NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

AINAH LEE, Plaintiff and Appellant, v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION et al., Defendants and Respondents.	F087038 (Super. Ct. No. MCV079217) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Katherine Rigby and Brian Enos, Judges.[‡]

Law Office of Anthony P. Capozzi and Anthony P. Capozzi for Plaintiff and Appellant.

Rob Bonta, Attorney General, Chris A. Knudsen, Assistant Attorney General, Kristin M. Daily and Marie C. Yelavich, Deputy Attorneys General, for Defendants and Respondents.

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[‡] Judge Rigby entered the order granting defendants' motion for summary judgment; Judge Enos denied Lee's motion for reconsideration.

Plaintiff Ainah Lee appeals a summary judgment granted in favor of her employer, the California Department of Corrections and Rehabilitation (CDCR), and her former supervisor, Regina Rose (collectively, defendants). Lee contends the trial court erred in finding her claims for emotional distress and assault and battery were barred by the workers' compensation exclusive remedy rule, and her emotional distress claims against CDCR were common law tort claims barred by the Government Claims Act. Lee further contends the trial court erroneously sustained defendants' objection to documents Lee submitted in opposition to defendants' motion for summary judgment.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Facts

On March 24, 2014, Lee began working as a Pharmacist I for CDCR at the on-site pharmacy in the California Correctional Women's Facility (CCWF) in Chowchilla. The on-site pharmacy is licensed by the California Board of Pharmacy (BOP). Pharmacists at CCWF are responsible for reviewing and filling prescription orders for inmate patients.

On August 18, 2015, Lee submitted an anonymous complaint to the BOP about a "satellite pharmacy" at CCWF. The satellite pharmacy was a room down the hall from the main pharmacy. In her complaint, Lee alleged the following occurred in August 2015: (1) a technician was let into the satellite pharmacy to work without a direct pharmacist's supervision; (2) the satellite pharmacy was left opened and unattended; and (3) the satellite pharmacy's door was left open although the pharmacy has a large amount of dangerous unaccounted for drugs, and there are many inmates around the building and a nearby supply room where inmates have access. On August 21, 2015, the BOP acknowledged receipt of Lee's complaint. Lee did not tell anyone at CCWF she had filed a complaint with the BOP.

On September 4, 2015, Lee was given a disciplinary letter of instruction stating her job performance was not meeting the standards expected of a correctional health services employee or for her position.

In February 2016, Regina Rose began working as the pharmacist in charge (PIC) at CCWF's pharmacy. As the PIC, Rose supervised all pharmacists and technicians at the pharmacy and was Lee's direct supervisor. Shortly after Rose began working at CCWF, she converted the satellite pharmacy into a pharmacy office.

Around June 2016, Rose notified pharmacy personnel that a BOP inspector would be performing an on-site inspection of the pharmacy. Rose was aware that licensed pharmacies are subject to routine inspection and oversight by the BOP. At that time, Rose was unaware Lee, or any other pharmacy employee, had filed a complaint with the BOP.

Lin Hokana of the BOP performed an on-site inspection of the CCWF's pharmacy on August 12, 2016. Lee called in sick on the date of the inspection because she did not want others to know she made a report to the BOP. The BOP inspection report stated the inspection was in response to an anonymous complaint and did not identify Lee as the complainant. The report noted a few items at the pharmacy that needed correction but concluded there were no violations. By letter dated September 15, 2017, the BOP notified Rose its investigation was complete, the case had been closed, and no further action would be taken. Rose believed the matter had been resolved without issue.

In February 2017, CDCR notified Lee she was being suspended from work for 41 days related to two incidents: (1) on August 19, 2016, pharmacy technicians reported that Lee had forged their initials on prescription bottle labels; and (2) on September 19, 2016, Lee was reportedly sleeping at her workstation, creating a backlog with the prescription fill overflow. Lee went off work for the 41-day suspension but appealed her suspension to the State Personnel Board (SPB).

