PROPOSED TENTATIVE

The operative pleading is the first amended complaint (FAC), filed on September 28, 2023. Plaintiff Laurie Ramirez (plaintiff or Ms. Ramirez) advances nine causes of action against defendant Santa Maria Joint High School (defendant or Santa Maria), her former employer. Briefly, defendant employed plaintiff as a "Special Education Teacher" between 2013 and the date of plaintiff's termination on July 11, 2022, at Righetti High School. (¶¶ 8, 9.) Plaintiff advances four causes of action under California's Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900, et seq.) for sex discrimination, sexual harassment (hostile work environment), retaliation, and failure to prevent discrimination and retaliation; one cause of action for retaliation per Labor Code section 1102.5; one cause of action each for violations of Labor Code sections 6310 and 6311; one cause of action for retaliation per Labor Code section 232.5; and one cause of action for civil penalties under the Private Attorneys General Act (the PAGA) (Labor. Code, § 2698, et seq.). The factual gravamen of the lawsuit (which will be recounted in more detail below) involves plaintiff's interactions with defendant's representatives about "Student A,"[1] a 14-year old student "who was diagnosed with autism . . . ." Plaintiff alleges that Student A, who was assigned to plaintiff's classroom at all times relevant to this lawsuit, exhibited "severe behavioral issues," and who was "physically large in stature and size," with behavior that "jeopardized the safety of himself, other students, Plaintiff, other employees of Defendant, and the public." The FAC details a number of interactions between plaintiff and Student A, and acknowledges that on March 3, 2022, plaintiff "slapped Student A in the face in an effort to protect herself" from Student A's action; this act, according to defendant, was the reason for her dismissal (termination). Defendant has filed a summary judgment/summary adjudication motion to all nine (9) causes of action. Opposition and reply have been filed.

The court will first make some preliminary observations about the briefing. It will then assess the evidentiary objections and requests for judicial notice; detail the allegations in the FAC and arguments advanced by defendant and the legal background that frames the issues; and then assess the merits of the arguments. The court will finish with a summary of its conclusions.

A) Preliminary Observations About Briefing

On May 7, 2026, defendant filed a "Reply," a new declaration from attorney Molly Thurmond (with new Exhibits B and C), and a reply separate statement (titled in full as a "Reply in Support Its Separate Statement of Undisputed Facts, And Response to Plaintiff's Separate Statement of Additional Facts"). The summary judgment statute has recently been amended, effective January 1, 2025, and is now crystal clear on the subject: ". . . The reply ***shall not*** include any new evidentiary matter, additional material facts, or separate statement submitted with the reply and not presented in the moving papers or opposition papers." (Code Civ. Proc., § 437c, subd. (b)(4).) Ms. Thurmond's declaration contains new information that was not produced with the motion or opposition. The reply separate statement also was not presented with the motion or opposition. As a result of this legislative fiat, the court will not consider the contents of these two documents to the extent they violate this proscription. This determination obviates the

[1] This is the nomenclature utilized in the FAC, describing the minor student as "Student A." Another description utilized in the briefing is "AG." The court will utilize the description from the FAC to protect the minor's privacy. No disrespect is intended.

need for the court to address plaintiff's challenge to the reply separate statement and Ms. Thurmond's declaration advanced in a May 11, 2025 filing.

B) Evidentiary Objections

Both parties have advanced evidentiary objections.

Plaintiff asks the court to determine whether the material facts set forth in defendant's separate statements are judicial admissions based on statements made in the FAC, as detailed in Issue Nos. 1 to 10, 14, 17, 19, 22, 24, 26, 51, 56, 57-65, 79-81, 83, 84, 85, 87, 89, 90, and 91 from defendant's separate statement. Defendant has filed a response.

The court need not address these evidentiary challenges on an individual bases, for it finds that general legal principles are sufficient to provide guidance. It is generally accepted that a claim a fact is undisputed in the separate statement is not evidence; nor is it considered a judicial admission. (*Myers v. Trendwest Resorts, Inc*. (2009) 178 Cal.App.4th 735, 747.) To the extent the supposed "undisputed fact" as alleged in defendant's separate statement recounts a statement made in plaintiff's operative pleading (assuming it does), the general rules are also settled. "The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court." (Code Civ. Proc., § 420.) An admission in a pleading is conclusive on the pleader, and when pleadings contain allegations of fact in support of a claim or defense, the opposing party may rely on the factual statements as judicial admissions, and may not be contradicted by the party whose pleadings are used against him. (*Myers, supra*, at p. 746.) In moving for summary judgment, a party may rely on the doctrine of judicial admissions by utilizing allegations in the opposing party's pleadings to eliminate triable issues of material fact. (*Id*. at p. 747.) Under this authority, the court finds that the enumerated undisputed statements of material fact in the separate statement are neither evidence nor judicial admissions simply by their presence in the separate statement; further, to the extent the individual statement turns out to be evidence, and further that it is clearly stated as a fact in the first amended pleading, it will constitute a judicial admission. Whether that is true or not, and whether it is material, can only be determined when the court assesses the merits of the particular arguments individually. Accordingly, it is unnecessary to address these issues preemptively, on a wholesale fashion as evidentiary objections (as an evidentiary template), when the appropriate inquiry rests on whether a disputed issues of material fact has been established or not. The objections are overruled with this qualification.

Defendant has advanced thirteen (13) evidentiary objections to plaintiff's evidentiary proffer in opposition, as follows: twelve (12) evidentiary objections to Laurie Ramirez's declaration; and one (1) evidentiary objection to Laurie Ramirez's deposition testimony. Plaintiff has filed a response. The court overrules all objections for the following reasons.

The court overrules objections No. 1 and No. 6, because plaintiff has established a sufficient foundation to testify based on her personal experience as a Special Education Teacher; she can testify to things from her own experience; she can also testify based on what she personally witnessed; and she can opine based on her expertise. The court overrules No. 2 because there is a nonhearsay purpose for the evidence – the impact the statement had on Ms.

Ramirez. The court overrules Nos. 3, 4, and 5 because defendant challenges the entire paragraph on hearsay grounds, and the entire paragraph does not consist of unreliable hearsay. There is no indication at all that plaintiff is introducing the substance of each of these paragraphs for the truth of the matter asserted, rather than for a nonhearsay purpose – the impact the specific conversation had on Ramirez.

The court overrules No. 7 because Ms. Ramierz is not introducing the contents of any communication with Mr. Shipman for the truth of the matter asserted – she declares only that she reported to Mr. Shipman, which is not hearsay but an act.

