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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STEVEN HERNANDEZ, Plaintiff and Appellant, v. SONOCO PRODUCTS COMPANY et al., Defendants and Respondents.	B325376 Los Angeles County Super. Ct. No. 20STCV35777

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen I. Goorvitch, Judge. Affirmed.

Employee Justice Legal Group, Kaveh S. Elihu and Daniel J. Friedman for Plaintiff and Appellant.

Jackson Lewis, Dylan B. Carp, Andrea F. Oxman and Peter M. Waneis for Defendants and Respondents.

On December 12, 2018, defendant Sonoco Products Company fired plaintiff Steven Hernandez because he left open the guard gate on a company compactor, which is an industrial machine designed to crush trash. OSHA regulates these machines because of their danger to workers.[1] Sonoco's safety rules required all employees to close the guard on the compactor when they finish using it. Hernandez maintained he *did* close the guard, but the company investigated and concluded otherwise.

In 2020, Hernandez sued Sonoco and his former supervisor Reynaldo Flores for disability and age discrimination and related employment claims under the Fair Employment and Housing Act, Government Code section 12900 et seq. (FEHA).[2] Hernandez had filed his administrative complaint about his dismissal on September 20, 2019. Accordingly, the trial court ruled that, given the one-year statute of limitations, the limitations period was September 20, 2018—one year before Hernandez filed—to September 20, 2019, although Hernandez was terminated on December 12, 2018. The trial court ruled litigation about events before September 20, 2018 was time-barred.

Based on these rulings, the trial court entered summary judgment for Sonoco and Flores. The court concluded the

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[1] <https://www.osha.gov/laws-regs/standardinterpretations/1994-09-20-0#:~:text=Specifically%2C%20the%20OSHA%20standard%20requires,and%20health%20in%20the%20workplace> [as of Mar. 17, 2025], archived at <https://perma.cc/E5MG-LQKB>.

[2] References to statutes are to the Government Code unless otherwise stated.

continuing violations doctrine did not apply, and Hernandez had failed to present sufficient evidence within the limitations period to raise a triable issue as to any of his claims. We affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *Sonoco fires Hernandez after he violates a company safety rule*

Sonoco makes packaging, including paper canisters for frozen juice and other products. Hernandez—who is now in his 50s—began working for Sonoco in 1987 when he was 18. Hernandez was represented by Teamsters District Council 2 and was subject to the terms of its labor agreement with Sonoco.

Sometime between 2013 and 2016, Hernandez began suffering pain in his hands due to arthritis. Hernandez sought medical treatment and began taking intermittent leave under the Family Medical Leave Act (FMLA) (and/or the California Family Rights Act (CFRA)). Hernandez's doctor certified he had a serious medical condition requiring him to be absent intermittently during "flare-ups." Over the next couple of years, Hernandez's doctor recertified his condition and Sonoco continued to approve his leaves.[3]

Sonoco uses forms to track employee absences. Employees with unexcused absences accumulate points. In November 2017, a supervisor gave Hernandez a form stating he had violated Sonoco's attendance policy. The form warned Hernandez to "correct" his attendance immediately, noting he could be

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[3] Hernandez's wife Maria also worked at Sonoco. Maria took medical leave for her own conditions, including arthritis and anxiety. Maria's doctor completed paperwork for Hernandez to take leave to care for his wife, and Sonoco approved this request.

terminated if he accumulated more points. After a further dispute about Hernandez's attendance, and an investigation into his attendance points, which "confirmed" he had "provided false information to the company," Sonoco fired Hernandez on December 18, 2017.

Hernandez filed a grievance through the union. Hernandez's union representatives asked Sonoco to reinstate him subject to a last chance agreement (LCA). The company agreed.

The LCA stated the company would make a one-time non-precedential agreement to reinstate Hernandez on account of his years of service and his overall work record, on the condition the 36-day period immediately preceding the document's signature date of January 5, 2018 was an uncompensated "disciplinary suspension."[4] The LCA provided "the remainder/ entirety" of Hernandez's "future employment with Sonoco" would be in accordance with the LCA's specific terms. Hernandez would "follow all established plant rules, policies, and procedures." The LCA continued, "You are fully aware and fully understand that if you violate any present or future rules, policies, or procedures you will be terminated immediately regardless of what level of discipline would have otherwise been administered." The LCA provided Hernandez would "exhibit perfect attendance" for the next year. If Hernandez violated the LCA, he could grieve the matter but the grievance would "immediately be moved to the 3rd step of the grievance

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[4] A second condition was that Hernandez would withdraw any complaints he had filed with government agencies. There is no indication in the record that, as of January 5, 2018, Hernandez had filed any complaints with any government agency.

process" and "[t]he ruling, from the 3rd step meeting, [would] be binding and [would] not be taken to arbitration." Hernandez signed this document on January 5, 2018, as did his union representative. A plant manager signed for Sonoco. Hernandez returned to work that month.