In July 2017, Lee filed a complaint with the Office of Inspector General about unsafe practices by nurses. Lee did not tell anyone at CCWF about her complaint to the Office of Inspector General.

The SPB conducted a hearing on Lee's appeal of her suspension in September 2017 at which Rose testified. Rose reportedly first learned about Lee's complaint to the BOP at the hearing. The SPB reversed Lee's suspension, and she received backpay for the days she had missed. The SPB's proposed decision on Lee's appeal was issued in October 2017 but not served on CDCR until February 2018.

Lee reported that Rose generally harassed her at work by keeping Lee in long meetings preventing her from completing her regular duties, assigning her excessive work, yelling at her in front of other employees, rushing her work, and denying her overtime. Lee believed Rose was retaliating against her for filing whistleblower complaints.

On December 8, 2017, Lee was having an issue with a prescription. The order called for repackaging a prescription from its original packaging, but the manufacturer's label stated the drug is not allowed to be repackaged. Lee approached Rose about the prescription hoping Rose could give her direction. Rose advised Lee to use her professional judgment as a licensed pharmacist to decide whether to complete the order as prescribed.

By the end of the workday Lee had not resolved the issue with the prescription and Rose repeatedly told Lee to go home. Lee gathered her things and began to walk out of the pharmacy while pulling a rolling briefcase behind her. Rose grabbed and pulled Lee's briefcase from her grip as Lee was leaving. Rose touched Lee's hand when she grabbed the briefcase, but Lee was unsure if the touch was intentional or incidental. Rose accused Lee of stealing pharmacy property, records, and documents. She took the briefcase and looked through every pocket inside. She tried to look through a spiral binder inside the briefcase, but Lee told Rose that was her personal property, and Rose

had no right to search it. Rose's search of the briefcase lasted about ten minutes and then Lee took the briefcase back. Lee believed Rose was angry about the SPB's proposed decision to revoke Lee's suspension although Lee did not know if Rose had received a copy of the proposed decision.

After she retrieved her briefcase, Lee left the pharmacy and took the briefcase to the triage and treatment area (TTA). Lee asked a nurse at the TTA to contact the commander in charge to search her belongings. A custody person searched Lee's belongings and cleared her because she had no contraband or pharmacy property. Lee left the facility with her briefcase and went home.

On the next workday, Rose reported the incident with Lee to her supervisor, Dr. Jimmy Webster, and the Chief Support Executive, Corryn Pierini. Pierini advised Rose that in the future she should contact custody staff to secure items or conduct searches of personal property. CCWF conducted a workplace violence assessment in relation to the incident. CCWF's investigation concluded Lee's allegations of "assault" were not substantiated.

Lee did not return to work after December 8, 2017, and was on medical leave until about June 8, 2019. On or about June 17, 2019, CDCR notified Lee that she would be deemed absent without leave and would be separated from her employment with CDCR effective June 26, 2019. Lee did not return to work and was separated from employment for being absent without leave. Lee's appeal of her separation was denied.

Lee filed four workers' compensation claims related to her employment at CDCR. The first claim was for stroke-like symptoms and alleged a date of injury of August 28, 2017. On that day, Lee was rushed to Community Regional Medical Center in Fresno via ambulance. This occurred the day after Rose and Lee had a two and a half hour meeting about "med errors." Lee also filed two claims alleging she was assaulted by Rose on December 8, 2017, causing injury to her left shoulder, high blood pressure, "psyche/stress/anxiety," and depression. The fourth claim alleged "continued retaliatory

harassment from [Rose]" associated with the BOP investigation caused injury to Lee in the form of high blood pressure, "psyche/stress/depression," and anxiety. Lee received two years of partial back pay from workers' compensation in a lump sum of $108,000.

On April 18, 2018, Lee submitted a government tort claim form to the Department of General Services related to the December 8, 2017, incident. On May 11, 2018, the Department of General Services rejected Lee's claim.