The court overrules No. 8 because the ***entire*** paragraph is not hearsay. The first part of the paragraph indicates the overall nature of the conversation, and does not recount specific communications – and thus is not being introduced for the truth of the matter stated. The second part of the paragraph (recounting a statement from Mr. Lyon) arguably is not introduced for the truth but its impact on Ms. Ramirez, a possible nonhearsay purpose.

The court overrules No. 9, as the there is no hearsay, but recitation of events (a request, an assignment, and a recitation of Ms. Ramirez's personal awareness), all of which is within Ms. Ramierz personal knowledge as a foundational prerequisite.

The court overrules No. 10. The statement does not lack foundation (Ms. Ramirez recounts what she did, saw, or experienced).

The court overrules No. 11. Ms. Ramirez attempts to explain what she meant by "fall guy" in her deposition testimony, and the nature of the lawsuit. This is not hearsay, does not lack foundation, and does not include impermissible legal conclusions.

The court overrules No. 12. Plaintiff recounts how she reacted to information from a parent who saw "two male aides in the park with a disabled student who was very aggressive." One of the students hit the student in the face. I reported the incident to Ted Lyon," and the two male aides were not terminated. A nonhearsay purpose exists for the admission of this evidence – its impact on Ms. Ramierz (and thus it is not being introduced to show the male aid actually hit the student). As such, it is admissible.

The court overrules No. 13. In response, plaintiff indicates she has not introduced the contents of the emails for their truth of the matter stated, but for its impact on plaintiff's state of mind. To the extent Mr. Ramirez is recounting whether she received the emails, and whether it was sent or not, it is not hearsay. The court therefore overrules No. 13.

C) Judicial Notice

Defendant asks the court to take judicial notice of 13 exhibits, as follows: 1) a complaint filed by plaintiff with the State California, Civil Rights Department (along with correspondence from the Civil Rights Department indicating receipt of the complaint); 2) a "Confidential Memorandum" from Kevin Platt (Assistant Superintendent, Human Resources of defendant

Santa Maria Joint Union High School District) dated March 8, 2022, placing plaintiff on paid administrative leave; 3) a letter from Kevin Platt to plaintiff concerning the summary of investigative findings made by defendant following the March 3, 2022 slapping incident, dated April 26, 2022; 4) a letter from Keven Platt, to plaintiff, concerning notice of a pre-disciplinary hearing and notice of intent to discharge, dated May 18, 2022; 5) email exchanges concerning the May 18, 2022 letter in Item 4; 6) a letter from Yoland Ortiz, Assistant Superintendent, Business Services, as the officer charged with hearing and determining any pre-disciplinary findings, upholding the charges and recommending suspension, including all attachments (consisting of 18 separate exhibits); 7) a copy of Resolution No. 42-2021-2022, from the Santa Joint Union High School District, passed by the Board of Trustees, dismissing plaintiff; 8) a June 8, 2022 letter from Kevin Platt, informing plaintiff she was placed on immediate unpaid suspension with an intent to dismiss, including a statement of charges and a demand for hearing; 9) email exchanges about the charges and suspension; 10) a letter from Kevin Platt to plaintiff indicating her dismissal was official on July 11, 2022; 11) a letter from the Commission on Teacher Credentialing, dated August 25, 2022, indicating there was probable cause to recommend suspension of plaintiff's teaching license; 12) a copy of the collective bargaining agreement between defendant and Santa Maria Join Union High School District Faculty Association/CTA/NEA; and 13) the complaint for damages filed by Student A against defendant in the United States District Court, Central District, on December 19, 2022.

Plaintiff objects to judicial notice of all 13 exhibits.

The court denies defendant's request to take judicial notice of the email exchanges contained in Exhibits 5 and 9. Those exchanges are not the proper subject of judicial notice.

The court overrules plaintiff's objections to judicial notice of Exhibits 1, 7, and 13. Exhibit 1 is complaint submitted by plaintiff to the Civil Rights Department, and thus is part of the that executive agency's official records (*Goncharov v. Uber Technologies, Inc.* (2018) 19 Cal.App.5th 1157, 1161, fn. 2); Exhibit 7 is an official act of the Board of Trustees of the Santa Maria Joint High School District; and Exhibit 13 is a court document. All are the proper subject of judicial notice.

As for the correspondence at issue in Exhibits 2, 3, 4, 6, 8, 10, and 11, each reflects an official act from the appropriate executive administrative agency – Exhibit 2 (placing plaintiff on administrative leave); Exhibit 3 (official findings by defendant after investigation); Exhibit 4 (defendant's notice of intent to dismiss plaintiff); Exhibit 6 (official findings of the hearing conducted by defendant); Exhibit 8 (official notice of results of hearing); Exhibit 10 (defendant's official date of termination); and Exhibit 11 (official action taken by the Commission on Teacher Credentialing, Division of Professional Practices). Each document is the appropriate subject of judicial notice.

As for Exhibit 12, which consists of a collective bargaining agreement that governs the procedural requirements for plaintiff's suspension and termination be defendant, courts have allowed judicial notice of such an agreement. (See, e.g., *Theiler v. Ventura County Community College Dist.* (2011) 198 Cal.App.4th 852, 855, fn. 2.)

Plaintiff claims that defendant has failed to properly authenticate each of these documents. But each exhibit above meets the requirements for self-authentication pursuant to Evidence Code section 1421 [a writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be author of the writing]. The content of each document supports this conclusion.

The court, while taking judicial notice of these documents, does not take judicial notice of their truth. (*Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 145 [court may take judicial notice of existence of documents in court file but not truth of hearsay therein]; *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 [judicial notice of public records proper but not truth of matters stated in records]; see also *Water Audit California v. Merced Irrigation Dist*. (2025) 111 Cal.App.5th 1147, 1168 [court can take judicial notice of official acts and government records, but not the truth of critical factual matters asserted in those documents].)

D) The First Amended Complaint and Arguments Advanced by Defendant

Plaintiff alleges that she was employed by defendant from 2013 until her termination on or about July 11, 2022. She was a "Special Education Teacher." In September 2021, she was informed that defendant was anticipating a 14-year old student enrollee at Righetti High School (Student A), who was diagnosed with autism. Student A's mother was Jennifer Reeder. Plaintiff met with Student A and Ms. Reeder, and noted that Student A was "physically large in stature and size" (weighing "at least" 250 pounds). During the period Student A was assigned to plaintiff's classroom, plaintiff observed that "Student A regularly exhibited severe behavioral issues and reasonably believed that Student A's behavior jeopardized the safety of himself, other students, Plaintiff , and other employees of Defendant and the public." Plaintiff describes Student A's conduct as "aggressive." To address this conduct, plaintiff requested "that Plaintiff and other employees who taught Student A receive Crisis Prevention training, including learning how to effectively implement defense and non-violent physical techniques to deflect Student A's attacks and diffuse aggressive conduct." This request was denied.