One of Sonoco's safety rules required employees who used the compactor—which crushed trash—to close the guard or gate before leaving the area. On December 12, 2018, production supervisor Flores and a foreman named Jose Arellano were walking the plant. As they approached the trash crusher, they passed Hernandez leaving the area with his empty trash bin. When Flores and Arellano arrived at the crusher, they saw the guard was open. Flores took photographs.

Flores asked Hernandez if he'd just returned from bringing a bin to the compactor. Hernandez said he had. Flores asked him if he'd shut the gate. Hernandez replied he thought he had.

Both Flores and Arellano wrote witness statements. Sonoco investigated the "possible . . . violation" of its safety policies. On December 13, 2018, Sonoco suspended Hernandez without pay pending its investigation and "corporate review" of the violation. At Sonoco's request, Hernandez submitted a written statement. He wrote he had closed the guard. Hernandez also submitted a grievance, signed by his union steward, challenging his suspension as "lack[ing] evidence." A production manager denied the grievance.

Three senior Sonoco officials reviewed the company's investigation of Hernandez. Kim Bowers was Area Manufacturing Manager for Sonoco. She reported to Wade Floyd, the Division Vice President, Manufacturing. Ernie James was Sonoco's Director of Employee and Labor Relations. These three

officials decided to terminate Hernandez. According to Bowers, the three managers made the termination decision "because [they] believed in good faith that [Hernandez] had left the gate to the trash compactor open in violation of Company safety policy and in violation of his [LCA]." Sonoco terminated Hernandez's employment on December 20, 2018. (We refer to Hernandez's termination date as December 12, 2018—the last day he worked at Sonoco.)

2. *Hernandez's lawsuit*

On September 20, 2019, Hernandez—represented by the same attorney he has in this case—filed an administrative charge with the Department of Fair Employment and Housing (DFEH) (now known as the Civil Rights Department) against Sonoco and Flores. The DFEH immediately issued a right to sue notice.

On September 18, 2020, Hernandez filed a complaint alleging 12 causes of action against Sonoco: (1) discrimination based on age and disability, (2) harassment based on age and disability, (3) retaliation, (4) failure to prevent discrimination, harassment, and retaliation, (5) failure to provide reasonable accommodations, and (6) failure to engage in a good faith interactive process—all in violation of FEHA; (7) violation of the CFRA; (8) wrongful termination in violation of public policy; (9) declaratory judgment; (10) discrimination based on use of sick leave under Labor Code sections 233, 244, and 246.5; (11) retaliation under Labor Code section 98.6; and (12) retaliation under Labor Code sections 1102.5 and 1102.6. Hernandez also named Flores as a defendant in his second cause of action for harassment, and he sought punitive damages against both defendants. The trial court sustained Sonoco's

demurrer without leave to amend as to the eleventh and twelfth causes of action.

Sonoco and Flores separately moved for summary judgment or, in the alternative, summary adjudication of issues. They contended any of Hernandez's claims based on events before September 20, 2018—including his 2017 termination and the LCA—were barred by the one-year statute of limitations because he did not file his DFEH complaint until September 20, 2019[5]; and, in any event, the evidence showed his claims failed as a matter of law. Hernandez filed a joint opposition to the motions. Among other arguments, Hernandez asserted the continuing violations doctrine applied to the events before September 2018 because the LCA connected his termination with Sonoco's "unlawful failure to excuse [his] absences due to his or his wife's disabilities in 2017." Hernandez also contended Sonoco was equitably estopped from relying on the statute of limitations. Sonoco and Flores filed replies. Hernandez also filed a motion for summary adjudication of his first, fourth, fifth, seventh, and eighth causes of action. Sonoco opposed that motion.

At the hearing on the motions, Hernandez's counsel told the court he'd recently taken the deposition of another Sonoco employee, Erika Armenta, that supported his claim of

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[5] At the time of the alleged conduct, the limitations period for filing an administrative complaint with DFEH was one year from when the alleged practice that violated FEHA occurred. (Former § 12960, subd. (d).) Effective January 1, 2020, that limitations period was extended to three years from the date of the unlawful practice. (§ 12960, subd. (e)(5); Stats. 2019, ch. 709, § 1.) Hernandez does not dispute that the one-year limitations period in effect in 2019 applies.

harassment within the limitations period. The court permitted the parties to file supplemental briefs on any evidence developed after the opposition brief had been filed. Hernandez filed a supplemental opposition with deposition excerpts, arguing Armenta's testimony demonstrated Flores's "harassing conduct was ongoing and continuous." He also argued—for the first time—the statute of limitations should be equitably tolled as to Flores as well as Sonoco because Hernandez had filed a worker's compensation claim in February 2019. Defense counsel objected, noting Hernandez could have presented evidence of his worker's compensation claim when he originally opposed the motions. Counsel also argued Armenta's deposition testimony did not raise a triable issue of fact as to Hernandez's harassment claim.