II. Procedural History

Lee filed her initial complaint on November 8, 2018. The named defendants included CDCR, Rose, and other CDCR employees, but Lee later dismissed all defendants except CDCR and Rose. In the operative third amended complaint, Lee alleged causes of action for: (1) intentional infliction of emotional distress; (2) negligent infliction of emotional distress; and (3) assault and battery. Although none of Lee's complaints are in the record, the parties do not dispute these were Lee's three causes of action against defendants.

On May 19, 2022, defendants filed a motion for summary judgment on the following grounds: (1) Lee's causes of action were barred by the workers' compensation exclusivity rule; (2) Lee's common law tort claims for emotional distress cannot be brought against CDCR; and (3) Lee's assault and battery claim against Rose fails as a matter of law because Rose neither intended nor actually caused a harmful or offensive contact with Lee.

On July 21, 2022, Lee filed an opposition to defendants' motion for summary judgment, arguing there were at least 10 disputed material facts that cannot be decided as a matter of law and must be decided by a trier of fact. Among other claims in her opposition, Lee asserted that a coworker expressed bias against Asian women and Lee was an Asian woman. Attached to Lee's opposition was a declaration by Lee regarding her allegations and an exhibit with Lee's "just discovered" work notes chronicling her concerns at CCWF.

Defendants replied to Lee's opposition and objected to admission of her attached declaration and exhibits. Defendants argued in relevant part that Lee's work notes should not be admitted because Lee willfully and repeatedly abused discovery by failing to provide her notes in response to repeated requests, and Lee had claimed her notes had been lost or destroyed.

On April 6, 2023, the trial court issued its tentative ruling granting defendants' motion for summary judgment. The court concluded: (1) Lee's three causes of action were barred by workers' compensation exclusivity; (2) Lee's assault and battery claim against CDCR was barred because CDCR did not assault Lee or ratify Rose's conduct; (3) Lee's emotional distress claims were common law causes of action and do not satisfy the requirements of the Government Claims Act; (4) Lee cannot establish a triable issue of material fact to support either of her emotional distress claims; (5) the assault and battery claims cannot overcome summary judgment because there is no evidence Rose had the intent to harm or make harmful contact with Lee; (6) Lee's references to a hostile work environment are irrelevant to her claims; and (7) Lee's claims for punitive damages fail as a matter of law. The court sustained defendants' objections to certain exhibits provided by Lee in support of her declaration, including her work notes.

Following a hearing on April 7, 2023, the trial court adopted its tentative decision as its ruling and granted defendants' motion for summary judgment. Lee's motion for reconsideration of the court's decision was denied. On July 27, 2023, the court entered judgment in favor of CDCR and Rose. Lee timely appealed.

DISCUSSION

I. Summary Judgment

A. *Standard of Review*

The purpose of summary judgment "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.*

(2001) 25 Cal.4th 826, 843 (*Aguilar*).) "A party is entitled to summary judgment only if there is no triable issue of material fact and the party is entitled to judgment as a matter of law. [Citation.] A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. [Citation.] If the defendant meets this burden, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. [Citation.] A triable issue of fact exists if the evidence would allow a reasonable trier of fact to find the fact in favor of the party opposing summary judgment." (*Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 636–637 (*Grebing*); see Code Civ. Proc., § 437c.)

We determine whether summary judgment was properly granted based on an examination of the evidence before the trial court " 'with the exception of evidence to which objections have been appropriately sustained.' " (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 90 (*Light*).) "We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent." (*Grebing, supra,* 234 Cal.App.4th at p. 637.) "The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

B. *Workers' Compensation Exclusivity*

"As a general rule, an employee who sustains an industrial injury 'arising out of and in the course of the employment' is limited to recovery under the workers' compensation system." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1001 (*Torres*), quoting Lab. Code, § 3600, subd. (a).)[1] "Where the provisions of the workers' compensation system apply, an employer is liable without regard to negligence for any injury sustained by its employees arising out of and in the course of their

[1] Undesignated statutory references are to the Labor Code.

employment. [Citation.] The employee, in turn, is generally prohibited from pursuing any tort remedies against the employer or its agents that would otherwise apply." (*Light, supra*, 14 Cal.App.5th at p. 96; see § 3602, subd. (a).) This exclusive remedy rule is part of the "presumed 'compensation bargain,' pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16 (*Shoemaker*).)