During plaintiff's assignment with Student A, Student A made several attempts to strike and push plaintiff, although plaintiff was able to "dodge Student A's strikes. On one occasion, however, Student A pushed Plaintiff, and she fell into a television." On another occasion, plaintiff saw Student A striking another student in the face. On yet another occasion, plaintiff on information and belief alleges that Student A "grabbed and violently twisted the nipple of another one of Plaintiff's students in the restroom at Defendant's work premises in the presence of" T'ea Pule," plaintiff's classroom aide. All events were documented, and plaintiff made requests to transition to a reduced-day schedule; she was warned against such a request by principal Ted Lyon and Jeremy Shipman, Supervisor of Special Education at Righetti High School.

On several occasions thereafter, Student A "ran away from the supervision" of plaintiff and her aides, "and appeared to search for a means to operate various types of vehicles and machinery . . . ." On one occasion plaintiff witnessed Student A "violently grab" Zach Rudd (Zach Rudd was one of plaintiff's assistants), attempting to pull the latter "through and into the metal fence, injuring Rudd." After this incident, plaintiff observed that Student A was more compliant with Rudd and Instructional Assistant Aaron Moreno, who were both males. "Plaintiff observed that Student A's behavior was more difficult to manage when the male employees were absent," and this was explained to Jeremy Shipman and principal Ted Lyon, and thus plaintiff asked to receive a permanent male assistant to help manage Student A.[2] Defendant "subsequently hired a male Instructional Assistant," but the employee was assigned to work in another classroom with a male instructor.

On October 21, 2021, Student A "grabbed and violently twisted Plaintiff's breast" during plaintiff's class, amounting to a sexual assault. On October 25, 2021, plaintiff alerted defendant to the situation involving Student A, noting that he has "injured to one degree or another, all three of the staff who worked directly with him . . . ." She described Student A as grabbing her chest causing bruising; pinching another; and pinching and squeezing another. She described her attempts to prevent Student A from driving a maintenance cart. She indicated that at this time she could not ensure the safety of her staff, students, or Student A himself. She urged defendant provide help as described above.

The problems continued. In November or December 2021, Student A again grabbed and violently twisted plaintiff's breast, again resulting in bruising. Plaintiff also terms this as another "sexual assault." Student A made several unsuccessful efforts to bite plaintiff, and her staff, including a staff member's forearm.

On March 2, 2022, plaintiff complained that Student A's aggressive and dangerous conduct continued to pose safety issues in her classroom, and again emphasized to defendant that she needed a male in the classroom to supervise. On March 3, 2022, plaintiff and one assistant saw plaintiff bang his head against a wall and slam doors, and they tried to prevent Student A from exiting and running away. Student A at this time "reached his hand outward near Plaintiff's

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[2] Plaintiff explains in the FAC that Rudd "only worked on a substitute basis, and Moreno when out on leave in September or October 2021. . . ." They were unavailable generally and plaintiff and her female assistances "were forced to teach Student A without the presence of a male employee." (§ 20.)

breast and Plaintiff responded [by] yelling words to the effect, 'Don't fucking touch me!' Then, Plaintiff slapped Student A in the face in an effort to protect herself after Student A opened his mouth and moved in toward Plaintiff like he was going to bite her." Plaintiff complained to defendant about Student A's conduct, underscoring her need for a male assistant to help.

On March 6, 2022, defendant informed plaintiff that she was placed on paid leaving pending further investigation of this interaction (the slapping incident) with Student A. Plaintiff was dismissed effective July 11, 2022.

As noted above, plaintiff claims four causes of action under FEHA: 1) sex discrimination (Gov. Code, § 12940, subd. (a); 2) sexual harassment (hostile work place environment) (Gov Code, § 12940, subd. (j)); retaliation (Gov. Code, § 12940, subd. (h)); and 4) failure to prevent discrimination, harassment, retaliation) (Gov. Code, § 12940, subd. (k)). Plaintiff also advances ae fifth cause of action for retaliation under Labor Code section 1102. The sixth cause of action is based on unlawful discrimination and retaliation in violation of Labor Code section 6310, while the seventh cause of action is based on retaliation in violation of Labor Code section 6311. The eighth cause of action is based on violation of Labor Code section 232.5, and the ninth cause of action is for civil penalties under the PAGA (Lab. Code, § 2698, et seq.).

Defendant has filed a summary judgment, or in the alternative a summary adjudication, motion to all nine (9) causes of action advanced by plaintiff. Defendant initially invites the court to treat its motion as a nonstatutory judgment on the pleadings on the basis of exhaustion (as to all nine causes of action) because plaintiff failed to exhaust administrative remedies. Additionally, defendant seems at times to be asking the court to treat the summary judgment/adjudication motion as a nonstatutory motion for judgment on the pleadings as to each of the nine causes of action individually, claiming plaintiff "fails to state" or plead a cause of action as to each. As for the summary judgment/adjudication portion of the motion, defendant contends that there is no evidence to support any of the nine causes of action. Plaintiff opposes the claims, contending disputed issues of material fact exist.

The court will first address defendant's request to treat the summary judgment/summary adjudication motion as a nonstatutory motion for judgment on the pleadings. It will then address defendant's challenges to each cause of action in seriatim.

E) Merits

1) Preliminary Comments About Nonstatutory Motion for Judgment on the Pleadings

Initially, the court declines defendant's invitation to treat the summary judgment motion as a nonstatutory motion for judgment on the pleadings (even assuming the procedure withstands enactment of the statutory procedure) for failure to plead exhaustion, in the first 16 pages of defendant's motion and in parts of defendant's separate statement. The court has authority to treat a summary judgment/adjudication request as a nonstatutory motion for judgment on the pleadings (*Cordova v. 21st Century Ins. Co.* ((2005) 129 Cal.App.4th 89, 109), and can do so at its discretion. (*Korchemny v. Piterman* (2021) 68 Cal.App.5th 1032, 1054; see *Bezirdjian v. O'Reilly* (2020) 183 Cal.App.4th 316, 324 [trial court may treat the motion as a nonstatutory motion for judgment on the pleadings and not a summary judgment motion]; *Saltarelli & Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5 [trial court may elect to treat summary judgment motion as a nonstatutory motion for judgment on the pleadings]; *Stolz v. Wong Communications Limited Partnership* (1994) 25 Cal.App.4th 1811, 1917 [where a motion for summary judgment is in effect a motion for judgment on the pleadings, "the court ***may*** grant a plaintiff leave to amend the complaint"].) There are two reasons why the court declines this invitation.