The trial court held a second hearing on the motions on August 11, 2022. The court took the matter under submission, then, on September 16, 2022, granted Sonoco's and Flores's motions for summary judgment. The court stated, "Assuming [Hernandez] satisfied his initial burden" of showing a prima facie case of discrimination and retaliation under *McDonnell Douglas Corporation v. Green* (1973) 411 U.S. 792, Sonoco had "articulate[d] non-discriminatory reasons for [Hernandez's] termination, specifically, a violation of one of Sonoco's policies." The court discussed the testimony about the gate on the compactor. The court noted Hernandez had "testified that he closed the gate to the trash compactor before he left." However, the court continued, Sonoco "relied on reports from two employees," who saw Hernandez "leaving the trash compactor area with his trash bin and then found the gate open when they arrived." Sonoco also relied on "photographs documenting the violation, which both employees authenticated."

In any event, the court stated, Hernandez's denial of the violation was "not sufficient to give rise to a triable issue because it [did] not call into question the good faith or reasonableness of S[o]noco's belief that [Hernandez] violated the policy in question." Citing *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344 (*Arteaga*), the court said, "An employer's mistaken good faith belief does not establish discrimination or retaliation."

The court continued, "S[o]noco's evidence is sufficient to satisfy its burden on summary judgment, shifting the burden back to [Hernandez] to advance 'substantial responsive evidence that the employer's proffered reasons were untrue or pretextual.' " The court noted Hernandez's claim that he was terminated in retaliation for his past use of medical leave relied on alleged events that occurred outside the one-year limitations period. The court incorporated by reference its ruling on Flores's summary judgment motion. In that ruling, the court laid out in detail the questions—and Hernandez's answers—at his deposition. When asked about whether Flores and another manager named Rachel Wirthele had disciplined him, made negative comments to him about his age, got "upset" if he used FMLA leave, or otherwise harassed him between September 20, 2018 and his December 2018 termination date, Hernandez repeatedly replied he didn't know, couldn't recall, or couldn't remember.

As for Hernandez's reliance on the continuing violations doctrine, the court found there was "no evidence of actionable discrimination or harassment during the limitations period

—September 20, 2018 through December 12, 2018—that is sufficient to invoke the continuing violations doctrine."[6]

In light of the ruling on defendants' motions, the court denied Hernandez's motion for summary adjudication.[7]

DISCUSSION

1. *We previously denied Hernandez's motion to "refile" his opening brief*

Hernandez filed his opening appellate brief on November 20, 2023. On April 18, 2024, Sonoco and Flores filed their respondents' briefs. Their first contention was that Hernandez had forfeited his appeal because he had not accurately cited the record.

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[6] The court noted Armenta's deposition testimony didn't benefit Hernandez. Armenta, the court said, did "not testify that any of the alleged harassment occurred during the limitations period of September 20, 2018, and December 12, 2018." More importantly, the court continued, "Armenta did not testify that Flores harassed [Hernandez] and his wife, but rather that he complained about them after they had already left work."

[7] Hernandez contends he appealed from the court's denial of his motion for summary adjudication. His opening brief presents no separate argument as to how the court erred in denying his motion. Instead—at the end of the section arguing his discrimination cause of action should have survived summary judgment—he conclusorily argues he "should have prevailed" on his motion "with respect to his disability claim." We therefore deem Hernandez's challenge to the court's denial of his motion for summary adjudication forfeited. (See *Tukes v. Richard* (2022) 81 Cal.App.5th 1, 12, fn. 5 ["A contention not appropriately raised in the opening brief under a separate argument heading may be deemed forfeited."].)

On July 9, 2024, Hernandez's counsel filed a *corrected* motion to file a *corrected* opening brief on *the same day he submitted his reply brief*. His motion represents that "some" of his citations to the evidence in the summary judgment proceedings below "were inadvertently and mistakenly truncated or omitted" from the opening brief "during the conversion process" to record citations. The opening brief, he says, thus did not include "all of the citations to the evidence in the record included in Appellant's oppositions to the Motions [for summary judgment] and upon which the trial court rendered its decisions."

