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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CAROLYN BLANCHARD, Plaintiff and Appellant, v. PIER 1 IMPORTS (U.S.), INC., Defendant and Respondent.	A126243 (Sonoma County Super. Ct. No. SCV243254)

Carolyn Blanchard sued her former employer, Pier 1 Imports (U.S.), Inc. (Pier 1) alleging that Pier 1 was liable under the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.)[1] for sexual harassment by a coworker. Her complaint as to Pier 1 was dismissed after the trial court sustained, without leave to amend, a demurrer to her second amended complaint (SAC).

The question we must decide is whether an employer can be vicariously liable under FEHA for sexual harassment by a nonsupervisory coworker, even in the absence of notice of any actionable misconduct by the coworker, if it fails to take "corrective action" to prevent a risk of future actionable harassing conduct.[2] We conclude that the employer is not liable under these circumstances and we affirm the judgment.

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[1] All further statutory references are to the Government Code unless otherwise specified.

[2] As discussed *post*, we do not reach the issue of an employer's *direct* liability under section 12940, subdivision (k) (section 12940(k)) for failure to prevent harassment in the workplace.

I. BACKGROUND

Because we treat Pier 1's demurrer as admitting the truth of all material facts properly pled (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439–440), we set forth the facts as alleged in Blanchard's SAC.

Blanchard and Richard Clapham were both employed by Pier 1 at its Petaluma store. Clapham was a convicted and registered sex offender before being hired by Pier 1. On information and belief, Blanchard alleges that Clapham was previously convicted of sexually assaulting, battering, and/or raping, and/or attempting to rape two women in or near a bathroom. On information and belief, Blanchard alleges that Clapham informed Pier 1, on an unknown date before November 25, 2006, and while he was seeking employment, that he was a convicted felon.[3] Nonetheless, Blanchard alleges on information and belief that Pier 1 failed to adequately perform a background check.

Sometime during the summer of 2006, Blanchard informed the store manager that Clapham had made her feel uncomfortable by giving her an unusual and inappropriate amount of attention. Around that same time, Blanchard alleges on information and belief, another female coworker also informed the manager of comments made by Clapham regarding his desire to be sexually intimate and/or pursue a romantic relationship with Blanchard. Clapham asked Blanchard out on dates, remarked on her appearance, stared at her, told others that he found Blanchard attractive and wanted to pursue a relationship with her, and stood uncomfortably close. Clapham's conduct was unwelcome and offensive.

On or about November 25, 2006, Pier 1 scheduled Clapham to work a closing shift with Blanchard. Each was responsible for cleaning a bathroom. A female manager was the only other person in the store, but she was not in the vicinity. While Blanchard was cleaning the inside of the women's restroom, Clapham stripped naked and waited, with an erection, immediately outside of the restroom. When Blanchard opened the door to

[3] Blanchard does not allege that Pier 1 had actual knowledge of Clapham's status as a sex offender.

exit the restroom, she was confronted by Clapham, who pushed her back into the restroom, covered her mouth with his hand, and attempted to prevent her from leaving the restroom. Blanchard escaped. Clapham was ultimately incarcerated after being charged with assault, assault with intent to commit rape, and false imprisonment.

Based on these facts, Blanchard alleged the following causes of action against Clapham in her SAC: (1) battery; (2) assault; (3) sexual battery; (4) false imprisonment; (5) intentional infliction of emotional distress; and (6) negligent infliction of emotional distress.[4] Blanchard also alleged a single cause of action against Pier 1 for violation of FEHA, citing "section 12940 et seq."[5]

Blanchard alleges that Pier 1's conduct violated FEHA in that "harassment of employees on the basis of sex is an unlawful employment practice" and that "it is unlawful for an employer to fail to take all reasonable steps necessary to prevent harassment from occurring." Specifically, Blanchard alleges that she "was subjected to unwanted and harassing conduct by [Clapham], on at least one occasion when he gave her unwanted, unusual and inappropriate attention while in the course and scope of employment prior to the incident on November 25, 2006 . . . . [¶] This harassment took the form of asking [Blanchard] out on dates, remarking on her appearance, staring at her, telling others that he found [Blanchard] attractive and wanted to pursue a relationship with her, [and] standing uncomfortably close."