First, defendant in its answer (filed on November 1, 2023), advanced as the twenty-seventh affirmative defense failure to exhaust administrative remedies; plaintiff thereafter did not demur or file a statutory motion for judgment on the pleadings, which it could have done, choosing to advance the issue as an affirmative defense for two and half years. Under the circumstances, the issue should continue to be treated as an evidentiary issue, not a pleading deficiency. Defendant has not mentioned the issue in its separate statement. Exhaustion at this stage can be addressed at trial via a bifurcated proceeding if desirable. Second, and far more practically, trial is scheduled for October 26, 2026, with a trial confirmation date on September 28, 2026. It is very late in the game (with earmarks of gamesmanship) to be raising such challenges at this time, at least without any explanation as to why defendant waited until now (rather than by demurrer or by a statutory motion for judgment on the pleadings), for this runs the real risk of impacting the scheduled court dates detailed above (for leave to amend will generally be required). Prejudice exists in sufficient quantum to undermine the viability and efficacy of the nonstatutory motion procedure under the circumstances.

Nor will the court analyze defendant's challenges to each cause of action through the prism of a nonstatutory motion for judgment on the pleadings (if that is what was intended), for the same reasons as noted above. Plaintiff in its separate statement claims in Issue Nos. 51, 56, 64, 79, 80, 83, 85, 87, and 89 as to each cause of action, that plaintiff "fails to state a cause of action upon which relief may be had." The court will not examine any deficiencies as pleading issues, but only whether material issues of disputed fact exist or not (through the traditional summary judgment/adjudication assessment matrix).

With this, the court will analyze each cause of action separately.

2) First Cause of Action for Sex Discrimination (Gov. Code, § 12940, subd. (a))

In evaluating FEHA discrimination claims, California uses a burden-shifting mechanism, known as the *McDonnell Douglas* test. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–55, citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.) At trial, the mechanism requires the plaintiff-employee to first establish a prima facie case of discrimination. (*Guz*, at pp. 354–355.) If the plaintiff makes out a prima facie case, then it is rebuttably presumed that the employer engaged in discrimination, and the burden shifts to the employer to set forth a legitimate nondiscriminatory reason for the "adverse employment action" the plaintiff claims was a result of discrimination. (*Guz*, at pp. 355–356.) If the employer sets forth such a reason, the burden shifts back to the employee to prove intentional discrimination. (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 965.)

An employer moving for summary judgment bears the initial burden to disprove an element of the plaintiff's prima facie case or adduce evidence showing a legitimate, nondiscriminatory reason for its adverse employment action. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 861.) If it does so, then the burden shifts to the employee to produce "substantial responsive evidence" that the employer's stated reasons were untrue or pretextual, or the employer acted with discriminatory animus. (*Id*. at 862.) A prima facie showing of discrimination under FEHA generally requires that the plaintiff show she (1) was a member of a protected class, (2) was qualified for or competently performing her job, (3) suffered an adverse employment action, and (4) some other circumstance suggesting discriminatory motive. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1004.)

Under this formula, it appears uncontested that plaintiff is a member of a protected class, and was qualified for or competently performing her job. But as plaintiff alleges, there are two possible adverse employment actions at issue here – plaintiff's termination ***and*** an earlier action in which defendant failed to assign a male aide permanently to help her in her class with Student A. The court agrees with defendant that if termination were the only adverse action at issue here, defendant would likely have shown that there was a legitimate reason for her termination, undermining a sex discrimination cause of action. But this other (earlier) adverse employment action survives defendant's challenge.[3] As plaintiff argues in opposition, this cause of action also rests on the fact defendant knew plaintiff needed help in the classroom with Student A; knew the three female staff members (including plaintiff) were having great difficulty controlling Student A; knew they had knowingly requested a male assistant permanently; but instead of assigning the male assistant to help plaintiff, defendant assigned him to another male teacher. Plaintiff alleges this was done (i.e., assigning the male assistant to a male special education instructor) because

[3] The FAC is not a model of clarity; further, plaintiff in opposition at times identifies two adverse employment actions for some causes of action (termination and failure to help), and at times identifies only one (termination) for others. The court has taken plaintiff at face value as to each cause of action as it comes, and observes only at this time that at trial plaintiff will have to be much clearer about the appropriate theory she wishes to advance.

defendant discriminated against plaintiff based on her gender. No doubt there are potential problems with this theory, but defendant (who has the burden) does not address it in its separate statement or in its original motion.

Defendant instead addresses this claim for the first time in its reply, and then only cursorily. On page 7 of its reply, defendant argues as follows: "Plaintiff did not have a right to a male aide – and in fact her demand for a male aide would subject the School District to a complaint of gender discrimination. There was no evidence or data that a male aide was required in the classroom. There is no legal obligation to provide the training Plaintiff requested. There is no legal obligation to absolutely protect Plaintiff from harm caused by a disabled student." It is a little unclear, but it appears defendant is claiming that this cannot be an adverse employment decision. If so, that is untrue, as the failure to provide the requested help arguably threatened to derail plaintiff's career as a Special Education Teacher. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.3d 1028, 1060 ["Actions that threaten to derail an employee's career are objectively adverse"]; *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1162 [the protections against discriminating in the workplace take into account the entire spectrum of employment actions that are reasonable likely to adversely and materially affect an employee's job performance or opportunity for advancement in a career].) More specifically, defendant provides ***no*** evidence to support any of these allegations; it also provides no case authority. It is defendant's burden on summary judgment to present evidence to show that plaintiff cannot make a prima facie case. Defendant has not accomplished this. Defendant, for example, fails to address the allegations in the FAC that a male assistant was hired after plaintiff's concerns were expressed to defendant about the need for a permanent male assistant, and fails to address plaintiff's claim that the male assistant was assigned to another male special education teacher despite plaintiff's express requests. Given the threadbare record, the court cannot say as a matter of law that a prima facie case of sex discrimination does not exist.

Accordingly, the court denies summary judgment/adjudication as to the first cause of action.

3) Second Cause of Action for Sexual Harassment (Hostile Work Place Environment) (Gov. Code, § 12940, subd. (j), et al.)