"In determining whether exclusivity bars a cause of action against an employer or insurer, courts initially determine whether the alleged injury falls within the scope of the exclusive remedy provisions." (*Charles J. Vacanti M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811 (*Vacanti*).) Section 3600 provides that, with certain exceptions, workers' compensation liability exists "in lieu of any other liability whatsoever … against an employer for any injury sustained by his or her employees arising out of and in the course of the employment" if specified "conditions of compensation concur." (*Id.*, subd. (a).) Section 3602, subdivision (c) "makes explicit the converse of the exclusivity rule, i.e., that ordinary civil remedies apply to injuries falling outside the workers' compensation system." (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 625.)[2] Lee concedes the conditions of compensation under section 3600 apply here but argues there are exceptions at play.

The exclusivity rule is an affirmative defense and generally bars a civil action because workers' compensation is the plaintiff's sole remedy. (*Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, 224.) But certain types of injurious employer

[2] Section 3602, subdivision (c) states: "In all cases where the conditions of compensation set forth in Section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted."

misconduct bring the employee outside the compensation bargain and permit a civil action against the employer. (*Shoemaker*, *supra*, 52 Cal.3d at p. 16.) "There are some instances in which, although the injury arose in the course of employment, the employer engaging in that conduct ' "stepped out of [its] proper role[ ]" ' or engaged in conduct of ' "questionable relationship to the employment." ' " (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708 (*Fermino*).) "The compensation bargain does not encompass conduct that contravenes a fundamental public policy or exceeds the risks inherent in the employment relationship." (*Singh v. Southland Stone, USA, Inc.* (2010) 186 Cal.App.4th 338, 366 (*Singh*); accord, *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 902–903 (*Miklosy*).) "Where the acts are 'a "normal" part of the employment relationship' …, or where the motive behind these acts does not violate a 'fundamental policy of this state' [citation], then the cause of action is barred. If not, then it may go forward." (*Vacanti*, *supra*, 24 Cal.4th at p. 812.)

Though courts " 'have struggled with the problem of defining the scope' of the compensation bargain" (*Vacanti*, *supra*, 24 Cal.4th at p. 811), case law has recognized certain employer misconduct not subject to the exclusivity rule. Criminal "false imprisonment committed by an employer against an employee is always outside the scope of the compensation bargain." (*Fermino*, *supra*, 7 Cal.4th at p. 723.) Likewise, an intentional employer assault does not fall within the exclusivity rule. (*Id.* at pp. 710–711; *Conway v. Globin* (1951) 105 Cal.App.2d 495, 498.) In *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, our Supreme Court held that the workers' compensation insurer, standing in the shoes of the employer, was not insulated by the exclusivity rule for a cause of action for fraud. A section 132a[3] claim is not an employee's exclusive

[3] Section 132a prohibits "discrimination against workers who are injured in the course and scope of their employment." An employee who shows discrimination under the statute is entitled to increased workers' compensation up to $10,000, reinstatement,

remedy for work-related injury discrimination and does not preclude pursuit of a discrimination claim under the California Fair Employment and Housing Act or common law wrongful discharge remedies. (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1158.) It has also been held that the exclusivity rule does not bar a cause of action for fraudulent concealment where the employer willfully concealed from the employee and his doctors the connection between an employee's industrial injury and his asbestos exposure. (*Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465, 476 (*Johns-Manville*).)

By contrast, our Supreme Court has held that "claims for intentional or negligent infliction of emotional distress are preempted by the exclusivity provisions of the workers' compensation law." (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 747.) Emotional distress injuries "are subsumed under the exclusive remedy provisions of workers' compensation" where "the basic conditions of compensation are otherwise satisfied [citation], and the employer's conduct neither contravenes fundamental public policy [citation] nor exceeds the risks inherent in the employment relationship." (*Id.* at p. 754.)