Blanchard also alleges that Pier 1 "knew or should have known of the risk of harm [Clapham] posed based on its knowledge of his self-admitted felony status, the nature of

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[4] Clapham is not a party to this appeal.

[5] Blanchard's complaint and first amended complaint included claims against both Clapham and Pier 1 for battery, assault, sexual battery, false imprisonment, negligent infliction of emotional distress, intentional infliction of emotional distress, negligence, and negligent entrustment. On March 24, 2009, the trial court sustained Pier 1's demurrer as to these claims in the first amended complaint without leave to amend, and sustained the demurrer with leave to amend as to the FEHA cause of action. No appeal was taken from this order. Blanchard's common law tort claims have therefore been abandoned as to Pier 1 and are not at issue in this appeal.

his previous convictions and the previous complaints lodged by [Blanchard] and a fellow co-worker . . . . Despite this, [Pier 1] failed to prevent the harm and/or take immediate and corrective action and instead permitted [Clapham] to work together with only one other woman, at night, in or around a bathroom. As such, [Pier 1] authorized, condoned and/or ratified [Clapham's] behavior to the detriment of [Blanchard], causing special and general damages."

Pier 1 demurred, arguing that, because Blanchard was attempting to hold it liable for the allegedly harassing conduct of a coworker and not a supervisor, Pier 1 could be liable for sexual harassment, pursuant to section 12940, subdivision (j)(1) (section 12940(j)(1)), only when it knew or should have known of unlawful harassment but failed to take immediate and appropriate corrective action. Pier 1 argued that it could not be held liable for any alleged failure to respond to Clapham's conduct because his conduct before the attack "falls far short of constituting hostile work environment sexual harassment."[6] In her opposition, Blanchard argued that Clapham's conduct before the November 25, 2006 incident was sufficient to create a hostile work environment.

The trial court sustained Pier 1's demurrer without leave to amend. The court concluded: "The facts alleged fail to show that the alleged harassing conduct was pervasive or severe. [Blanchard] has had three opportunities to adequately plead this cause of action and she has failed to do so." A judgment of dismissal was entered in favor of Pier 1. Blanchard filed a timely notice of appeal from the judgment.

II. DISCUSSION

Although the arguments presented in Blanchard's opening brief lack clarity, the thrust of her argument appears to be that Pier 1 is liable, under section 12940(j)(1), for failing to anticipate that Clapham might assault her and failing to take corrective action

[6] Blanchard's SAC includes no allegations regarding Pier 1's response to the assault. It appears to be undisputed that Clapham was immediately terminated after the November 25, 2006 incident.

before the assault occurred.[7] She also argues that the facts alleged were sufficient to state a cause of action for failure to take reasonable steps to prevent harassment, pursuant to section 12940(k).

A. Standard of Review

"On appeal from an order of dismissal after an order sustaining a demurrer, the standard of review is de novo: we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.] First, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. Next, we treat the demurrer as admitting all material facts properly pleaded. Then we determine whether the complaint states facts sufficient to constitute a cause of action. [Citations.] [¶] We do not, however, assume the truth of contentions, deductions, or conclusions of law. [Citation.]" (*Stearn v. County of San Bernardino, supra*, 170 Cal.App.4th at pp. 439–440.)

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[7] Section 12940(j)(1) provides in its entirety: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: [¶] . . . [¶] (j)(1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee, *other than an agent or supervisor, shall be unlawful if the entity*, or its agents or supervisors, *knows or should have known of this conduct and fails to take immediate and appropriate corrective action*. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered. *An entity shall take all reasonable steps to prevent harassment from occurring*. Loss of tangible job benefits shall not be necessary in order to establish harassment." (Italics added.)