Hernandez appended a second "opening" brief to his July 2024 motion. This document indeed does include new citations. For instance, page 58 contains the following:

> "(2 CCR § 11021(a)(1)(C)-(D); OAB at 54-55; 2-AA-541; 3-AA-574; 8-AA-1983; 8-AA-2013; 11-AA-2938-2939 at 70:1-71:7, 11-AA-2939 at 71:11-16, 11-AA-2939-2940 at 71:19-72:6; 11-AA-2948 at 88:16-23; 11-AA-2958 at 104:4-18; 11-AA-2959-2960 at 105:19-106:9; 11-AA-2961 at 110:1-9, 14-21; 11-AA-2982 at 29:12-23; 11-AA-2983 at 67:6-8; 11-AA-3017-3018 at 61:21-62:2; 11-AA-3018 at 62:9-14; 11-AA-3022 at 107:13-18; 11-AA-3035 at 35:2-20; 11-AA-3038-3039 at 42:2-43:2; 11-AA-3058-3059. at 24:24-25:6; 11-AA-3059 25:13-18; 11-AA-3093 at 34:6-14; 11-AA-3119 at 58:10-14; 11-AA-3122-3123 at 76:6-77:4; 11-AA-3124 at 80:4-15; 12-AA-3132 at 51:3-20; 12-AA-3141-3142 at 84:6-85:5; 12-AA-3157-3158 at 17:14-18:24; 12-AA-3159-3161 at 21:18-23:1; 12-AA-3168 at 33:4-6; 12-

AA-3172-3174 at 46:24-48:2; 12-AA-3176 at 62:18-25; 12-AA-3198-3199 at 55:23-56:8; 12-AA-3413; 13-AA-3434)"

Hernandez's counsel's conduct is unprofessional and unacceptable. It requires the other side and the court to expend considerable time comparing two lengthy documents (each in excess of 100 pages) to see what has been added. It deprives opposing counsel of the right to respond to the new and tardy additions. And massive blocks of record citations are impenetrable. Accordingly, we have issued an order denying Hernandez's motion to file a new and different opening brief.

2. *Summary judgment and our standard of review*

Summary judgment is appropriate if there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618.) A defendant moving for summary judgment must show the plaintiff cannot establish one or more elements of the cause of action or cannot refute an affirmative defense. (Code Civ. Proc., § 437c, subds. (*o*), (p)(2).) If the defendant satisfies this initial burden, the burden shifts to the plaintiff to present evidence demonstrating there is a triable issue of material fact as to the cause of action or defense. (*Id*., subd. (p)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) The plaintiff may not rely on the allegations in the pleadings but must refer to specific facts. (Code Civ. Proc., § 437c, subd. (p)(2); *Husman v. Toyota Motor Credit Corp*. (2017) 12 Cal.App.5th 1168, 1180.)

"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 p. 850.) "In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence as to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact." (Code Civ. Proc., § 437c, subd. (c).)

We review a grant of summary judgment de novo and independently decide whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) First, we identify the issues raised by the pleadings, as these are the allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts that negate the opponent's claims and justify a judgment in the moving party's favor. When this showing is made, the final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact. (*Los Angeles Unified School Dist. v. Torres Construction Corp*. (2020) 57 Cal.App.5th 480, 492.)

In conducting this de novo review, we take the facts from the record that was before the trial court when it ruled on the motion, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained. We liberally construe the evidence in support of the

party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.) We thus accept as undisputed facts only those parts of the moving party's evidence that are not contradicted by the evidence of the opposing party. (*Arteaga, supra,* 163 Cal.App.4th at p. 342.) In the employment discrimination context, the employee's "subjective beliefs . . . do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433 (*King*).)

3. *The trial court properly granted the motions for summary judgment based on the statute of limitations*

"A plaintiff suing for violations of FEHA ordinarily cannot recover for acts occurring more than one year before the filing of the DFEH complaint." (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1400 (*Jumaane*).) As Hernandez filed his DFEH complaint on September 20, 2019, any of his claims based on alleged unlawful conduct that took place before September 20, 2018 are barred. Hernandez contends his DFEH complaint was timely as to Sonoco's conduct before September 20, 2018 —including his 2017 termination and the LCA—based on the continuing violations doctrine, equitable estoppel, and equitable tolling. We conclude these contentions are without merit.

4. *The continuing violations doctrine*

Hernandez argues he can reach back earlier than September 20, 2018, and use the continuing violations doctrine to extend the limitations period. Governing law bars this tactic, because the earlier action—ending in the LCA—was "permanent."

The continuing violations doctrine allows a plaintiff to impose liability for unlawful employer conduct occurring outside the statute of limitations if the conduct is sufficiently connected to unlawful conduct within the limitations period. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802 (*Richards*).) "[W]hen the defendant has asserted the statute of limitation defense, the plaintiff has the burden of proof to show his or her claims are timely under the continuing violation doctrine." (*Jumaane*, *supra*, 241 Cal.App.4th at p. 1402.) The doctrine requires the plaintiff to prove that (1) the conduct occurring outside the limitations period was similar or related to the conduct that occurred within the limitations period; (2) the conduct was reasonably frequent; and (3) the conduct had not yet become permanent. (*Ibid.*; *Richards*, at p. 823.)

An employer's series of unlawful employment actions can be viewed as one course of conduct if, among other requirements, the actions have *not* acquired a degree of *permanence* so that employees are on notice that further efforts at informal conciliation with the employer to obtain accommodation or end harassment would be futile. (*Richards, supra,* 26 Cal.4th p. 823.)