With this background in mind, we turn to whether Lee's causes of action are barred by the exclusivity rule.

1. Emotional Distress Claims

Lee's emotional distress claims were based on constant scrutiny and harassment at work, the 2015 disciplinary letter, her 41-day suspension in 2017, Rose yelling at her in front of other staff and detaining her in long work meetings, and Rose's instigation of the briefcase incident. In her deposition, Lee testified Rose generally harassed her at work. Lee had issues with the amount and type of work Rose gave her and felt that Rose picked

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and reimbursement for lost wages and work benefits caused by the employer's discriminatory acts. (§ 132a, subd. (1).)

on her. One time, Rose gave Lee several contradicting tasks and caused Lee so much stress she could not function that day. Another time, Rose kept Lee in a two and a half hour meeting about work errors that prevented Lee from completing her regular duties. In 2017, Rose yelled at Lee in front of a pharmacist and two technicians despite Lee begging Rose to discuss the issues in another room. On Lee's last day of work, Rose "yanked" Lee's briefcase from her as she was leaving because, according to Lee, Rose believed Lee was stealing from the pharmacy.

The facts in this case bear similarities to what occurred in *Singh*, in which the employee (Singh) also claimed intentional infliction of emotional distress based on mistreatment by his boss (Johar): "Singh testified that Johar berated and humiliated him, criticized his job performance, and insulted him with profanities on a regular basis beginning in June 2005. Johar entered his office one day while Singh was eating lunch and working on his laptop computer. According to Singh, Johar was irate about something that he wanted immediately. When Singh responded that he would provide it after he finished eating lunch, Johar stated that he wanted it right away and slammed the laptop computer shut onto Singh's hand, which held a sandwich. Singh also testified that on another occasion, Johar shouted at him, grabbed his lapels, and threatened to throw him out of the office if he did not sign a release." (*Singh*, *supra*, 186 Cal.App.4th at p. 367.) The Court of Appeal concluded the defendant employer and Johar were entitled to judgment notwithstanding the verdict based on the exclusivity rule because the "misconduct all occurred in the normal course of the employer-employee relationship. The misconduct all occurred in the workplace and involved criticisms of job performance or other conflicts arising from the employment. Although the misconduct was offensive and clearly inappropriate, we believe that it all arose from risks encompassed within the compensation bargain. This does not by any means excuse the misconduct, but compels the conclusion that, absent a violation of a fundamental public policy, which has not been shown, the workers' compensation exclusivity rule applies to any emotional injury

arising from the described misconduct." (*Id.* at pp. 367–368.)

Like the *Singh* court, we conclude the misconduct here occurred in the normal course of the employer-employee relationship and is therefore subject to the exclusivity rule. As discussed above, emotional distress injuries are subject to the workers' compensation exclusive remedy. "[W]hen the misconduct attributed to the employer is actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decisions as manifestly unfair, outrageous, harassment or intended to cause emotional disturbance resulting in disability." (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160.) Here, the instances of misconduct all happened in the workplace, involved criticisms of Lee's work, and friction between Lee and her supervisor related to work. "Some harassment by superiors when there is a clash of personality or values is not uncommon" and does not inevitably bring the conduct outside the compensation bargain. (*Id.* at p. 161.) While we do not condone Rose's grabbing of Lee's briefcase (and discuss this incident in more detail below), an employer's reasonable efforts to investigate employee theft, including employee interrogation, are a normal part of the employment relationship. (*Fermino*, *supra*, 7 Cal.4th at p. 717.) Even if some misconduct was inappropriate, as in *Singh*, it arose from risks encompassed within the compensation bargain. None of the misconduct violated fundamental public policy or exceeded the risks inherent in the employment relationship.