"[I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) The burden of showing a reasonable possibility that a complaint's defects can be cured by amendment is on the plaintiff. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) On appeal from a demurrer we search the facts to see if they make out a claim for relief under *any* theory, regardless of whether the theory was raised before the trial court. (*Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 629–630.)

B. Sexual Harassment

Under California law, a plaintiff must show more than offensive conduct to recover for sexual harassment. To be actionable, the harassing conduct must constitute either quid pro quo harassment (when a term of employment or employment itself is conditioned on submission to unwelcome sexual advances) or result in a hostile work environment. (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 516–517.) Blanchard has not alleged quid pro quo harassment. The elements of a cause of action for hostile work environment harassment are: "(1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608, fn. omitted.) In this case, it is the latter two elements that are at issue.

"[T]o prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. [Citations.] 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.' [Citation.]" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.)

Under FEHA, an employer is strictly liable for harassment by a supervisor. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1041.) But, an employer is liable for harassment perpetrated by a nonsupervisory employee only "*if the entity*, or its agents or supervisors, *knows or should have known of this conduct and fails to take immediate and appropriate corrective action*." (§ 12940(j)(1), italics added.) In other words, "[i]f an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 1136, superseded by statute on other grounds as stated in *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 470–471.)

Although Blanchard did not specifically allege in her SAC that Clapham's assault, on November 25, 2006, constituted actionable harassment, we can readily assume that the assault on that date was sufficiently severe to create a hostile work environment. (See *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1049 ["an isolated incident of harassing conduct may qualify as 'severe' when it consists of 'a *physical* assault or the threat thereof' "]; *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1045.) However, Clapham was not Blanchard's supervisor and Blanchard has simply not alleged, and it appears she cannot allege, that Pier 1 failed to take immediate and appropriate corrective action following the November 25, 2006 assault. Rather, Blanchard argued below that her interactions with Clapham *before* the assault were by themselves sufficient to create a hostile work environment, which Pier 1 failed to correct. The trial court concluded that Blanchard had

failed to plead a harassment cause of action because "[t]he facts alleged fail to show that the alleged harassing conduct was pervasive or severe."

However, Blanchard does not challenge on this appeal the trial court's ruling that Clapham's conduct *before* the November 25, 2006 assault was insufficient to create a hostile work environment. Rather, Blanchard argues for the first time here that Pier 1 may be held liable for a hostile work environment created by the November 25, 2006 sexual assault itself because Pier 1 failed to take action in response to Blanchard's pre-assault complaints.[8] Blanchard contends: "[The SAC] alleged that [Pier 1] should have known that a convicted sex-offender it had hired and who had expressed a romantic and sexual interest in [Blanchard] . . . [posed a] probability that he would sexually harass her in the future. The gravamen of [Blanchard's] FEHA cause of action, therefore, relies upon Pier 1's failure to take immediate and appropriate corrective action in light of the constructive knowledge alleged."

Blanchard essentially argues that an employer is liable, under section 12940(j)(1), for a nonsupervisory employee's later actionable harassment if it knew or should have known of a *risk* that the employee would engage in future actionable harassment, and failed to prevent it, even if it had no notice of any previous actionable misconduct by the coworker. In other words, Blanchard contends that the employer's duty to take "immediate and appropriate corrective action" is not just remedial, but anticipatory as well. Pier 1, on the other hand, argues that FEHA, under section 12940(j)(1), does not impose liability on an employer for failure to anticipate and prevent actionable harassment by a nonsupervisory coworker. Thus, we look to the statute to see if it supports the interpretation Blanchard suggests.

"The primary duty of a court when interpreting a statute is to give effect to the intent of the Legislature, so as to effectuate the purpose of the law. [Citation.] To

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[8] "When a demurrer is sustained without leave to amend the petitioner may advance on appeal a new legal theory why the allegations of the petition state a cause of action. [Citation.]" (*20th Century Ins. Co. v. Quackenbush* (1998) 64 Cal.App.4th 135, 139, fn. 3.)

determine intent, courts turn first to the words themselves, giving them their ordinary and generally accepted meaning. [Citation.] If the language permits more than one reasonable interpretation, the court then looks to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, and the statutory scheme of which the statute is a part. [Citation.] . . . Ultimately, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and it must avoid an interpretation leading to absurd consequences. [Citation.]" (*In re Luke W.* (2001) 88 Cal.App.4th 650, 655.) " ' " 'When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear.' [Citations.] Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. [Citations.]" ' [Citation.]" (*Phelps v. Stostad* (1997) 16 Cal.4th 23, 32.)

