, which consisted of calling the plaintiff both at home and her workstation asking for a date, to have otherwise evolved into a hostile work environment, the court held that "when violence or the threat of violence is added to the equation, a trier of fact could determine that the [complaining employee's] conditions of employment had been drastically changed and that she was in a hostile work environment." (*Sheffield, supra*, 109 Cal.App.4th at pp. 163-164, fn. omitted [harasser made a fist and slammed it into her other palm while frowning and looking at the victim who had rejected her advances; two days later she attacked the plaintiff at her desk].) Here, however, there was no threat of violence that transformed Routh's workplace into a hostile work environment.

#### *Retaliation, Discrimination, and Wrongful Termination*

Routh contends she was subjected to a variety of adverse employment actions for complaining to Fontaine that she was sexually harassed, which constitute both retaliation and discrimination under FEHA, and which resulted in her wrongful termination. "FEHA makes it unlawful for an employer or other person to 'discharge . . . or otherwise discriminate against any person because the person has opposed any practices forbidden under this part.' (Gov. Code, § 12940, subd. (h).) A violation of this prohibition occurs when the employer takes harmful action against an employee in retaliation for the latter's engaging in a protected activity." (*McCaskey v. California State Auto Assn.* (2010) 189 Cal.App.4th 947, 987.) The elements of such a claim are substantially the same as those for disparate treatment, except instead of having to show that the action was motivated by

animus toward the plaintiff as a member of a protected class, the plaintiff must show that the motive was retaliatory animus. (*Id.* at pp. 987-988.)<sup>3</sup>

To prevail at trial on a FEHA claim of retaliation, a plaintiff must establish a prima facie case of retaliation. If the defendant then articulates a legitimate non-retaliatory explanation for its acts, the plaintiff must then show that the defendant's proffered explanation is merely a pretext for the illegal employment action. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) "To establish a prima facie case, the plaintiff must show that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action." (*Ibid.*; in accord, see also *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 814.)

The Department argued it was entitled to summary judgment on the retaliation claim because it met its burden to provide legitimate non-retaliatory explanations for the adverse employment actions to which Routh was subjected. The trial court ruled that the Department established legitimate, non-discriminatory reasons to discipline Routh and Routh had not raised an issue of fact suggesting those reasons were untrue or pretextual, or the Department had any discriminatory or retaliatory animus.

The evidence shows that on August 29, 2006, Routh complained to Fontaine about sexual harassment by Pruett and Hillis. While Fontaine spoke to the two men about her complaints and made Roberts aware of the situation, he did not document Routh's accusation. Around the same time, Routh's former supervisor, Clark, discovered problems on cases Routh worked on prior to her assignment at Camp Owen.<sup>4</sup> Clark

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<sup>3</sup> While Routh alleged in her complaint liability under FEHA based on sex discrimination, her discrimination claim is based on the same conduct as her retaliation claim.

<sup>4</sup> Lerude stated in her declaration that Clark reported the problems she found in Routh's cases on August 23, 2006. The trial court overruled Routh's hearsay objection to

brought the matter to Lerude's attention, who asked Clark to audit Routh's cases. On September 18, 2006, Clark wrote a memorandum regarding the problems she discovered. Lerude's supervisors brought the matter to Roberts' attention, who ordered an internal affairs investigation, which showed problems with Routh's work. Before the investigation was completed, Roberts determined Routh had not successfully completed her probation and demoted her. After her demotion, Routh filed a complaint with the EEOC. Once the internal affairs investigation was completed, Roberts concluded Routh should be disciplined; he agreed to a five-day suspension without pay and to remove any finding of dishonesty from Routh's personnel file. Although the dishonesty finding was removed from most documents, it was not removed from a *Skelly* letter, which remained in her file. Routh applied for a position with the CDCR and received an offer of employment subject to a background investigation. The offer was withdrawn, however, after a CDCR representative reviewed her personnel file. Routh continued in her position as a DPO II and received a satisfactory review. In May 2008, however, her supervisor, Zahry, discovered a discrepancy on her timecard, about which he thought she was being deceptive. The matter was brought to Roberts' attention, who ordered an internal affairs investigation although no other DPO had been subjected to an internal affairs

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this statement. Routh asserts the trial court erred in so ruling, arguing Lerude's statement regarding the date Clark made her report is hearsay. We do not agree, as Lerude's statement is not one made "other than by a witness while testifying at the hearing." (Evid. Code, § 1200, subd. (a).) While Routh contends the date of Clark's report is in dispute, she offered no evidence to support a conclusion that Clark's report occurred on another date.