We reject Lee's contentions the misconduct falls outside the scope of the compensation bargain because defendants purportedly failed to provide Lee with a safe workplace environment or "punished" Lee for being "a victim of violence." Preliminarily, the record reflects the first time Lee raised the issues of a safe workplace environment and retaliation was in her declaration in opposition to defendants' motion

for summary judgment.[4] Lee may not raise new allegations outside the complaint in evidence submitted to oppose summary judgment. (*Robinson v. Hewlett-Packard Corp.* (1986) 183 Cal.App.3d 1108, 1132 ["It is well settled that documentary evidence filed in opposition to a defendant's motion for summary judgment may not create issues outside the pleadings, nor is it a substitute for an amendment to the pleadings"].) Furthermore, though Lee's declaration stated she understood CDCR had a responsibility to provide her with a safe work environment, including a zero-tolerance policy for workplace violence, she did not argue defendants' alleged failure to provide a safe workplace contravened fundamental public policy and brought her claim outside the exclusivity rule. We need not entertain a theory opposing summary judgment raised by Lee for the first time on appeal. (*DiCola v. White Brothers Performance Products, Inc.* (2015) 158 Cal.App.4th 666, 676 (*DiCola*).)

In any event, the argument lacks merit. Lee presented no evidence she was retaliated against following the briefcase incident. She did not return to work after the incident because she was on medical leave and was ultimately separated from employment with CDCR for being absent without leave. Regarding CDCR's purported failure to provide a safe work environment, Lee expressly recognizes in her briefing that "[a] prime example of intentional employer misconduct *that is still subject to the exclusive remedy rule* is failure to provide a safe workplace, including willful violation of safety codes or regulations." (Italics added.) In *Arendell v. Auto Parts Club, Inc.* (1994) 29 Cal.App.4th 1261 and *Gunnell v. Metrocolor Laboratories, Inc.* (2001)

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[4] Lee does not claim this allegation was raised in the operative complaint, which is not in the record before us. As the appellant, Lee has the burden of providing an adequate record. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609.) "[I]t is a fundamental principle of appellate procedure that a trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment…. 'Failure to provide an adequate record on an issue requires that the issue be resolved against [the appellant].' " (*Id.* at pp. 608–609.)

92 Cal.App.4th 710, both cited by Lee, an employee's civil action premised on an unsafe work environment was found to be subject to the exclusivity rule. (*Arendell*, at pp. 1264–1266 [the tort claims of two employees robbed at gunpoint were precluded by the exclusivity rule because the employer's failure to take adequate security measures despite a known risk of harm "invokes no fundamental public policy"]; *Gunnell*, at pp. 722–723 [employee's tort claim for exposure to toxic substances at work was barred by the exclusivity rule although the employer failed to assure the safety of the substances used by the employee or the physical environment].) Even if we assume defendants failed to provide Lee with a safe work environment, her emotional distress claims would still be barred by the exclusivity rule. (See *Johns-Manville, supra*, 27 Cal.3d at p. 475 [failure to provide a safe workplace is insufficient to justify a civil action against an employer].)

2. Assault and Battery Claim

Lee contends she alleged an exception to the exclusivity rule for an employer's willful physical assault pursuant to section 3602, subdivision (b)(1). A civil action may be pled for a workplace injury where the employee's injury "is proximately caused by a willful physical assault by the *employer*." (§ 3602, subd. (b)(1), italics added.) Under the undisputed facts, CDCR was Lee's employer as defined in the Labor Code. (See § 3300, subd. (a).) Lee presented no evidence CDCR committed a physical assault against her or had any involvement in Rose's conduct during the briefcase incident. The trial court expressly found CDCR did not commit an assault against Lee. Lee does not contest that finding on appeal and instead argues there is a triable issue of fact about whether Rose, another CDCR employee, assaulted her. In the absence of evidence CDCR committed an assault against Lee, the exception in section 3602, subdivision (b)(1) is not applicable.