The dispute between Sonoco and Hernandez in 2017 over his absences—which led to his firing in December 2017—culminated in the LCA. The LCA satisfied the permanence test because it sealed off further discussion of whether Sonoco would give Hernandez additional chances. The title of this one-page document is "Last Chance Employment Agreement." When a chance is your "last," that means there will be no more chances.

The final paragraph of the LCA stated, "The Company is concerned about your suitability to work in an industrial environment such as ours. We are willing to give you this last

chance to demonstrate your ability to work safely, productively and appropriately in this environment. However, failure to abide by the conditions set forth in the LAST CHANCE AGREEMENT will result in immediate discharge."

Accordingly, the continuing violations doctrine has no application to Hernandez's December 12, 2018 termination for a new and different offense. The LCA was a permanent resolution of the earlier conflict between Hernandez and Sonoco. As a matter of law, this document put Hernandez on notice that further efforts at informal conciliation with Sonoco to obtain accommodation or to end harassment would be futile. (*Richards, supra,* 26 Cal.4th at p. 802.)[8]

5. *There was no equitable estoppel*

The trial court rejected Hernandez's attempt to invoke equitable estoppel because his complaint did not allege it, as is required. The trial court was right about Hernandez's complaint and right on the law as well. The pleadings set the boundaries of the issues to be resolved at summary judgment. (*Nein v. HostPro, Inc.* (2009) 174 Cal.App.4th 833, 851.) Hernandez's complaint did not allege the facts on which he bases his legal argument, i.e., that Sonoco gave him a reason to believe the

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[8] Hernandez's failure to carry his burden of proof on this "permanence" element is sufficient to support affirmance of the trial court's grant of Sonoco's and Flores's summary judgment motions. We therefore need not discuss in detail two other independent grounds for affirmance: (1) Sonoco's termination of Hernandez for violating the absence policy and its later termination (again) of Hernandez for violating a safety policy were not "sufficiently similar in kind"; and (2) in any event, Hernandez failed to identify any actionable discrimination or harassment within the limitations period.

statute of limitations would not apply. The LCA said nothing of the sort.

Moreover, Hernandez presented no evidence in opposition to Sonoco's summary judgment motion to support the imposition of an estoppel based on his having signed the LCA. Hernandez offered nothing demonstrating he reasonably believed—based on Sonoco's statements or conduct—that, because he signed the LCA, he could (or was required to) defer filing a DFEH complaint about his 2017 termination until Sonoco fired him a second time. Nor did Hernandez provide evidence that anyone at Sonoco misrepresented that the company would not enforce the statute of limitations, or that the LCA itself rendered the statute of limitations inapplicable as to his 2017 claims.

The doctrine of equitable estoppel does not apply.

6. *There was no equitable tolling*

The time for filing a DFEH claim may be tolled where the plaintiff can establish " 'timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.' " (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 102.) Hernandez contends his filing of his workers' compensation claim on February 4, 2019 should equitably toll the statute of limitations as to his harassment cause of action. He says his allegation in the claim that he suffered " 'psych and stress (due to harassment and pressure from management)' " should have "alerted Flores and Sonoco to begin investigating the facts that formed the basis of [his] harassment claims under FEHA."

Two problems independently defeat Hernandez's argument in this court about equitable tolling. First, he neither pleaded the elements of equitable tolling nor alleged he'd filed a worker's

compensation claim on February 4, 2019. Second, Hernandez did not timely raise the issue of equitable tolling in the trial court. Sonoco and Flores thus correctly argue the trial court rightly found Hernandez's equitable tolling theory is barred. (See, e.g., *Long v. Forty Niners Football Co., LLC* (2019) 33 Cal.App.5th 550, 555 ["Where a claim is time-barred on its face, the plaintiff must specifically plead facts that would support equitable tolling."].)

7. *Hernandez's claims of discrimination and retaliation fail*

Hernandez asserts Sonoco discriminated against him in violation of FEHA on the basis of his age (over 40), his disability, and his association with a disabled person (his wife). (§ 12940, subd. (a); § 12926, subd. (*o*).) He also contends Sonoco retaliated against him for having engaged in the protected activities of: taking medical leave; requesting reasonable accommodation; complaining about or protesting his "supervisors' discriminatory, retaliatory, and harassing conduct towards him" based on his age, disability, and association with his wife; and "opposing the employment practice of terminating him in 2017 and 2018 due to his" age, disability, and association with his wife.