FEHA's "prohibition against sexual harassment includes protection from a broad range of conduct, ranging from expressly or impliedly conditioning employment benefits on submission to or tolerance of unwelcome sexual advances, to the creation of a work environment that is hostile or abusive on the basis of sex." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 461.) A hostile work environment sexual harassment claim requires a plaintiff employee to show: (1) he or she was subjected to unwelcome sexual advances, conduct or comments; (2) the harassment was based on sex; and (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279,; *Kelley v. The Conca Companies* (2011) 196 Cal.App.4th 191, 202–203; *Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524.)

Pursuant to Government Code section 12940, subdivision (j)(1), an employer may be responsible for the acts of nonemployees with regard to harassment of employers, if the employer or its agents or supervisors know 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 that the employer may have with respect to the conduct of those nonemployees shall be considered." (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 921, citations omitted.) An employer may not be liable for failure to prevent harassment unless there is a claim for sexual harassment. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288; *Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 880; see also *M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 701 [once an employer is informed of the sexual harassment, the employer must take adequate remedial measures].) The more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims. (*M.F., supra*, at p. 701.) CACI 2025 describes the types of conduct that may constitute harassing sexual conduct: verbal harassment, such as obscene language, demeaning comments, slurs, or threats; physical harassment, such as unwanted touching, assault, or physical interference with normal work or movement; visual harassment, such as offensive posters, o0bjects, cartoons, or drawings; or unwanted sexual advances.

It seems clear from the opposition that plaintiff predicates this cause of action ***exclusively*** on the fact Student A pinched her breasts and conducted other "aggressive and violent conduct" towards her, which plaintiff frames as sexually harassing conduct, of which defendant knew (plaintiff expressly informed defendant about it on an ongoing basis), and yet did nothing to correct.[4] The court admits at the outset that it is troubled by the premise upon which this cause of action rests – a severely autistic 14-year old boy engaging in sexual harassment of his teacher. Plaintiff certainly provides no case authority exploring this exact point, although plaintiff does cite *Freitag v. Ayers* (9th Cir. 2006) 468 F.3d 528, which involved a claim for sexual harassment under Title VII of the Civil Rights Act of 1964, and which provides some guidance to the court.[5]

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4 See fn. 3, *ante*.

5 As our high court has observed, given the similarities between FEHA and Title VII with regard to sexual harassment and hostile work place environment, "California courts frequently seek guidance from Title VII decisions when interpreting the FEHA and its prohibition against sexual harassment. . . ." (*Lyle, supra,* 38 Cal.4th at p. 278; see *Lewis v. Benicia, supra*, 224 Cal.App.4th at p. 1525, fn. 6 ["In particular, for hostile work environment

In *Freitag*, plaintiff (a female prison guard) sued the California Department of Corrections and Rehabilitation (CDCR) for sexual harassment based on a failure to correct a hostile work environment as a result of male prisoners' sexual harassment of her and other female prison guards. On appeal the appellate court found the theory was viable and supported by sufficient evidence. At issue was the practice by prison inmates at Pelican Bay who engaged in exhibitionist masturbation directed at female prison guards, which created a hostile work environment. The Ninth Circuit observed that employers may be liable for third-party conduct, where the employer knows or should have known of the conduct and fails to take immediate and corrective action. "This theory of liability is grounded not in the harassing act itself – i.e., inmate misconduct – but rather in the employer's 'negligence and ratification' of the harassment through its failure to take appropriate and reasonable responsive action." (*Id.* at p. 538.) The Ninth Circuit refused to carve out an exception to this rule "whereby prisons, due to their distinctive character and problems, and in particular their 'inherently hostile environment,' are immune from lawsuits by correctional officers arising from sexual harassment from inmates." (*Id*. at p. 529.) The Ninth Circuit explained why: " "In short, the defendants cite no authority, and we have found none, holding that prisoners are uniquely exempt from liability for sexual harassment under Title VII, nor have they proffered any evidence that Congress intended prison employees to be thus exempt. Further, we see no persuasive argument, legal or otherwise, to support the novel position that the defendants take on this issue." (*Ibid*.) Because there was sufficient evidence to show that plaintiff was subjected to conduct of a sexual nature; the conduct was unwelcome; the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment; and the employer was aware of the sexual conduct reasonably refused to take corrective measures, the Ninth Circuit upheld the jury's verdict of sexual harassment based on hostile work environment. (*Id*. at p. 541.) This court, following this line of reasoning, is loath to excuse defendant of liability simply because a disabled student is involved without more evidence tailored to the specific situation.[6]

Defendant argues in its motion for summary judgment that while the allegations of Student A's misconduct "may, technically, fall within any of these categories" as listed in CACI

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claims, California courts apply standards developed under Title VII"]; see also *Thomas v. Regents of University of California* (2023) 97 Cal.App.5th 587, 608 [same].)

6 *Freitag* is not alone in this proposition. Although not cited by the parties, the court in *Turman v. Turning Point of Central California, Inc*. (2010) 191 Cal.App.4th 53 addressed the viability of a lawsuit by plaintiff against her employer, who operated a number of halfway house facilities in California wherein federal and state prisoners were housed. (*Id*. at p. 55.) Plaintiff was employed to conduct urinalysis drug testing on the residents. (*Id*. at p. 56). Plaintiff sued for sexual harassment based on hostile work environment, basing the claim on the fact the resident prisoners subjected her to sexual harassment "in the form of lewd and sexually offensive name calling and reference to sexual acts." Defendant on appeal claimed the jury's verdict was not supported because "harassment by prisoners is inherently part of the job." The *Turman* court, expressly relying on *Freitag*, rejected the claim as follows: "While it may be true that male residents who are living under restricted conditions are likely to harass or mistreat their female supervisor, this does not absolve respondent of its legal responsibility under FEHA to take immediate and appropriate action to correct the situation." *Turman* rejected bright-line rules involving nonemployees who are troubled and likely to engage in sexual harassing behavior – declining to carve out exceptions for employers similarly situated. The obvious impact of *Turman* in the present context seems clear despite the factual differences.

2523, there is insufficient evidence to show there was a pattern or practice of unlawful sexual harassment. According to defendant, "Ramirez must be made to present facts sufficient to raise a triable issue of harassing conduct that violates the FEHA. In this case [sic] has not done so."