Blanchard contends that the "should have known" language in section 12940(j)(1) requires an employer to anticipate and prevent actionable harassment by a coworker before it occurs, rather than merely imposing an obligation to respond once it does. Although not considering the argument raised here by Blanchard, our Supreme Court has said that "[t]he employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known *of the harassing conduct* and (b) failed to take immediate and appropriate corrective action. (§ [12940(j)(1)].) This is a negligence standard. [Citation.]" (*State Dept. of Health Services v. Superior Court, supra,* 31 Cal.4th at p. 1041, italics added.)

Blanchard makes much of the Supreme Court's statement that section 12940(j)(1) provides a negligence standard for employer liability in these circumstances. From this statement, Blanchard extrapolates that section 12940(j)(1) is nothing more than a restatement of the rule that " 'whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with

regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.' " (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112, superseded by statute on other grounds as stated in *Perez v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 462, 467; see also Civ. Code § 1714, subd. (a).) Blanchard also argues that the statutory terms "should have known" incorporate the definition of constructive knowledge provided in Civil Code section 19.[9]

Blanchard cites no FEHA decision that supports her position. "FEHA is not a codification of preexisting common law." (*Fisher v. San Pedro Peninsula Hospital, supra,* 214 Cal.App.3d at p. 604; see also *Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 118 ["the cause of action for sexual harassment is a creature of statute"].) The question is not whether section 12940(j)(1) allows constructive knowledge to trigger an employer's duty to take corrective action or even what is meant by "should have known." Rather, the relevant question is of *what* must an employer have knowledge, either actual or constructive, to trigger its duty to take corrective action? Essentially, Blanchard asks us to read section 12940(j)(1) as if it said "[h]arassment of an employee . . . by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, *knows or should have known of* [*circumstances exposing an employee to a future danger of sexual harassment*] and fails to take immediate and appropriate corrective action." If the Legislature had so intended, we believe it would have said so.

The plain language of the statute is not consistent with Blanchard's interpretation. Section 12940(j)(1) provides in pertinent part: "Harassment of an employee . . . by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known *of this conduct* and fails to take immediate

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[9] Civil Code section 19 provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

and appropriate corrective action." (Italics added.) The statutory term "this conduct" can only refer back to "[h]arassment of an employee . . . by an employee, other than an agent or supervisor . . . ." (§ 12940(j)(1).) Blanchard herself concedes, in her reply brief, that "this conduct" means actionable sexual harassment. We think this concession is determinative. We cannot "under the guise of statutory construction, 'rewrite the law or give the words an effect different from the plain and direct import of the terms used.' [Citation.]" (*City of Pasadena v. AT&T Communications of California, Inc.* (2002) 103 Cal.App.4th 981, 984.)

Blanchard's reliance on *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531 (*Doe*) is misplaced. In *Doe*, the statutory provision at issue was Code of Civil Procedure section 340.1, subdivision (b)(2), "which extends the statute of limitations within which a victim of childhood sexual abuse may sue a person or entity who did not perpetrate abuse but was a legal cause of it." (*Doe,* at p. 536.) That section provides that "such actions must be brought before the victim's 26th birthday, unless the defendant 'knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person . . . .' [Citation.]" (*Ibid*.)