To establish a prima facie case for disparate treatment discrimination, a plaintiff must show (1) he was a member of a protected class; (2) he is otherwise qualified to do his job; and (3) he suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354–355 (*Guz*); *Arteaga*, *supra*, 163 Cal.App.4th at pp. 344–345.) To establish a prima facie case of retaliation under FEHA, a plaintiff must show (1) he 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. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).)[9]

For both discrimination and retaliation causes of action, once the employee establishes a prima facie case, the burden shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for its employment decision. (*Guz*, *supra*, 24 Cal.4th at pp. 354–356; *Yanowitz*, *supra*, 36 Cal.4th at p. 1042.) The ultimate issue is simply whether the employer acted with a motive to discriminate illegally. Thus, if nondiscriminatory, the employer's true reasons need not necessarily have been wise or correct. (*Guz*, at p. 358; *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 (*Hersant*) [the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent].)

By presenting such evidence, the employer shifts the burden to the plaintiff to present admissible evidence that the employer's decision was motivated at least in part by prohibited discrimination. (*Guz*, *supra*, 24 Cal.4th at pp. 353, 356–357; *Yanowitz*, *supra*, 36 Cal.4th at p. 1042.) The employee's evidence must relate to the motivation of the decisionmakers and prove, by nonspeculative evidence, "an actual causal link between prohibited motivation and termination." (*King*, *supra*, 152 Cal.App.4th at pp. 433–434.) The stronger the employer's

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[9] The requirements for a prima facie case under CFRA are similar. (See *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 885.)

showing of a legitimate, nondiscriminatory reason, the stronger the plaintiff's evidence must be in order to create a reasonable inference of a discriminatory motive. (*Guz*, at p. 362 & fn. 25.)

Initially, Hernandez argues the *McDonnell Douglas* burden-shifting test does not apply here because he presented direct evidence that his and his wife's disabilities substantially motivated Sonoco's decision to terminate his employment. The evidence on which Hernandez relies relates to Sonoco's decision to fire him in 2017 based in part on the attendance issue. Again, we have concluded Hernandez's 2018 termination was not a continuing violation of Sonoco's alleged conduct in 2017, or of its reinstatement of Hernandez under the LCA. Accordingly, Hernandez's evidence[10] does not show Sonoco terminated him in December 2018 because of his or his wife's disabilities or because he took medical leave under the CFRA. Nor do we consider Hernandez's evidence of acts that occurred outside the limitations period as circumstantial evidence of Sonoco's

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[10] This is an example of where Hernandez's "corrected" opening brief added a thicket of record citations that he did not cite in his original brief. Hernandez's original opening brief included one citation to the record—to the two-page, November 30, 2017 documented discussion form—to support his contention that "[i]t is undisputed" his 2017 discipline and termination, the LCA, and the 2018 termination "were based in substantial part on points that [plaintiff] incurred for taking medical leave to care for his own disability and to care for his wife's disabilities." Hernandez's "corrected" brief adds another 16 record citations to support this statement. Hernandez's "corrected" opening brief even cites to respondents' brief. (Compare Hernandez's opening brief at p. 49 with Hernandez's proposed corrected brief at pp. 49–50.)

discriminatory or retaliatory animus in terminating his employment in December 2018.

We will assume for the sake of argument that Hernandez established a prima facie case for discrimination and retaliation. We therefore need not consider whether he "waived any contention" that he made a prima facie case of discrimination or retaliation, as Sonoco argues.

To the extent Hernandez bases his discrimination and retaliation claims on his age, however, the record contains no evidence of any circumstances from which a trier of fact could infer a causal link between Hernandez's age and his termination or other adverse employment action within the limitations period. (*Guz, supra*, 24 Cal.4th at p. 355.) Our review of the record shows: none of Hernandez's supervisors or managers made any negative comment to him about his age; an unknown individual told him he was old when he was about 48 or 49, but Hernandez did not report the remark; other than that one incident, there were no other instances where an employee commented about his age; supervisor Wirthele told Hernandez he "got paid too much," leading him to believe she was commenting on his age, as he earned more than others because he had a grandfathered rate of pay due to seniority; and Wirthele never made a negative comment to Hernandez about his age.

The record includes no evidence that anyone at Sonoco associated Hernandez's claimed disability with his age. As there is no evidence any supervisor or manager at Sonoco negatively commented on Hernandez's age, a reasonable trier of fact could not make the leap from a negative comment about how much he earned, or the fact arthritis can be a side effect of aging, to an age-based motivation for firing him.

In any event, again, Sonoco met its burden to produce competent and admissible evidence demonstrating it terminated Hernandez's employment in December 2018 for a legitimate, nondiscriminatory, and nonretaliatory reason: Bowers, James, and Floyd together decided to fire him because they "believed in good faith" he left the crusher guard open in violation of company procedures and, as a result, he had violated the LCA. Sonoco's evidence showed a legitimate reason for discharge. (See *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 225.)