Despite the court's concerns, as recounted above, it is defendant's burden on summary judgment/adjudication to show that there are no issues of disputed fact, and if that standard is satisfied, the burden would then shift to plaintiff to show otherwise. The court, as noted above, is unwilling to carve out a bright-line exception to liability for defendant employer simply because a disabled student is involved, in line with the rationales adopted in *Freitag* and *Turman*, cited above. Notably, defendant presents ***no*** medical evidence from an expert that indicates Student's A's actions were not sexually motivated (and thus his acts did not involve sexual harassment). By contrast, plaintiff makes it clear in the operative pleading that Student A was more compliant with male authority than female authority, and essentially that all physical assaults by Student A against her were sexually motivated. Plaintiff alleges that on October 21, 2021, while she was teaching, Student A "grabbed and violently twisted Plaintiff's breast," resulting in bruising. (¶ 24.) "On another occasion," in November or December of 2021, "Student A grabbed and violently twisted Plaintiff's breast" again, also resulting in bruising. Thereafter, Student A made "several unsuccessful attempts to bite Plaintiff" and her female assistant Pule, biting Pule's arm. After each of these incidents, plaintiff informed defendant of the problem and asked for corrective measures, none of which was allegedly made.

The court cannot say as a matter of law, on such a limited and meagre record, that Student A's s behavior was not sexually motivated and was insufficiently severe or pervasive not to alter plaintiff's working conditions. (*Beltran v. Hard Rock Hotel Licensing, Inc.* (2023) 97 Cal.App.5th 865, 878.) The statute makes it clear that a single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile offensive work environment. (Gov. Code, § 12923, subd, (b).) It should be for a trier of fact to decide this issue.

Defendant's separate statement bolsters this conclusion. Defendant in Issue Nos. 60, 61, 62, and 63, all associated with the second cause of action, provides that the FAC as well as the deposition testimony from plaintiff shows that Student A grabbed, pinched, bit, and hit males and females alike. No doubt that is true, for plaintiff admitted in her deposition that Student A "attacked []Rudd," as detailed in paragraph 18 of the FAC. But this at best only dims, it does not eviscerate, the viability of the allegations of sexual harassment. The court is not permitted to make a credibility determination about evidence, which is in reality what defendant seems to be asking the court to do. (Code Civ. Proc., § 473c, subd. (e) [if a party is otherwise entitled to summary judgment pursuant to this section, summary judgment cannot be denied on grounds of credibility].) That seems particularly true as plaintiff alleges a number of attacks by Student A against plaintiff's assistants, mostly all female. The complaint is otherwise ambiguous about the gender of some of the Student A's victims. In paragraph 15, for example, plaintiff alleges that on "one occasion Student A grabbed and violated twisted the nipple of another one of Plaintiff's students in the restroom at Defendant's work premises . . . ." We are not told the gender of the victim, and this court is required to construe the allegations in the complaint favorably to the nonmoving party. (See, e.g., *Degala v. John Stewart Co.* (2023) 88 Cal.App.5th 158, 167 [the nonmoving party's evidence must be given a liberal construction, while the moving party's submissions are strictly construed, with all evidentiary doubts and ambiguities resolved in favor of the nonmoving party].) Defendant's evidentiary showing fails to establish it is entitled to judgment as a matter of law.

With these rules in mind, and despite the court's reservations as noted above, the court denies summary judgment/adjudication as to the second cause of action.

4) Third Cause of Action for Retaliation (Gov. Code, § 12940, subd. (h).)

"[T]o establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Wawrzenski v. United Airlines, Inc.* (2024) 106 Cal.App.5th 663, 699.) Defendant contends that plaintiff has failed to show retaliation based on a "protected activity." According to defendant, plaintiff "must . . . establish that she opposed a practice prohibited by the FEHA, or filed a complaint or participated in a proceeding under the FEHA . . . she has neither alleged any such activity nor produced any evidence of any such activity . . . ." In opposition to the third cause of action, plaintiff makes it clear the nature of its theory: she objected to sexual harassment, and defendant "failed to remedy the conduct ***and terminated Plaintiff in retaliation for reporting the conduct.***" (Emphasis added.) Termination is therefore the only adverse employment action at issue in this cause of action.[7]

Defendant argues in its separate statement that plaintiff cannot establish causation between the protected activity (in this instance reports of sexual harassment by Student A) and any adverse employment action (relying exclusively on termination in this vein), and thus, summary adjudication is appropriate on this ground.

The court agrees with defendant. A close examination of plaintiff's deposition as a whole reveals no ambiguity about this issue. Starting on page 39 of the deposition transcript, defense counsel asked a number of questions that have direct bearing on this subject. "Do you believe you were terminated because you requested a male instructional assistant?" Plaintiff replied "No." Plaintiff was then asked: "Do you believe you were terminated because any complaint or concern you raised about [Student A]?" Plaintiff queried: "Can I say why I believe I was terminated?" Defense counsel replied: "Well, your attorney can ask you that." Plaintiff replied, "Okay, say one more time." Defense counsel then asked: "Do you believe you were terminated

[7] See fn. 3, *ante*.

because of any complaint or concern your raised about [Student A]?" Plaintiff replied: "I believe I was terminated to protect the school from litigation." Defense counsel then asked again: "Do you believe you were terminated because of any complaint or concern you raised about [Student A]?" Plaintiff's counsel interjected with an objection - vague and ambiguous. Defense counsel then replied, "Yes or no question." Plaintiff answered, "No." Defense counsel then asked: "Do you believe you were terminated because of any discussion you had about [Student A]?" Plaintiff's counsel interjected with another objection – vague and ambiguous as to "discussion." Defense counsel then turned to plaintiff and said, "You can answer." Plaintiff replied, "No." Defense counsel then asked: "Do you believe you were terminated because of your belief that [Student A's] school day should be reduced?" Plaintiff again replied, "No." "Do you believe you were terminated because you believed [Student A] was dangerous?" Plaintiff again replied, "No." Defense counsel then asked: "Do you believe you were terminated because you stated your belief that it would be helpful to have additional support?" Plaintiff replied, "No." Plaintiff finished by stating as follows: "I believe I was terminated to appeal to the mother so she wouldn't sue the school. I believe I was the fall guy."

Plaintiff in her declaration tries to explain away what otherwise seems to be her clear, unequivocal answers to these questions, as follows: "I testified in my deposition that I believed that I was terminated to protect the school from litigation by AG's mother and because I was the 'fall guy.' What I meant by 'fall guy' was that the school had ignored my complaints about AG's harassment, assaults, and the danger he posed to me and others in my classroom, in particular females, and the school had ignored my requests to have a male assistant assigned to my class as a regular position. Because of this, what I was concerned [] if I did not receive help then occurred – I had to defend myself and my staff from [Student A]. I believe that the school wanted to show [Student A's] mother that it took action to 'protect' AG, even though it had failed to take any action to protect me or my staff. It is all of these events that caused by termination."

