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MONICA ORTEGA, Plaintiff and Appellant, v. RADY CHILDREN'S HOSPITAL OF SAN DIEGO, Defendant and Respondent.

D056282

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

2011 Cal. App. Unpub. LEXIS 2804

April 18, 2011, Filed

PRIOR HISTORY: [*1]

APPEAL from a judgment of the Superior Court of San Diego County. Super. Ct. No. 37-2008-00096388-CU-WT-CTL. Timothy B. Taylor, Judge.

DISPOSITION: Affirmed.

JUDGES: IRION, J.; MCDONALD, Acting P. J., AARON, J. concurred.

OPINION BY: IRION

OPINION

Plaintiff Monica Ortega appeals from the summary judgment entered in favor of defendant Rady Children's Hospital of San Diego (Rady) on her complaint for employment discrimination and related claims. The undisputed evidence shows that at the time of her discharge, Ortega could no longer perform essential functions of her job and that there was no vacant position for which she was qualified to which Rady could reassign her. We therefore affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Ortega's Employment at Rady*

Ortega worked at Rady as a housekeeper from October 2000 until July 2007. Her job responsibilities included cleaning and disinfecting patient rooms, making beds, removing trash and soiled linens from patient rooms, "high dusting," and vacuuming and mopping floors.

In September 2006, Ortega saw a physician because she had pain in both shoulders, with the pain being more severe in her left shoulder. Ortega was allowed to return to work with temporary work restrictions (e.g., no lifting [*2] more than five pounds, no above-shoulder lifting or reaching, no pushing or pulling with left hand). Rady temporarily modified Ortega's job duties to comply with these restrictions.

In October 2006, Ortega took a medical leave of absence. She underwent surgery on her left shoulder in

January 2007 and recuperated for several months afterwards.

Ortega returned to Rady in May 2007 to deliver a progress report prepared by her physician. The physician placed several temporary restrictions on Ortega's job duties (e.g., no overhead work with left upper limb; no vacuuming, mopping or pushing linen cart; no lifting more than 15 pounds with left upper limb). Ortega "didn't feel capable of doing" her job as a housekeeper and did not return to work at that time.

Ortega again returned to Rady in June 2007 with another progress report prepared by her physician. The physician placed several permanent restrictions on Ortega's job duties (e.g., no repetitive overhead work with left upper limb, no lifting more than 25 pounds with left upper limb) and stated that Ortega would require retraining or vocational rehabilitation if a light duty position was not available. Ortega told Rady's manager of environmental [*3] services, Roy Robinson, that she "couldn't go back to do that same job [i.e., housekeeper] but that [she] could do something else."

Robinson contacted Victoria Davidson of Rady's Human Resources Department to discuss Ortega's work restrictions and to try to find a suitable alternate job for her. Robinson and Davidson concluded Ortega could not perform the essential tasks of a housekeeper. Davidson also reviewed Ortega's personnel file and a list of available jobs and concluded there were no open positions for which Ortega was qualified. Rady therefore terminated Ortega's employment by letter dated July 20, 2007.

B. *Trial Court Proceedings*

After obtaining a right-to-sue letter from the Department of Fair Employment and Housing, Ortega filed a complaint against Rady. In her complaint, she alleged Rady violated the California Fair Employment and Housing Act (FEHA; *Gov. Code, § 12900 et seq.*) [1] by (1) terminating her based on her disability; (2) failing reasonably to accommodate her disability; and (3) failing to engage in an interactive process to identify reasonable accommodations for her disability. She also alleged Rady retaliated against her for filing a workers' compensation claim and [*4] wrongfully terminated her employment in violation of public policy. Ortega sought compensatory and punitive damages, attorney fees and costs.

1 Subsequent undesignated statutory references are to the Government Code.

Rady moved for summary judgment or, alternatively, for summary adjudication [2] (*Code Civ. Proc., § 437c*), on the ground it had legitimate, nondiscriminatory reasons for terminating Ortega's employment, namely, Ortega could no longer perform the essential tasks of a housekeeper and there were no other available jobs for which she was qualified. The trial court granted Rady's motion and entered judgment in its favor on all claims.