The plaintiffs, who had filed their actions after their 26th birthdays, focused on the words "reason to know," in the statute, arguing that they imposed a duty of inquiry. According to the plaintiffs, their allegations that defendants were aware of circumstances that, if investigated, would have revealed the abuser to have pedophilic tendencies were sufficient to invoke the exception. (*Doe, supra,* 42 Cal.4th at pp. 536, 546, 552.) The court rejected the argument, concluding that the Legislature's use of a "reason to know" standard was not equivalent to the inquiry notice described in Civil Code section 19. (*Id.* at p. 547.) In any event, the court determined that precise interpretation of the "reason to know" and "otherwise on notice" language was unnecessary because the plaintiffs failed to allege that the defendants had knowledge or notice of the abuser's past unlawful sexual conduct. (*Id.* at pp. 548–549.)

The court observed: "[T]hese words must, of course, be read in the context of the provision as a whole. Thus, the subject of which the nonperpetrator defendant must have had knowledge or notice is, the statute clearly tells us, the *perpetrator's unlawful sexual conduct* as that term is defined in the statute . . . ." (*Doe, supra,* 42 Cal.4th at p. 546.) The court held that the defendants' demurrers were properly sustained. "That defendants had knowledge or notice of misconduct by [the abuser] that created a risk of sexual exploitation is not enough under the express terms of the statute." (*Id.* at p. 552.)

Here, Blanchard's focus on the "should have known" language in section 12940(j)(1) is similarly unavailing. Pier 1's demurrer to Blanchard's harassment claim was properly sustained because Blanchard does not allege, and apparently cannot allege, that Pier 1 knew or should have known of any actionable *conduct* by Clapham and that it failed to take immediate and appropriate corrective action thereafter. Even if Pier 1 had actual or constructive knowledge of some nonactionable conduct by Clapham that presaged future actionable harassment (particularly in light of Pier 1's purported knowledge of Clapham's criminal history), that is not a basis for employer liability under the express terms of the FEHA statute.

Blanchard's reliance on *Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153 (*Sheffield*) is also misplaced. *Sheffield*, which is one of the few FEHA cases cited by Blanchard, actually supports Pier 1's interpretation of the statute. In *Sheffield*, Betra Thompson, a coworker of Tina Sheffield, called Sheffield at home and asked for a date. Sheffield declined and complained to her supervisor the next day, indicating that she wanted Thompson to leave her alone. That same day Thompson called Sheffield at her workstation at least three times, asking for a date. Sheffield continued to complain to her supervisor. (*Id.* at pp. 156–157.) Several days later, Thompson saw Sheffield in a hallway. Thompson made a fist, which she slammed into her palm, while at the same time looking at Sheffield and frowning. Sheffield reported this incident to her supervisor. (*Id.* at p. 158.) Two days later, Thompson attacked Sheffield at her desk. The attack was investigated and Thompson was eventually terminated. (*Id.* at pp. 158–159.)

Noting that it was not until the physical attack that the employer took any action, the reviewing court considered whether the conduct complained of before the physical attack was sufficiently severe or pervasive to create a hostile work environment. (*Sheffield, supra,* 109 Cal.App.4th at pp. 162–164.) The employer argued that because "the time span from the initial call to the attack was less than seven days, there was insufficient time for Thompson's conduct to have evolved into a hostile work environment for [Sheffield]." (*Id.* at p. 163.) In rejecting this argument, the court observed: "[W]hat makes this case unique is the violence aspect that inserted itself into the case when Thompson, who was much bigger than [Sheffield], made a fist and slammed that fist into her other palm while looking at [Sheffield] and frowning. Until this incident Thompson's actions had amounted to boorish or overbearing behavior. The slamming the fist into the palm added an aspect of violence that could be found to have changed the conditions of [Sheffield's] employment. The fist-slamming incident was also reported to [Sheffield's] supervisor. Yet nothing was done on that day, Tuesday, or the next day. Not until Thursday, after [Sheffield] had been attacked, did the [employer] act. . . . [W]hen violence or the threat of violence is added to the equation, a trier of fact could determine [Sheffield's] conditions of employment had been drastically changed and that she was in a hostile work environment." (*Id.* at pp. 163–164, fn. omitted.) Turning to the issue of employer liability, the court concluded that "a trier of fact could determine that [the employer] failed to take reasonable steps to prevent the harassment *once it knew of Thompson's implied threats of violence*." (*Id.* at p. 164, italics added.) Thus, in *Sheffield*, it was the employer's notice of conduct that created a hostile work environment that triggered the employer's responsibility to take action.