The court is not persuaded by plaintiff's explanations offered in her declaration. In *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21, our high court made it clear that when statements in self-serving declarations opposing summary judgment contradict admissions made during discovery, no triable issue of material fact exists. "[T]he classic *D'Amico* situation" occurs where "a party takes a position under oath in discovery; the opponent moves for summary judgment; and in opposition the party files a declaration that conflicts with its earlier testimony." (*Turley v. Familian Corp.* (2017) 18 Cal.App.5th 969, 981.) "In that situation, courts have held that the court may disregard the declaration." (*Ibid.*) ***This is precisely the situation here.*** There could be no mistake about what plaintiff was being asked during her deposition – she consistently replied "No" to a number of direct questions about whether her reports about Student A (central to the retaliation cause of action) played any role in her termination. Plaintiff consistently replied they did not. True, more recent cases have clarified that the *D'Amico* rule "does not apply where there is a 'reasonable explanation for the discrepancy' or 'countenance ignoring other credible evidence that contradicts or explains that party's answers or otherwise demonstrates there are genuine issues of factual dispute.' " (*Mackey v. Trustees of California State University* (2019) 31 Cal.App.5th 640, 658.) Plaintiff's explanation in her declaration unquestionably contradicts the answers she provided during her deposition. *D'Amico* therefore applies.

The court grants defendant's summary judgment/adjudication motion to the third cause of action.

5) Fourth Cause of Action for Failure to Prevent Discrimination and Retaliation (Gov. Code, § 12940, subd. (k).)

The entire thrust of defendant's summary judgment/adjudication motion to this cause of action rests on its claim that because plaintiff has not established a claim for discrimination or retaliation, which are prerequisites to any claim for failure to prevent discrimination or retaliation, summary adjudication is appropriate. As plaintiff has adequately stated a claim for discrimination (the first cause of action), summary adjudication is therefore inappropriate.

The court denies summary judgment/adjudication as to the fourth cause of action.

6) Fifth Cause of Action for Unlawful Retaliation (Lab. Code, 1102.5)

Plaintiff alleges in the FAC that defendant violated Labor Code section 1102.5, subdivisions (a),[8] (b), and/or (c) when "it retaliated against Plaintiff through all of its actions as described herein." Plaintiff alleges that "the protected conduct was a contributing factor in Defendants' retaliation against Plaintiff." Plaintiff makes it clear in opposition, as reflected in the string pleading portions of the FAC, that she "complained to Defendant about harassment and safety concerns, both of which she reasonably believed were unlawful under the FEHA and Labor Code. Defendant denied Plaintiff's request for help and terminated her." Denial of help ***and*** termination are claimed to be the "adverse actions" that occurred . (Opp. at p. 25.)

Labor Code section 1102.5, subdivision (b) provides that an employer "shall not retaliate against an employee for disclosing information, or because the employer believes that the

[8] Labor Code section 1102.5, subdivision (a) provides that an employer "shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information disclosing a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job description." This provision has no bearing on this lawsuit, as plaintiff has not pointed to any rule, regulation or policy adopted by defendant.

employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." Subdivision (c) provides that an employee "shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation."

Labor Code section 1102.5 is California's general whistleblower statute. (*Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922, 933.) It was enacted to encourage workplace whistleblowers to report unlawful acts without fearing retribution. An employee injured by prohibited retaliation may file a private suit for damages. (Lab. Code, § 1105.) Labor Code section 1102.5(b) in general prohibits an employer from retaliating against an employee who discloses information with the belief that the information discloses a violation of law by the employer. The statute states that an employer "shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information ... to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance ... if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." (Lab. Code, § 1102.5(b).) To recover under this provision, plaintiff must "establish, by a preponderance of the evidence, that retaliation for an employee's protected activities was a contributing factor in a contested employment action . . . . Once the plaintiff has made the required showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons even had the plaintiff not engaged in protected activity." (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 718; § 1102.6.)

The entirety of defendant's challenge to this cause of action reads as follows: "Ramirez has not alleged any facts of a violation of law, or her belief that the [defendant] violated a law, or that she reported any belief that the [defendant] violated any law. If this cause of action is based on an allegation that [defendant] violated FEHA, Ramirez never disclosed such violation prior to her termination. Accordingly, the complaint does not include the essential facts to state this cause of action, let alone raise a trial issue of any material fact." Defendant is in reality advancing (as noted above) a nonstatutory motion for judgment on the pleadings, not a challenge to the evidence via summary adjudication. And as indicated above, the court will not entertain this motion at this time, given the looming trial date. Further, defendant's separate statement does not address the critical elements of Labor Code section 1102.5, subdivision (b). Plaintiff has alleged a protected activity – complaints of sexual harassment by Student A – and has alleged a contested employment action[9] that survives (i.e., defendant's failure to provide help based on plaintiff's complaints). Defendant has not attempted to show by clear and convincing evidence that it would have taken the action in (assigning a male employee to another teacher) irrespective of plaintiff's concerns. "Once the plaintiff has made the required showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons even had the plaintiff not engaged in protected activity." (*Lawson, supra, at* p. 718.) Defendant has failed to meet its burden of proof.

The court denies summary judgment/adjudication as to the fifth cause of action.

7) Sixth Cause of Action – Discrimination and Retaliation in Violation of Labor Code section 6310

Labor Code section 6310 subdivision (a) prohibits employees from being discharged or discriminated against because they have "[m]ade any oral or written complaint to [to the division , other governmental agencies having statutory responsibility for assisting the division with reference to employee safety of health, ***their employer***, or their representative]." (*Id.*, subd. (a)(1), emphasis added.) The type of complaint covered is "a bona fide oral or written complaint to . . . their employer . . . of unsafe working conditions . . . in their employment or place of employment." (*Id.*, subd. (b).) By its terms, the statute expressly applies to safety complaints made by an employee to her employer. (See *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 679, 682; see also *Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1350–1351.) Plaintiff's cause of action alleges defendant "discriminated and retaliated against [her]" because he complained to defendant that the classroom was an unsafe workplace as a result of Student A's behavior.[10]

Here is the entirety of defendant's argument as to this cause of action: "Labor Code section 6310 prohibits discrimination or retaliation arising from complaints and/or proceedings before the Division of Occupational Safety and Health ('DOSH'). There are no such allegations. Accordingly, Ramirez has not, and cannot, allege facts sufficient to state this cause of action, nor produce evidence sufficient to raise a triable issue."

Defendant has misread the current version of the statute, as reflected in the highlighted language above. It is enough under the statute for plaintiff to make an oral or written complaint

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[9] As noted, plaintiff alleges two contested adverse employment actions – the failure to provide help and her termination. (See fn. 3, *ante*.) The court will not focus on plaintiff's termination but on the failure to provide help as requested based on violations of FEHA, for only one is required in order to survive summary adjudication (at least as pleaded and as argued).