2 For brevity, we will hereafter call Rady's motion simply a motion for summary judgment.

II

DISCUSSION

A. *Motion to Augment Record*

Ortega has moved to augment the record on appeal to include a complete copy of her deposition transcript. Rady opposes the motion on the ground that the entire transcript was never before the trial court and that only the portions it had submitted as part of its motion for summary judgment should be included in the record on appeal. We agree with Rady.

Augmentation is proper to include "[a]ny document filed or lodged in the case [*5] in superior court . . . ." (*Cal. Rules of Court, rule 8.155(a)(1)(A)*.) "The function of the augmentation procedure is to supplement an incomplete but existing record," not to "add[] material that was not a proper part of the record in the trial court." (*People v. Brooks (1980) 26 Cal.3d 471, 484*.) Moreover, on appeal from a summary judgment, our review is confined to the record that was before the trial court. (*Wilson v. 21st Century Ins. Co. (2007) 42 Cal.4th 713, 716-717*; *Wiler v. Firestone Tire & Rubber Co. (1979) 95 Cal.App.3d 621, 627*.) We may not consider deposition testimony that was not before the trial court when it ruled on the motion for summary judgment. (*Government Employees Ins. Co. v. Superior Court (2000) 79 Cal.App.4th 95, 98, fn. 4*.)

We therefore grant Ortega's motion to augment only to the extent it encompasses the portions of her deposition transcript that were before the trial court when it ruled on Rady's motion for summary judgment. We otherwise deny the motion to augment.

B. *Appeal from Summary Judgment*

On appeal from a summary judgment in favor of the defendant, "[t]he rules of review are well established. If no triable issue as to any material fact exists, the [*6] defendant is entitled to a judgment as a matter of law. (*Code Civ. Proc., § 437c, subd. (c)* . . . .) In ruling on the motion, the court must view the evidence in the light most favorable to the [plaintiff]. . . . We review the record and the determination of the trial court de novo." (*Shin v. Ahn (2007) 42 Cal.4th 482, 499* (*Shin*), citations omitted.) With this standard of review in mind, we will address Ortega's basic contentions that there are factual disputes with respect to each of her five causes of action that require a trial and that the trial court therefore erred in granting Rady's motion for summary judgment.

1. *FEHA Claims*

As previously noted, Ortega's complaint contains three separately labeled causes of action under the FEHA: (1) employment discrimination based on her disability; (2) failure to accommodate her disability; and (3) failure to engage in an interactive process to identify reasonable accommodations. According to Ortega, she is entitled to go to trial on these claims because she presented evidence that she could perform her job as a housekeeper or the job of a food service worker if Rady made reasonable accommodations for her disability. We will first set out the [*7] elements of her three FEHA claims and then analyze the claims together because the dispositive legal and factual issues substantially overlap.

a. *Essential Elements*

Discrimination. The FEHA makes it "an unlawful employment practice" for an employer to discharge a disabled employee unless the employee cannot perform essential job functions "even with reasonable accommodations." (§ 12940, subd. (a)(1).) To prevail on a disability discrimination claim, a discharged employee must prove: (1) she has a disability; (2) *she can perform the essential functions of the job either with or without reasonable accommodations*; and (3) she was discharged because of her disability. (*Green v. State of California (2007) 42 Cal.4th 254, 262* (*Green*); *Sandell v. Taylor-Listug, Inc. (2010) 188 Cal.App.4th 297, 311* (*Sandell*).)

Failure to Accommodate. The FEHA makes it "an unlawful employment practice" for an employer "to fail to make reasonable accommodation" for the known disability of an employee (§ 12940, subd. (m)), and " '[r]easonable accommodation' " includes "reassignment to a vacant position" (§ 12926, subd. (n)(2)). To prevail on a failure-to-accommodate claim, an employee must prove that (1) she has [*8] a disability; (2) *she can perform the essential functions of her existing job or another available job with reasonable accommodations*; and (3) the employer failed to make reasonable accommodations. (*Scotch v. Art Institute of California (2009) 173 Cal.App.4th 986, 1009-1010* (*Scotch*); *Nadaf-Rahrov v. Neiman Marcus Group, Inc. (2008) 166 Cal.App.4th 958, 963, 978* (*Nadaf-Rahrov*); *Jensen v. Wells Fargo Bank (2000) 85 Cal.App.4th 245, 256*.)