Although not cited by Blanchard, *Erickson v. Wisconsin Dept. of Corrections* (7th Cir. 2006) 469 F.3d 600 (*Erickson*) provides some support for her argument. In *Erickson*, the plaintiff brought a hostile work environment claim under Title VII after being raped by an inmate who was conditionally permitted to perform janitorial services, during certain hours, in the office space where the plaintiff worked. (*Id.* at pp. 601–602, 604.) The employer argued that it could not be held liable for sexual harassment by the

nonsupervisory inmate because it was not notified of any actual acts of sexual harassment before the rape. (*Id.* at p. 605.) The United States Court of Appeals for the Seventh Circuit rejected this contention, relying on the fact that the plaintiff had notified her supervisors, eight days before the rape, that the inmate had been present in the office while she was working alone, after hours, and that he looked at her in a way that made her feel uncomfortable. No action was taken in the eight days between the plaintiff's complaint and the rape. (*Id.* at pp. 603–604, 607.)

The court noted that Title VII's "primary objective" is " 'not to provide redress but to avoid harm.' [Citations.]" (*Erickson, supra,* 469 F.3d. at p. 605.) The court stated: "Prevention can involve proactive steps such as constructing a reporting system for instances of sexual harassment, training employees about sexual harassment risks and what can be done to ameliorate them . . . , *and taking reasonable steps to prevent harassment once informed of a reasonable probability that it will occur*. The greater the potential harm to the employee, the more vigilant the employer needs to be." (*Id.* at p. 606, italics added.) The court observed: "[The employer] knew, prior to [the plaintiff's complaint], that most of the office employees . . . were female; all of the inmates . . . were male. [The plaintiff's] supervisors . . . knew before [the plaintiff's complaint] of an increased risk that male inmates might sexually harass female employees. In fact, [the employer] implemented training . . . emphasizing that male inmates would fantasize about and attempt to establish inappropriate relationships with female employees. . . . Supervisors were also aware, before [the plaintiff's complaint], that unusual attention paid to a female employee by an inmate might suggest that the inmate posed a threat. And [the inmate], who was previously classified as a high-risk inmate in the opinion of at least one social worker, should have been more closely monitored after [the plaintiff's complaint]." (*Id.* at pp. 607–608.)

Taking into consideration the above circumstances, the court concluded that "a reasonable jury could have found that, after [the plaintiff's] discussion with her supervisors [before the rape], [the employer] had 'enough information to make a reasonable employer think *there was some probability that* [*the plaintiff*] *was being*

sexually harassed,' [citation], yet took no remedial action as it was obligated to do under Title VII. [Citations.]" (*Erickson, supra,* 469 F.3d at p. 608, italics added.) Finally, the court went on to state: "If [the employer] had no evidence of 'some probability' that sexual harassment was occurring, it would not be held liable. . . . [T]his is a close case. The totality of the circumstances in this case is crucial: if [the inmate] had actually been operating a vacuum near [the plaintiff's] workspace, with other workers present, at 10:30 a.m. . . . , for example, [the employer] would have gotten out of this case on summary judgment. [The employer] is not liable for any and all actions of its inmates, but it is liable (as any other employer would be) if it fails to respond to a reasonable notice, under the circumstances, that a sexual harassment might occur." (*Ibid.*)

There are obvious distinctions between the circumstances presented in *Erickson* and those presented here. But, even putting those distinctions aside, to the extent that the *Erickson* court held that an employer may be liable for harassment, under Title VII, for failure to take remedial action when notified of a coworker's conduct that does not create an actionable hostile work environment, we cannot follow *Erickson* here.[10] We simply are not persuaded that the same rule would have application under FEHA. "FEHA's provisions concerning employment discrimination by sexual harassment differ significantly from the provisions of Title VII. Indeed, Title VII does not specifically address sexual harassment at all. It is because Title VII lacks specific language on sexual harassment that the United States Supreme Court has been forced to infer not only a prohibition on sexual harassment in the workplace, but also a standard of employer liability and an affirmative defense to liability." (*State Dept. of Health Services v. Superior Court, supra,* 31 Cal.4th at p. 1040.) Accordingly, our Supreme Court has