We note that Routh also objected to many of the trial court's factual findings and argues the trial court should have granted her hearsay objections to various items of evidence. Routh, however, failed to present any reasoned argument and relevant legal authorities on her hearsay claims, and therefore has waived them. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) With respect to her arguments on the trial court's factual findings, we have independently reviewed the evidence supporting these findings and have included all of the evidence on each point in the statement of facts.

investigation for time card issues. Following that investigation, Roberts and Fontaine decided to terminate Routh for dishonesty.

Although the Department presented evidence sufficient to show that the two internal affairs investigations were instituted and conducted, and discipline imposed, for legitimate, non-retaliatory reasons, Routh presented circumstantial evidence that she was the victim of retaliation. (See *Colarossi, supra*, 97 Cal.App.4th at p. 1153 [circumstantial evidence, which can be used to show an employer's intent to retaliate, typically relates to factors such as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers].) While there is no evidence that Clark or Lerude were aware of Routh's sexual harassment complaint at Camp Owen, Roberts was certainly aware of it. After being advised of the problems with Routh's probation reports, he was the one who ordered the internal affairs investigation into them. While the investigation uncovered problems with Routh's reports, it was Roberts who decided on the discipline to be imposed and agreed to remove the finding of dishonesty from her personnel file. He did not ensure, however, that the finding was removed from her entire file. Once the time card discrepancy was brought to his attention, Roberts again ordered an internal affairs investigation, and he and Fontaine were the ones who decided Routh should be terminated. Roberts admitted in his deposition that he was not aware of any other person subjected to an internal affairs investigation into timecard irregularities; neither was he aware of any internal affairs investigations into the case reports of other DPOs.

Certainly the Department had the right to confront Routh about both her probation reports and her time card. However, Roberts' decision to institute internal affairs investigations into these matters, and ultimately to terminate Routh, might strike a trier of fact as rather suspicious. When considered in light of all of the evidence, the

Department's actions create an impression it possessed a retaliatory motive, not a benign one, in deciding to investigate and discipline Routh.<sup>5</sup>

We do not intend by anything we say to question the Department's right to institute internal affairs investigations into issues involving probation reports or time cards, and to discipline employees based on those findings. It may be determined that the Department's actions were justified and appropriate. But, considering the totality of the evidence in a light most favorable to Routh, as we must on summary judgment, we believe a rational trier of fact reasonably could conclude the Department's motives were retaliatory. That there is evidence that would support either conclusion convinces us the trial court erred in granting summary judgment on Routh's claims for retaliation and discrimination under the FEHA. Moreover, since the trial court granted summary judgment on Routh's wrongful termination claim on the same basis, judgment on that claim also must be reversed.

*Intentional Infliction of Emotional Distress*

The complaint alleged the same facts that established Routh's retaliation claim also constituted intentional infliction of emotional distress (IIED). The trial court granted summary judgment on this claim, finding it was barred by the Workers' Compensation Act. The trial court also found that Routh could not show either that (1) the

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<sup>5</sup> Routh stated in her declaration that she "was informed that Fontaine was 'out to get' me for my previous complaints of sexual harassment." The trial court sustained the Department's hearsay and Evidence Code section 352 objections to this statement. Routh repeats her statement in the opening brief without arguing the trial court's ruling was erroneous. She raises the issue for the first time in her reply brief after the Department pointed out the trial court's ruling in its brief. We do not consider points raised for the first time in a reply brief, as they do not give the Department an opportunity to respond or allow this court the benefit of a fully briefed issue to consider. (*Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1 ["an appellate court has the discretion to deem an alleged error to have been waived if asserted only in the reply brief and not the opening brief."].)

Department's conduct was extreme or outrageous, or (2) the Department's conduct was intentional and done to cause Routh emotional distress.

The parties agree that if we conclude, as we have, that any of Routh's FEHA claims survive summary judgment, Routh's cause of action for IIED is not subject to the exclusivity provisions of the Workers' Compensation Act. (See *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 347, 352.) This is so because such a claim, if based upon the employer's harassment or discrimination, is "founded upon actions that are outside the normal part of the employment environment." (*Murray v. Oceanside Unified Sch. Dist.* (2000) 79 Cal.App.4th 1338, 1363.)

The parties disagree, however, on whether there is a triable issue of fact regarding whether the Department's conduct was extreme and outrageous. An IIED cause of action requires a showing of extreme and outrageous behavior beyond all bounds of decency. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946, disapproved on another point in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.) The conduct must have been committed with the intention of causing, or reckless disregard of the probability of causing, emotional distress, and the plaintiff must have suffered severe emotional distress. (*Agarwal, supra*, at p. 946.) "Behavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress." (*Ibid.*) Whether behavior is extreme and outrageous is a legal determination to be made by the court, in the first instance. (*Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 44.) However, "[w]here reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." (*Lagies v. Copley* (1980) 110 Cal.App.3d 958, 974-975,

disapproved on other grounds in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 738.)