[10] See fn. 3, *ante*.

to his or her employer. This change was made in 1977, when the Legislature amended Labor Code section 6310, former subdivisions (a) and (b) to include complaints made by an employee "to . . . his employer." (Stats. 1977, ch. 460, § 1, p. 1515.) The current version of the statute expressly includes complaints made by the employee to his employer.

The court denies summary judgment/adjudication as to the sixth cause of action.

8) Seventh Cause of Action Retaliation (Lab. Code, § 6311)

Labor Code section 6311 prohibits an employer from discharging an employee for refusing to perform work that would violate occupational safety or health standards, where the violation would create a real and apparent hazard to the employee or his or her fellow employees. A prima facie claim of retaliation under Labor Code section 6311 requires a showing of protected activity (e.g., that an employee refused to work under unsafe conditions), an adverse employment action, and a causal link between the activity and the adverse action. (*Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 299.)

The court grants summary judgment/adjudication to the seventh cause of action, because there is no showing of protected activity (i.e., that plaintiff refused to work because of unsafe conditions). (Defendant's Separate Statement, Issue No. 86.) Plaintiff in her deposition testified as follows: "How many days of work did you miss from the beginning of school, 2021, August 2021 through March 3, 2022?" Plaintiff replied: "I don't recall, but it wasn't very many if I missed any. I tried not be out because of the dangers." Defense counsel queried: "What do you mean by 'dangers'?" Plaintiff replied: "[Student A's] aggressive behavior. I didn't want to leave my staff. I didn't want to leave them." This clearly indicates plaintiff did not refuse to work, a condition precedent for this cause of action. The plain language of Labor Code section 6311 requires plaintiff to have refused to work – and there is no disputed issues of material fact on this issue. Plaintiff did not refuse to work.

The court grants the motion for summary judgment/adjudication as to the seventh cause of action.

9) Eighth Cause of Action for Retaliation (Lab. Code, § 232.5)

Labor Code section 232.5 provides that an employer may not (a) require, as a condition of employment, that an employee refrain from disclosing information about the employer's working conditions; (b) require an employee to sign a waiver or other document that purports to deny the employee the right to disclose information about the employer's working conditions; or (c) discharge, formally discipline, or otherwise discriminate against an employee who discloses information about the employer's working conditions. It is clear that plaintiff is relying on Labor Code section 232.5, subdivision (c), for she claims that she disclosed "unsafe working conditions" to her managers, and "was retaliated against" when defendant refused to provide here with resources required to perform her job and then terminated her.

Defendant contends initially that plaintiff has failed to allege a "disclosure" within the meaning of Labor Code section 232.5. Not so. The statute provision clearly involves disclosures of information about the employer's working conditions. (See, e.g., *Zirpel v. Alki Productions, Inc.* (2023) 93 Cal.App.5th 563, 542.) Plaintiff disclosed potential sexual harassment by a student, which goes directly to unsafe working conditions.

Defendant alleges that there is no indication at any time that defendant believed anything illegal had been done. If there is sexual harassment, however, the illegality speaks for itself. Defendant contends that that defendant did not know or could not have known about her disclosures. Again, not so. Plaintiff indicates she reported directly to her supervisor about these matters. Defendant then contends that there is no private right of action for a violation of Labor code section 232.5. This argument fails under existing case authority that has sanctioned private damages. (See, e.g., *Zirpel, supra,* at pp. 742-743 [private right of action is appropriate].) Finally, defendant contends that Labor Code section 232.5 only protects disclosures that involve "external reports, such as those of outside agencies, the press, media, etc." (P. 22 of Motion.) According to defendant, it is clear that plaintiff only reported to her supervisor, and under defendant's rationale, this is insufficient to state a claim under this provision.

Defendant offers no authority for this proposition. More to the point, nothing in the language of Labor Code section 232.5 requires disclosures to third parties as opposed to the employer, and the court will not read into the statute something it does not say. In *Zirpel*, for example, the court seemed to indicate that there was sufficient evidence of a disclosure based on the fact the employer "reacted with a 'fit of rage' when [plaintiff] confronted him with safety issues and lack of regulatory approval. In addition, there was evidence that [the employer] read and responded to a text message [plaintiff] sent to a supervisor earlier that day expressing [plaintiff's] concerns about working conditions at the theater and his potential liability for workplace injuries. [The employer's[response to [plaintiff] stated he had read [plaintiff's] text message, that the work needed to be done, and '[n]othing stops.' Substantial evidence supports the jury's finding of causation. . . ." (*Id.* at p. 578.) This is not a ground for summary adjudication.

The court denies summary judgment/adjudication as to the eighth cause of action.

10) Ninth Cause of Action for PAGA claim (Lab. Code, § 2698, et seq.)

As the PAGA claim for civil penalties is derivative of plaintiff's fifth, sixth, and eighth causes of action, and as those causes of action survive summary adjudication, the PAGA cause of action survives. Defendant essentially acknowledges this in its motion. (See P. 23.)

The court denies summary judgment/adjudication as to the ninth cause of action.

Summary:

- The court will not consider defendant's declaration and reply separate statement, to the extent they violate section 437c, subdivision (b)(4), effective January 1, 2025.
- The court overrules plaintiff's evidentiary objections to any issues of undisputed fact in defendant's separate statement, choosing to examine whether plaintiff made a claimed judicial admission as part of the court's assessment of the merits of the summary judgment/adjudication motion itself, rather than as a general evidentiary template.
- The court overrules all thirteen (13) of defendant's evidentiary objections.
- The court denies defendant's request to take judicial notice of Exhibits 5 and 9. The court otherwise grants defendant's request to take judicial notice of all other exhibits, overruling plaintiff's objections. The court will not take judicial of the truth of any disputed fact in the judicially noticed documents.
- The court declines defendant's request to treat the summary judgment/adjudication motion as a nonstatutory motion for judgment on the pleadings, including any challenges based on failure to exhaust (raised as an affirmative defense in the answer) and any challenges to the nine causes of action individually, given the looming trial date (and thus real possibility of leave to amend), coupled with defendant's failure to explain why these challenges are made on the eve of trial.
- The court grants defendant's summary judgment/adjudication motion as to the third and seventh causes of action. The court denies defendant's summary judgment/adjudication motion as to the remaining causes of action.
- The parties should come prepared to discuss the trial confirmation conference scheduled for September 28, 2026, the pending jury trial scheduled for October 26, 2026, as well as any settlement efforts.