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[10] We note that other Seventh Circuit decisions have suggested that this is not the rule. (See *Bombaci v. Journal Community Pub. Group, Inc.* (7th Cir. 2007) 482 F.3d 979, 985, fn. 2 [isolated instances of offensive conduct not sufficient to notify employer that employee was being sexually harassed "because they did not come close to creating an actionable hostile work environment"].)

instructed that Title VII precedents are entitled to little weight when interpreting FEHA's sexual harassment provisions. (*Ibid.*)

Section 12940(j)(1) itself provides: "Harassment of an employee . . . by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known *of this conduct* and fails to take immediate and appropriate corrective action." (Italics added.) By limiting the statute to its plain language, we are not eliminating any distinction between constructive knowledge and actual knowledge, as Blanchard suggests. (See *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1263–1264 (dis. opn. of Kennard, J.) ["constructive knowledge exists when the intolerable conditions, or the improper practices that result in the intolerable conditions, are so obvious and pervasive that any reasonably attentive employer would notice them"]; *Weger v. City of Ladue* (8th Cir. 2007) 500 F.3d 710, 722 ["employee can show an employer's constructive knowledge of sexual harassment by demonstrating that 'the harassment was so severe and pervasive that management reasonably should have known of it' "].) Nor are we conflating the standard for liability under section 12940(k)[11] with that required for liability under section 12940(j)(1). Blanchard has simply failed to show that the Legislature intended an employer be held liable for harassment, under section 12940(j)(1), when it fails to take "corrective" action after obtaining actual or constructive knowledge of a risk that a nonsupervisory employee might engage in sexual harassment in the future.

Blanchard in reality seeks to craft a FEHA claim based on common law tort theories of negligent hiring and supervision—claims which she has abandoned.[12] We

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[11] A plaintiff cannot recover for failure to take reasonable steps to prevent harassment or discrimination under section 12940(k), absent a finding the plaintiff actually suffered actionable harassment or discrimination. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289 (*Trujillo*).)

[12] Accordingly, we need not address Pier 1's argument that Blanchard's sexual harassment claim is really a disguised negligent hiring or supervision claim, subject to workers' compensation exclusivity. It is also unnecessary to take judicial notice of certain legislative history materials that Pier 1 contends are relevant to Blanchard's

conclude that the statute provides no such cause of action and the trial court properly sustained Pier 1's demurrer, without leave to amend, with respect to Blanchard's claim that Pier 1 was vicariously liable for Clapham's sexual harassment.

C. Failure to Take Reasonable Steps to Prevent Harassment

Blanchard also contends that the trial court erred in sustaining Pier 1's demurrer because she stated a cause of action for failure to take reasonable steps to prevent harassment, under section 12940(k). We find that she has waived this issue.

In addition to making sexual harassment unlawful, the FEHA also demands that employers take all reasonable steps to prevent harassment. This obligation is articulated in both section 12940(j)(1) and section 12940(k). The former provides that "[a]n entity shall take all reasonable steps to prevent harassment from occurring. . . ." (§ 12940(j)(1).) The latter provides that it is an unlawful employment practice "[f]or an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (§ 12940(k).) Our Supreme Court has described section 12940(k) as creating "a separate unlawful employment practice . . . ." (*State Dept. of Health Services v. Superior Court, supra,* 31 Cal.4th at p. 1040.) Under section 12940(k), the duty of an employer to " 'take all reasonable steps necessary to prevent discrimination and harassment from occurring . . . is affirmative and mandatory. [Citations.]" (*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035.) And, although section 12940(j)(1) imposes vicarious liability on the employer for a coworker's harassment, as one commentator has noted, "[the] statutory tort [i.e., section 12940(k),] is *not dependent on the employer's vicarious liability* for the harassment." (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2009) ¶ 10:481.1, pp. 10-85 to 10-86 (rev. # 1, 2007).)