Routh contends a reasonable trier of fact could find that the Department engaged in systematic retaliation over a two year period and the retaliation constituted extreme and outrageous conduct. We agree. “Given an employee’s fundamental, civil right to a discrimination free work environment ([Gov. Code,] §§ 12920, 12921), by its very nature, [discrimination] in the work place is outrageous conduct as it exceeds all bounds of decency usually tolerated by a decent society. [¶] Accordingly, if properly pled, [discrimination] will constitute the outrageous behavior element of a cause of action for intentional infliction of emotional distress.” (*Fisher, supra*, 214 Cal.App.3d at p. 618.) Since Routh has established a triable issue of fact regarding her claims for retaliation and discrimination, there is also an issue of fact regarding her claim for IIED.

#### *Defamation and Related Tort Claims*

In Routh’s fourth cause of action for defamation, she alleges the Department published defamatory statements about her to “third persons [] who had no need or desire to know,” including the BPD, the CDCR, other agents or employees of the Department, prospective employers, and the community. The alleged statements are that she “deserved written warnings and disciplinary actions against her including termination and that she was dishonest and insubordinate.” In the fifth cause of action for intentional interference with prospective economic advantage and sixth cause of action for violation of Labor Code section 1050,<sup>6</sup> Routh alleges the Department prevented her from obtaining employment with the CDCR and BPD, as well as caused her to lose her volunteer

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<sup>6</sup> Labor Code section 1050 provides: “Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor.”

position with the BPD, when it disclosed information from the internal affairs investigations to both agencies.

The Department, in moving for summary adjudication on these claims, asserted that (1) there was no evidence the participants in Routh's personnel matters disclosed information to individuals or agencies outside their chain of command, (2) Routh undisputedly authorized the BPD and CDCR to inspect her personnel file after discipline had been imposed, (3) all of the allegedly defamatory information arose out of workplace investigations into Routh's work-related conduct, and (4) all of the information arising out of the workplace investigations is absolutely privileged under Civil Code section 47, subdivision (b)(4), which bars Routh's claims based on statements arising from those investigations. The Department further asserted the bar included any claim that such statements were distributed to persons who did not have a need to know about them, as the only persons outside the County who were made aware of the discipline imposed on Routh were representatives of the BPD and CDCR, and there is no evidence anyone from the Department spoke to those representatives about the content of Routh's file or disclosed information to other third parties.

The trial court, in granting the motion on these causes of action, found any release of information was made either during the disciplinary investigations or through Routh's authorization for the BPD and CDCR to review her personnel file; the information Ansolabehere released to the CDCR on the employment reference form did not disclose any private or untrue information; and the release of information during the disciplinary investigations and resulting action was protected under Civil Code section 47, subdivision (b). Moreover, the trial court found that while Roberts stated in his deposition that one letter was left in Routh's file on which the dishonesty finding was not redacted, there was no evidence the letter was left in the file intentionally. The trial court noted that while the complaint alleged other publications, they amounted to people knowing about the investigations or discipline, and Routh offered no facts or evidence to

support the existence of publications other than the review of her personnel file by the CDCR and BPD, and the employment reference form.

On appeal, Routh contends the release to the CDCR and BPD of the letter that contained the information that should have been redacted constituted defamatory publications that were not subject to the privilege of Civil Code section 47, subdivision (b), as the letter was released outside of any official proceeding. In response, the Department asserts that any statements made to the CDCR and BPD as part of their background investigations are absolutely privileged under *O'Shea v. General Tel. Co.* (1987) 193 Cal.App.3d 1040 (*O'Shea*).

A privileged publication is one made in any “(1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to [the traditional and administrative mandate statutes].” (Civ. Code, § 47, subd. (b).) The privilege is absolute and bars all tort actions based on such privileged communications except malicious prosecution actions. (*Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498, 1502.) Thus, the privilege covers Routh’s claims for intentional interference with prospective economic advantage and violation of Labor Code section 1050.

Information given by a former employer during a background investigation of a prospective employee by a law enforcement agency is absolutely privileged under Civil Code section 47, subdivision (b). (*Bardin v. Lockheed Aeronautical Systems Co.* (1999) 70 Cal.App.4th 494, 500, 504 (*Bardin*); *O'Shea, supra*, 193 Cal.App.3d 1040, 1048.)

In *O'Shea*, the plaintiff sued his former employer when the California Highway Patrol (CHP) decided not to hire him after the former employer provided negative information about the plaintiff during a background check. The trial court granted summary judgment to the defendant on the basis of absolute privilege. The *O'Shea* court affirmed, holding that a former employer’s statements obtained during a background

investigation by a law enforcement agency are absolutely privileged under Civil Code section 47, former subdivision (2), the predecessor to the current Civil Code section 47, subdivision (b). (*O’Shea, supra*, 193 Cal.App.3d at p. 1048; see also *Bardin, supra*, 70 Cal.App.4th at p. 500.)