Failure to Engage in Interactive Process. The FEHA makes it "an unlawful employment practice" for an employer "to fail to engage in a timely, good faith, interactive process" with a disabled employee "to determine effective reasonable accommodations, *if any*." (§ 12940, subd. (n), italics added.) "To prevail on a claim . . . for failure to engage in the interactive process, *an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred*." (*Scotch, supra, 173 Cal.App.4th at p. 1018*, italics added; see also *Nadaf-Rahrov, supra, 166 Cal.App.4th at p. 983* [availability of reasonable accommodation necessary to claim under § 12940, subd. (n)].)

b. *Analysis*

As indicated above, to prevail [*9] on any of her FEHA claims, Ortega would have to prove she could perform the essential functions of her former job as a housekeeper or some other available job, either with or without reasonable accommodations. In its motion for summary judgment, Rady sought to negate this essential element of each of Ortega's FEHA claims by establishing that she could not perform job functions at the time she was discharged. (See *Code Civ. Proc., § 437c*, subd. (*o*)(1) [claim has no merit if essential element cannot be established]; *Prilliman v. United Air Lines, Inc. (1997) 53 Cal.App.4th 935, 952* [summary judgment for employer proper when employee could not establish essential element of FEHA claim].) We must therefore determine whether the evidence submitted to the trial court discloses a triable factual dispute on this issue, and for the following three reasons we find that it does not.

First, the record demonstrates that Ortega could not

do the heavy lifting required of a housekeeper without some form of accommodation. The evidence shows, and Ortega concedes on appeal, that one of her permanent restrictions was that she lift no more than 25 pounds with her left upper limb. The evidence also shows, [*10] and Ortega also concedes on appeal, that the physical demands of the housekeeper job included occasional lifting of items weighing more than 25 pounds. Indeed, during her deposition, Ortega testified that picking up hampers full of dirty linens weighing "45 or 50 pounds" was the "main" part of her job as a housekeeper. *Thus, the undisputed evidence demonstrates that at the time of her discharge, Ortega could no longer perform an essential function of her job as a housekeeper without reasonable accommodations.*

Second, the record shows that there was no *reasonable* accommodation that would have allowed Ortega to do the heavy lifting required of a housekeeper. Ortega bore the burden to prove she could do her job as a housekeeper with a reasonable accommodation. (*Green, supra, 42 Cal.4th at p. 262*; *Nadaf-Rahrov, supra, 166 Cal.App.4th at p. 978*.) In an attempt to meet this burden, Ortega submitted a declaration stating that "[Rady] could have reasonably accommodated [her] restrictions by giving [her] assistance a few times a day to take out trash and linen." [3] The FEHA, however, does not obligate an employer to make the specific accommodation requested by a disabled employee; it only requires [*11] an employer to make a *reasonable* accommodation. (§ 12940, subds. (a)(1), (m); *Hanson v. Lucky Stores, Inc. (1999) 74 Cal.App.4th 215, 228*.) In the disability discrimination context, when lifting heavy objects is an essential job requirement, shifting the responsibility for such lifting to coworkers is *not* a reasonable accommodation. (See *Peters v. City of Mautson (7th Cir. 2002) 311 F.3d 835, 845* [request that "someone else do the heaviest lifting . . . unreasonable because it requires another person to perform an essential function of [the plaintiff's] job"]; *Phelps v. Optima Health, Inc. (1st Cir. 2001) 251 F.3d 21, 26* [hospital not required to allow disabled nurse to share lifting duties with other nurses]; see also *Dark v. Curry County (9th Cir. 2006) 451 F.3d 1078, 1089* [employer not required to exempt disabled employee from essential job functions or shift them to other employees]; *Olian v. Board of Education (N.D.Ill. 2009) 631 F.Supp.2d 953, 961* [employer not required to provide helper to assist disabled employee with essential job duties].) [4] *Thus, Ortega did not show she could continue to work as a housekeeper with reasonable accommodations.*