Pier 1 argues, in reliance on *Trujillo, supra,* 63 Cal.App.4th 280, that because Blanchard is unable to state a cause of action under section 12940(j)(1), she is also unable

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argument on this point. Thus, we deny Pier 1's request for judicial notice, which we originally deferred, to the extent it relates to workers' compensation exclusivity.

to state a cause of action under section 12940(k). In *Trujillo*, the plaintiffs sued their employer and a supervisor alleging the supervisor engaged in harassing and discriminatory conduct. The plaintiffs alleged causes of action for violation of FEHA due to racial discrimination, harassment, hostile work environment, and failure to prevent discrimination and harassment. The jury returned a special verdict "finding [the] defendants had committed no discriminatory, racially harassing, or retaliatory conduct . . . ." (*Id.* at p. 283.) However, the jury also found the employer had failed to take all reasonable steps necessary to prevent discrimination and harassment from occurring. The trial court granted the employer's motion for judgment notwithstanding the verdict concluding a necessary foundational prerequisite for the plaintiffs' failure to prevent cause of action was that the plaintiffs actually suffered discrimination or harassment. (*Id.* at p. 284.) The reviewing court affirmed the trial court's ruling, concluding that employers are not liable for failure to take reasonable steps to prevent harassment or discrimination, "except where the [harassment or discrimination] took place and [was] not prevented." (*Id.* at p. 289; see also *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925, fn. 4 ["courts have required a finding of actual discrimination or harassment under FEHA before a plaintiff may prevail under section [12940(k)]"].)

In her briefing, Blanchard conceded that the sufficiency of her claim under section 12940(k) was dependent upon the adequacy of her allegations in support of her section 12940(j)(1) claims and did not even attempt to distinguish *Trujillo*. It is only in her reply brief that Blanchard states in passing: "[I]t is readily apparent from a 'plain meaning' viewpoint that [section 12940(k)] does not contain any knowledge element in the violation. All that is required is that the employer failed to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

As Blanchard admits, in her pleadings below she alleged only a single cause of action under "section 12940." At oral argument she contended that the trial court "conflated" the pleading requirements for section 12940(j)(1) and section 12940(k) in sustaining the demurrer to her SAC (although she made no such argument to the court

below), but it appears that it is Blanchard herself who has done so. In her briefing and again in her oral argument, she asserts that the same pleading allegations support an action under either subdivision, and consequently she made no effort, at least in her opening brief, to articulate any distinction between the requisite elements of a cause of action under section 12940(k).

We believe *Trujillo* can be distinguished because, unlike the circumstances presented in that case, there has not been a finding here that neither discrimination nor harassment actually occurred. We have assumed for purposes of our prior discussion that Blanchard could plead that she suffered actionable harassment by Clapham on November 26. There is, however, no authority presented for the proposition that section 12940(k) is a strict liability statute, nor does Blanchard so contend. Neither party has addressed, with any reasoned discussion or citation to authority, what level of knowledge or culpability is required to establish a cause of action under that subdivision. We decline to develop Blanchard's arguments for her, and therefore decline to reach an issue not fully and timely presented. (*Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.) We also do not address arguments raised only in the reply brief.[13] (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4; *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 864, fn. 12.)

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[13] Blanchard's reply brief also contends for the first time that the nearly identical language in section 12940(j)(1) and section 12940(k) regarding the employer's duty to take all reasonable steps to prevent harassment "reflects the same thing from two different vantage points . . . prospectively for [section 12940(j)(1)] and retrospectively for [section 12940(k)]." We do not consider Blanchard's untimely argument and conclude that it is also unnecessary to take judicial notice of certain legislative history materials that Pier 1 contends are relevant to this point. Thus, we deny Pier 1's request for judicial notice, which we originally deferred.

III. DISPOSITION

The judgment is affirmed.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Needham, J.