The *O’Shea* court explained the purpose of the privilege “is to encourage the utmost freedom of communication between citizens and public authorities. The Legislature has wisely required a thorough background investigation of the character of those who wish to be peace officers. It is essential that former employers of those considered for peace officer positions feel free to discuss in detail the characteristics of their former employees, now being considered for the extremely demanding tasks undertaken by the peace officers of this state. [Citation.] [¶] As in any situation where a privilege may shield those who have committed otherwise wrongful acts, considerations of public policy must predominate. [Citations.] As . . . ‘ . . . a matter of law, there is an absolute privilege, and in fact a duty, for citizens to communicate openly and freely with an investigating officer seeking background information on a candidate for employment with a public law enforcement agency. The privilege under these circumstances is a necessary element of the need for law enforcement to hire persons who are qualified to protect the public.’” (*O’Shea, supra*, 193 Cal.App.3d at pp. 1048-1049, fns. omitted.)

Routh attempts to distinguish *O’Shea* by asserting the absolute privilege does not apply when an existing peace officer is applying for a position with another law enforcement agency, citing *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793 (*County of Riverside*). That case, however, does not support her argument. In *County of Riverside*, an officer obtained employment with the County of Riverside when his prior employer, the City of Perris, discontinued its police department and contracted with the County for law enforcement. (*Id.* at p. 796.) In connection with the change in employment, the officer waived his right to view his County background report and signed a second document, in which he acknowledged his County employment was

contingent upon satisfactory completion of the background investigation and he could be terminated if any negative information was uncovered in the investigation. (*Id.* at p. 797.) After hiring the officer on a probationary basis, the County performed a background investigation. As a result of the investigation, the County dismissed the officer without giving a reason. The officer attempted to obtain, but was denied, employment at other law enforcement agencies. The officer sued the County seeking, among other things, disclosure of the County's background investigation file. The officer subpoenaed copies of documents in the County's background investigation file, which the County refused to produce. The trial court ordered the County to produce documents after the officer moved to enforce the subpoena. The Court of Appeal upheld the trial court's decision. (*Id.* at pp. 797-798.)

Our Supreme Court concluded that while the Public Safety Officers Procedural Bill of Rights Act (the Act) gave the officer the right to view the documents prepared during the background investigation, his waiver of that right was enforceable. (*County of Riverside, supra*, 27 Cal.4th at pp. 795, 804, 806-807.) In addressing the scope of the Act, the court noted that the parties agreed if the County had completed its background investigation before hiring the officer, the officer would not have a right to view the documents in the investigation file because he was not a County employee. (*Id.* at p. 799.) Since the County hired the officer, albeit provisionally, the court concluded the background investigation file was part of the officer's personnel file which the Act gave him the right to view. (*Id.* at pp. 800-802.) In reaching this conclusion, the court rejected the County's argument that the deliberative process privilege, the official information privilege of Evidence Code section 1040, and the informant privilege of Evidence Code section 1041, precluded disclosure because, even if those privileges applied, the Act took precedence over them. (*County of Riverside, supra*, 27 Cal.4th at pp. 803-804.)

This case does not compel the conclusion the absolute privilege as stated in *O'Shea* does not apply when a current law enforcement officer is applying for a position

with another law enforcement agency. In our view, the same public policy considerations apply, i.e. communication between law enforcement agencies must be open and free when an investigating officer is seeking background information on a candidate for employment with a public law enforcement agency.

Routh contends that even if *O'Shea* applies, she can still maintain a cause of action for breach of contract based on the Department's failure to remove the references to, and findings of, "dishonesty" from her personnel file pursuant to the parties' agreement. We need not decide whether her statement is correct, as she neither alleged a breach of contract cause of action in her complaint nor did she seek leave to amend the pleadings before the hearing on the summary judgment motion to include such a claim. "To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. [Citation.] If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265 [rejecting the plaintiff's implied contention he could seek leave to amend his pleading for the first time on appeal].)

Since we hold Routh's claims for defamation, intentional interference with prospective economic advantage and violation of Labor Code section 1050 are barred by the Civil Code section 47, subdivision (b) privilege, we do not reach the parties' other arguments with respect to these claims.

### **DISPOSITION**

The judgment in favor of the Department is reversed and the order granting its motion for summary judgment vacated. The case is remanded to the trial court with directions to enter a new order granting summary adjudication in favor of the Department on Routh's causes of action for sexual harassment, defamation, intentional interference with prospective economic advantage and violation of Labor Code section 1050. The

new order shall deny summary adjudication on Routh's causes of action for retaliation, discrimination, wrongful discharge in violation of public policy and intentional infliction of emotional distress. Routh shall recover her costs incurred on appeal.

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Gomes, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Cornell, J.