3 Rady objected to Ortega's declaration [*12] on the ground it contradicted her prior deposition testimony, and the trial court sustained the objection. (See, e.g., *Guthrey v. State of California (1998) 63 Cal.App.4th 1108, 1120* ["A party cannot evade summary judgment by submitting a declaration contradicting his own prior deposition testimony."].) Ortega testified during her deposition that when she notified Rady of her permanent work restrictions she told Robinson she "couldn't go back to do that same job" and that her physician "told [her] that [she] could no longer do that job that [she] had been performing." Although this testimony can be read broadly to mean Ortega could no longer perform her duties as a housekeeper *under any circumstances*, i.e., with or without accommodation, it also can be read narrowly to mean she could no longer perform those duties *as she had in the past*, i.e., without accommodation. On this appeal from a summary judgment, we are required to view the evidence in the light most favorable to Ortega. (E.g., *Shin, supra, 42 Cal.4th at p. 499*; *Sandell, supra, 188 Cal.App.4th at p. 308*.) We therefore adopt the narrow interpretation of Ortega's deposition testimony, find no conflict with her subsequent declaration, [*13] and consider the declaration as part of our de novo review.

4 Because of the similarities between federal and state employment discrimination laws, we may properly rely on federal precedents. (See *Green, supra, 42 Cal.4th at pp. 261-262* [relying on federal case law interpreting Americans with Disabilities Act of 1990 in deciding how to allocate burden of proof for FEHA claim]; *Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 354* [California courts look to federal precedents in employment discrimination cases because federal and state laws are similar]; *Nadaf-Rahrov, supra, 166 Cal.App.4th at p. 974* [because reasonable accommodation requirements of FEHA are modeled on parallel federal requirements, federal "definition of 'reasonable accommodation' appropriately guides our construction of the state laws"].)

Third, the record shows that Rady could not

accommodate Ortega by reassigning her to another available job that she could have performed either with or without reasonable accommodations. In support of its summary judgment motion, Rady submitted a declaration from Davidson, a member of Rady's Human Resources Department, who stated that she had reviewed Ortega's personnel file and [*14] work restrictions [5] and a list of available positions and, based on that review, determined that there were no open positions for which Ortega was qualified. This shifted the burden to Ortega to submit evidence that there was an available job she could perform. (See *Code Civ. Proc., § 437c, subd. (p)(2)*; *Nadaf-Rahrov, supra, 166 Cal.App.4th at p. 978*.) In opposition to Rady's motion, the *only* job to which Ortega claimed she should have been reassigned was food service worker. The problem with reassignment to that job is that among its physical demands is occasional lifting of 26 to 50 pounds, which Ortega's permanent weight-lifting restriction would prevent her from doing. It is no answer to say, as Ortega does, that she "could be accommodated concerning the occasional lifting over 25 [pounds] with additional help from other workers," because, as we explained previously, requiring other workers to help Ortega do essential functions of her job is not a reasonable accommodation under the FEHA. (See pp. 9-10, *ante*.) *Thus, the undisputed evidence shows there was no available vacant position to which Rady could have reassigned Ortega and whose essential duties she could have performed even* [*15] *with reasonable accommodations.*

> 5 Ortega contends that Davidson erroneously relied on Ortega's *temporary* work restrictions rather than her *permanent* work restrictions. We view any such error as inconsequential, because the only restriction pertinent to our decision is the one that limited the amount of weight Ortega could lift with her left upper limb to 25 pounds. As noted, Ortega concedes that restriction is a permanent one.

In sum, the record shows that Ortega's weight-lifting restriction prevented her from performing essential duties of a housekeeper or a food service worker, and she has not shown the existence of a *reasonable* accommodation that would have allowed her to perform those duties. Since Ortega has no evidence to establish an essential element of each of her FEHA claims, Rady was entitled to summary adjudication on those claims. (See *Code Civ. Proc., § 437c, subds. (f)(1),* (*o*)(1); *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 853-855*.)

2. *Retaliation Claim*

Ortega contends triable issues of fact precluded the trial court from summarily adjudicating her fourth cause of action based on discharge in retaliation for filing a workers' compensation claim. [6] [*16] We disagree.