Hernandez failed to present substantial responsive evidence demonstrating the existence of a material triable controversy as to discriminatory or retaliatory animus on Sonoco's part. (See *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 862 (*Serri*); *Guz*, *supra*, 24 Cal.4th at p. 362.) His primary response to Sonoco's evidence that it fired him because he violated a safety rule—and, in turn, violated the LCA—is that the LCA itself was a result of Sonoco having impermissibly terminated him in 2017 for taking time off due to his disability and his exercise of his right to take medical leave. Accordingly, Hernandez argues his 2018 termination was discriminatory and retaliatory based on his disability (and age) because Sonoco could not have fired him for the violation in the absence of the LCA. We already have held, however, that claims based on conduct before September 20, 2018 are time barred. That holding invalidates this argument.

Hernandez also contends Sonoco inadequately investigated whether he left the guard open. As the trial court ruled, however, this argument is irrelevant. The question is not whether Sonoco's decision was correct, but whether it was motivated by a discriminatory or retaliatory animus based on a protected

characteristic. (*Hersant*, *supra*, 57 Cal.App.4th at p. 1005; *Guz, supra*, 24 Cal.4th at p. 358.) To that end, Hernandez presented no evidence that the people who conducted the investigation were involved in the decision to fire him. Hernandez did not raise, and affirmatively stated in his reply brief, that he does not espouse the "cat's paw" theory of liability that would allow any animus by Wirthele or Flores to be attributed to Bowers, James, or Floyd—the people who decided to terminate him.[11]

In sum, Sonoco presented evidence it had a valid reason for firing Hernandez: after an investigation, the company believed he violated a company safety policy. To combat this showing, Hernandez had to offer evidence that the people who decided to fire him harbored a discriminatory or retaliatory animus against him, or considered his disability or age, his use of medical leave, or his having engaged in some other protected activity. Hernandez offered no evidence of that kind. We have not discussed all the evidence Hernandez contends demonstrates triable issues of fact as to pretext. Based on our independent review of the record, we conclude that evidence does not show pretext.

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[11] The "cat's paw" doctrine refers to a situation where a supervisor, who holds a discriminatory animus but does not make the actual adverse employment decision, makes another corporate actor a tool for carrying out the discriminatory action. The supervisor's discriminatory purpose is imputed to the tool or cat's paw and, ultimately, to the employer. (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 110, 113–114.)

8. *Hernandez's claims about reasonable accommodation and the interactive process fail*

The trial court correctly observed that Hernandez's claims about reasonable accommodations and the interactive process are predicated on matters that occurred outside the limitations period. Our holding about the continuing violations doctrine affirms this logic and defeats Hernandez's claims on these doctrines. Hernandez presented no evidence Sonoco faulted him on attendance or disability issues in 2018. Nor did Hernandez offer evidence that he asked for a reasonable accommodation Sonoco did not grant him, or that Sonoco did not engage in the interactive process with him during the limitations period.

9. *Hernandez's harassment claim fails*

Hernandez contends his harassment claims are supported by evidence of the following conduct:

1. Hernandez received attendance points for using his FMLA/CFRA leave.
2. Flores and Wirthele "would get upset" each time Hernandez used "his paid sick time" and told him "he was using his FMLA too much."
3. Flores and Wirthele did not discipline anyone for spreading false rumors that Hernandez and his wife "were faking their FMLA leave" and Hernandez "was not a hard worker because he would leave work to go home due to his disabilities, creating a hostile work environment."
4. Flores complained to Hernandez and others about Hernandez's FMLA leave.
5. Flores spread false rumors about Hernandez, his absences, and his medical condition.

6. Flores fabricated the crusher guard incident that led to Hernandez's termination.

Again, the limitations period based on the filing date of Hernandez's DFEH complaint began on September 20, 2018. Defendants presented sufficient evidence that Hernandez cannot establish either that this conduct occurred within the limitations period, or that conduct that did occur was actionable harassment. The burden thus shifted to Hernandez to present evidence showing his harassment claims were timely under the continuing violations doctrine. Based on our independent review of the record, and construing the evidence in the light most favorable to Hernandez, we conclude he failed to present evidence of actionable harassment based on his disability or age during the limitations period.

In particular, no evidence supports Hernandez's assertion that Flores supposedly fabricated the crusher guard incident or somehow "framed" Hernandez for it. Flores's coworker Arellano, and Flores's photographs, corroborated Flores's account. Hernandez did not offer any evidence of fabrication or "framing."

Summary adjudication of Hernandez's second cause of action against Sonoco and Flores thus was proper. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 880 [when the plaintiff "can identify no act of . . . harassment occurring within the year preceding his DFEH complaint, his hostile working environment claim is necessarily barred by the statute of limitations"]; *Serri, supra,* 226 Cal.App.4th at p. 871 [summary adjudication on harassment claim proper where "none of the evidence [plaintiff] cited created a triable issue on the question whether [her supervisors] ever made any derogatory remarks

about [her] national origin, age, or sex, or that they engaged in other conduct that constitutes harassment"].)