> 6 Although the only protected activity specifically mentioned in the retaliation cause of action is the filing of a claim for workers' compensation, Ortega also argued in the trial court (and argues again on appeal) that Rady discharged her because she requested accommodations under the FEHA. To the extent a discharge in retaliation for these requests could constitute a separate cause of action under the FEHA (see § 12940, subd. (h) [prohibiting employer from discharging employee who engaged in certain activities protected by FEHA]), the cause of action would be subject to the same burden-shifting analysis we apply and the same conclusion we reach with respect to the retaliation claim based on Ortega's filing of a workers' compensation claim. (See *Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1042* (*Yanowitz*); *Arteaga v. Brink's, Inc. (2008) 163 Cal.App.4th 327, 355-356* (*Arteaga*); *Akers v. County of San Diego (2002) 95 Cal.App.4th 1441, 1453*; *Flait v. North American Watch Corp. (1992) 3 Cal.App.4th 467, 476* (*Flait*).)

Ortega is correct that the law prohibits an employer from discharging an employee because she filed a claim for workers' compensation. (*Lab. Code, § 132a, subd. (1)*.) [*17] To recover for retaliation, the employee must show that (1) she filed a workers' compensation claim (or engaged in some other conduct protected by *Labor Code section 132a*), (2) she was subsequently discharged (or suffered some other adverse employment action) and (3) there is a causal link between the two. (*Arteaga, supra, 163 Cal.App.4th at p. 356*.) On a motion for summary judgment, the court undertakes a three-step burden-shifting analysis: (1) the employee must show a prima facie case of retaliation; (2) the employer must show a legitimate, nonretaliatory reason for the discharge; and (3) the employee must rebut the employer's showing with evidence that the employer's proffered reason is a mere pretext for retaliation. (*Ibid.*; *Crown Appliance v. Workers' Comp. Appeals Bd. (2004)*

115 Cal.App.4th 620, 624-625; see also *Loggins v. Kaiser Permanente Internat. (2007) 151 Cal.App.4th 1102, 1108-1109* (*Loggins*) [three-step burden-shifting analysis applies to claims of retaliatory termination based on FEHA and wrongful termination in violation of public policy].) We thus proceed to apply this burden-shifting analysis to the evidence in the record.

Ortega arguably satisfied her initial burden [*18] to present a prima facie case of retaliation. The record shows that (1) she filed a workers' compensation claim, (2) she was subsequently discharged and (3) the two events occurred within 10 months of each other. (Cf. *Nadaf-Rahrov, supra, 166 Cal.App.4th at p. 990* [assuming prima facie case established when employee fired six months after asking for accommodation]; *Arteaga, supra, 163 Cal.App.4th at pp. 338-339, 356* [prima facie case established when employee fired six days after completing workers' compensation forms]; *Flait, supra, 3 Cal.App.4th at p. 478* [prima facie case established when employee fired "only a few months after" engaging in protected activity].)

In attacking the retaliation claim as part of its motion for summary judgment, Rady relied on the same reason for discharging Ortega as it relied on with respect to the FEHA claims -- that her permanent weight-lifting restriction prevented her from performing the essential duties of a housekeeper. We have already described the evidence Rady presented to support this reason, and concluded that evidence was sufficient to establish a legitimate, nondiscriminatory reason for discharging Ortega. (See pp. 8-11, *ante*.) Any inference [*19] of retaliation created by Ortega's prima facie case thus " ' " 'drop[ped] out of the picture,' " ' " and the burden shifted back to Ortega to prove intentional retaliation. (*Yanowitz, supra, 36 Cal.4th at p. 1042*; accord, *Arteaga, supra, 163 Cal.App.4th at pp. 343, 356*.)

In opposition to the motion for summary judgment, and again on appeal, the only evidence on the issue of pretext Ortega points to is the fact that she was discharged only 10 months after she filed her claim for workers' compensation. Assuming, without deciding, that 10 months is close enough in time to support a causal link between the claim and the discharge, we previously have ruled that "temporal proximity, although sufficient to shift the burden to the employer to articulate a nondiscriminatory reason for the adverse employment action, does not, without more, suffice also to satisfy the secondary burden borne by the employee to show a triable issue of fact on whether the employer's articulated reason was untrue and pretextual." (*Loggins, supra, 151 Cal.App.4th at p. 1112*; see also *Nadaf-Rahrov, supra, 166 Cal.App.4th at p. 990* ["Temporal proximity does not alone satisfy the burden."].) Ortega therefore did not sustain [*20] her burden to rebut Rady's showing of a legitimate, nondiscriminatory reason for discharging her.