10. *The derivative declaratory relief and punitive damages claims fail*

Having concluded Sonoco was entitled to summary adjudication of Hernandez's discrimination, retaliation, and harassment claims, we necessarily reach the same conclusion about his derivative claims for failure to prevent discrimination, harassment, or retaliation, and wrongful termination in violation of public policy. (*Lin v. Kaiser Foundation Hospitals* (2023) 88 Cal.App.5th 712, 727–728.) Hernandez's declaratory judgment and punitive claims fail because his underlying claims lack merit.

11. *Hernandez's medical leave claim fails*

Hernandez forfeited review of his cause of action for discrimination based on his use of medical leave under the Labor Code. He does not contend the trial court erred in granting summary adjudication of this tenth cause of action. He has forfeited the issue. (*Doe v. McLaughlin* (2022) 83 Cal.App.5th 640, 653; *Telish v. State Personnel Bd.* (2015) 234 Cal.App.4th 1479, 1487, fn. 4.)

12. *Hernandez's Labor Code claims fail*

In his eleventh and twelfth causes of action, Hernandez pleaded violations of sections 98.6, 1102.5, and 1102.6 of the Labor Code. In an April 2021 order, the trial court sustained Sonoco's demurrer to those causes of action without leave to amend. The court held there is no private right of action under section 98.6 and, in any event, Hernandez's remedy was under FEHA. As for the twelfth cause of action, the court stated Hernandez's complaint did not allege he reported criminal or

unlawful conduct; rather, his claims raised merely internal personnel matters.

Even though the court had sustained the demurrer without leave to amend, and Sonoco accordingly did not present any argument in its motion for summary judgment or summary adjudication on the eleventh and twelfth causes of action, the trial court included those claims in its September 2022 ruling. The court granted summary adjudication on the eleventh cause of action "for the reasons stated." On the twelfth cause of action, the court held there was insufficient evidence Sonoco terminated Hernandez "in retaliation for his use of medical leave or related complaints." Moreover, the court continued, "this retaliation claim is properly raised under FEHA, and not Labor Code section 1102.5."

Even if the trial court's analysis on the demurrer was not entirely correct,[12] Hernandez cannot show prejudice because, again, his claim is time-barred. The one-year statute of limitations under Code of Civil Procedure section 340, subdivision (a) applies when a civil penalty is mandatory. (*The TJX Companies, Inc. v. Superior Court* (2008) 163

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[12] The trial court focused on only the first of three different circumstances listed in Labor Code section 98.6 as prohibiting discharge or discrimination: that the employee engaged in conduct delineated in certain specified chapters of the code (and the sections under which Hernandez claimed to have taken sick leave are not within those chapters). Section 98.6 goes on, however, to prohibit discharge or discrimination where (2) the employee filed a complaint or claim relating to his rights that were under the Labor Commissioner's jurisdiction, or (3) because the employee has exercised "any rights afforded [him]" by the code. (Lab. Code, § 98.6, subd. (a).)

Cal.App.4th 80, 85.) Labor Code section 98.6 includes a mandatory civil penalty. (Labor Code, § 98.6, subd. (b)(3).)

As for Hernandez's twelfth cause of action for retaliation, Labor Code section 1102.5 "excludes from whistleblower protection disclosures that involve only disagreements over discretionary decisions, policy choices, interpersonal dynamics, or other nonactionable issues." (*People ex rel. Garcia-Brower v. Kolla's, Inc.* (2023) 14 Cal.5th 719, 734.) As with a retaliation claim under FEHA, a claim for retaliation under section 1102.5 requires a plaintiff to show (1) he engaged in a protected activity —i.e., reporting of unlawful activity, (2) his employer subjected him to an adverse employment action, and (3) there is a causal link between the two—i.e., the protected activity was a "contributing factor" to the employer's action. (See Labor Code §§ 1102.5, subd. (b), 1102.6; *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 718 (*Lawson*); see also CACI No. 4603.)

Hernandez alleged managers Flores and Wirthele spread rumors that he and his wife were "feigning" their injuries, he complained about this to human resources, and Flores threatened him. Even if these allegations were sufficient to state a cause of action under Labor Code section 1102.5, they would not have survived summary judgment. The executives who decided to fire Hernandez were Bowers, Floyd, and James; Hernandez presented no evidence that Flores or Wirthele was involved in the decision. Accordingly, he failed to meet his burden of establishing that retaliation for his protected activities was a contributing factor in his termination. (See *Lawson, supra*, 12 Cal.5th at p. 718.) And, finally, again, the evidence of Sonoco's legitimate nondiscriminatory reason for firing Hernandez clearly

and convincingly demonstrated it would have fired him even if he hadn't complained about his supervisors. (See Labor Code § 1102.6.)

DISPOSITION

We affirm the judgment and award costs on appeal to the respondents.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

ADAMS, J.