In short, where, as here, "the employee relies solely on temporal proximity in response to the employer's evidence of a nonretaliatory reason for termination, he or she does not create a triable issue as to pretext, and summary judgment for the employer is proper." (*Arteaga, supra, 163 Cal.App.4th at p. 357*.)

3. *Wrongful Termination Claim*

In her fifth and final cause of action, Ortega alleged a so-called *Tameny* claim for wrongful termination in violation of public policy. (See *Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 170* [recognizing tort action "when an employer's discharge of an employee violates fundamental principles of public policy"].) The only public policies identified by Ortega as having been violated by her discharge are those embodied in the disability discrimination provisions of the FEHA and in *Labor Code section 132a, subdivision (1)*. [7] (See, e.g., *Green v. Ralee Engineering. Co. (1998) 19 Cal.4th 66, 79* [claim for wrongful termination in violation of public policy must be based on public policy embodied in statutory or constitutional provision].) Since we have [*21] determined, however, that Rady's discharge of Ortega violated neither statute, her *Tameny* claim premised on violations of those statutes necessarily fails as well. (See, e.g., *Arteaga, supra, 163 Cal.App.4th at p. 355* [*Tameny* claim based on FEHA's prohibition of disability discrimination failed when related FEHA claim failed]; *Le Bourgeois v. Fireplace Manufacturers, Inc. (1998) 68 Cal.App.4th 1049, 1060, fn. 14* [same]; *Tyco Industries, Inc. v. Superior Court (1985) 164 Cal.App.3d 148, 159* [*Tameny* claim based on *Lab. Code, § 970* failed when claim under statute failed].)

> 7 Although in her complaint Ortega alleged that her termination also violated the California Constitution, she has never identified any particular constitutional provision that Rady purportedly violated. Vague allegations of public policy violations "unaccompanied by citations to specific statutory or constitutional provisions" are

"insufficient to create an issue of *material* fact justifying a trial on the merits." (*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238, 1257*.) Thus, Ortega's failure to identify a specific constitutional provision that was violated by her discharge "dooms [her] cause of action." (*Ibid.*)

4. [*22] *Punitive Damages*

Ortega alleged in her complaint that Rady acted with oppression, fraud and malice in discharging her and included in the complaint a prayer for punitive damages. (See *Civ. Code, § 3294*.) Rady sought summary adjudication on the ground that Ortega's "claim for punitive damages [was] without merit as a matter of law." (Capitalization omitted.) (See *Code Civ. Proc., § 437c, subd. (f)(1)*; *Catalano v. Superior Court (2000) 82 Cal.App.4th 91, 97*.) The trial court ruled that Ortega "has come nowhere near offering clear and convincing evidence of oppression, fraud or malice that would justify the case going forward as one seeking punitive damages." Ortega challenges this ruling on appeal.

We need not decide whether this ruling was correct because Rady's motion for summary judgment disposed of all of Ortega's causes of action, none of which survived to support an award of punitive damages at trial. "Of course, there is no separate or independent cause of action for punitive damages." (*Coleman v. Gulf Ins. Group (1986) 41 Cal.3d 782, 789, fn. 2*; accord, *Caira v. Offner (2005) 126 Cal.App.4th 12, 39, fn. 20*.) "Such damages are mere incidents to the cause of action and can never [*23] constitute the basis thereof." (*Clark v. McClurg (1932) 215 Cal. 279, 282*; see also *Jackson v. Johnson (1992) 5 Cal.App.4th 1350, 1355* ["punitive damages are only ancillary to a valid cause of action"].) Thus, "[i]n light of our conclusion that [Ortega has] failed to establish any of [her five] causes of action, it is unnecessary to address this claim for punitive damages." (*Coleman, at p. 789, fn. 2*; see also *King v. United Parcel Service, Inc. (2007) 152 Cal.App.4th 426, 444* [claim for punitive damages moot when summary judgment on underlying claims affirmed].)

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

MCDONALD, Acting P. J.

AARON, J.