However, there is another exception to the exclusivity rule where the employee's injury "is proximately caused by the willful and unprovoked physical act of aggression of the other employee." (§ 3601, subd. (a)(1).) The trial court reasonably considered this

exception in addressing Lee's assault and battery claim given the alleged assaultive conduct was committed by another employee, Rose.[5]

Exceptions to the exclusivity rule are narrowly construed. (*Soares v. City of Oakland* (1992) 9 Cal.App.4th 1822, 1830.) "Flare-ups, frustrations, and disagreements among employees are commonplace in the workplace and may lead to 'physical act[s] of aggression.' [Citations.] ' "In bringing [people] together, work brings [personal] qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flareup.… These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment." [Citations.]' [Citation.] Because an employee's willful acts, including aggressive physical acts, may be considered within the scope of employment—thus subject to the exclusivity provision of section 3601, subdivision (a)—it follows that the Legislature envisioned this exception from exclusivity as requiring something more." (*Torres, supra,* 26 Cal.4th at p. 1009.) Accordingly, "a 'willful and unprovoked physical act of aggression' includes an intent to injure requirement." (*Id.* at p. 1006.)

Lee argues there was a triable issue about whether Rose intended to harm her, and the trial court improperly took defendants' side on this issue. We disagree. Viewing the evidence in the light most favorable to Lee, the facts do not support a finding Rose acted with the specific intent to injure Lee. In her declaration, Rose stated she approached Lee about the briefcase because Rose had previously been advised that pharmacy staff were not to bring large bags into the facility. Rose denied she made any physical contact with Lee over the briefcase. She was unaware of the SPB's proposed decision revoking Lee's suspension at the time of the briefcase incident and denied that Lee's appeal of that

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[5] Lee cites the section 3601, subdivision (a)(1) exception in her reply brief and the discussion in her opening briefing indicates she was invoking this exception.

suspension played any role in the exchange. In contrast, Lee testified in her deposition that Rose touched her hand when she grabbed the briefcase and accused Lee of stealing from the pharmacy. When pressed, Lee admitted she did not know if Rose's touch was intentional or incidental and expressly conceded she "cannot say whether [Rose] intentionally or unintentionally" touched her. Lee's testimony was equivocal about whether Rose touched her hand at all. At one point Lee testified she "believe[s Rose] touched [her] hand" because the handle was "not that big" and Rose "yanked it out from [her] grip." Lee did not know if Rose grabbed the briefcase's handle as opposed to its side and again said she "believe[s]" Rose yanked the briefcase with her hand.

A plaintiff's burden to show a triable issue of material fact in opposition to summary judgment is slight but not nonexistent: the plaintiff must present evidence that would allow a reasonable trier of fact to find the fact in the plaintiff's favor in accordance with the applicable standard of proof. (*Aguilar, supra*, 25 Cal.4th at p. 845.) Here, the burden is to present evidence that would allow a reasonable trier of fact to conclude Rose grabbed Lee's briefcase not to investigate if Lee was stealing or related to a policy against large bags but with an intent to physically injure her. But nothing in the evidence, not even Lee's own testimony, suggests Rose acted with an intent to injure Lee. Though Lee believed Rose was retaliating against her because the SPB had decided to revoke her suspension, Lee presented no evidence Rose was aware of the proposed decision at the time of the briefcase incident, and Rose denied knowledge of the proposed decision at that time.

Additionally, Lee failed to show her assault and battery claim was viable against CDCR independent of Rose. Section 3601, subdivision (a)(1) allows a cause of action against another employee (like Rose) for assault and battery, but the Labor Code "does not authorize a private action against an employer based on *another employee's* willful and unprovoked physical act of aggression." (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1487; see § 3601, subd. (b) [an employer may not be "held liable,

directly or indirectly, for damages awarded against, or for a liability incurred by the other employee" under § 3601, subd. (a)].) However, "an employer may be liable for an employee's act where the employer either authorized the tortious act or subsequently ratified an originally unauthorized tort." (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 169 (*Baptist*).) "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him. [Citations.] [¶] A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct which is 'inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it.' " (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73.)

Lee does not appear to dispute the trial court's finding CDCR did not ratify Rose's conduct surrounding the briefcase incident, and the record supports that finding. As the court stated, CDCR did not ratify Rose's conduct because CDCR advised Rose not to conduct employee searches herself, instructed Rose on the proper procedure for such a search, and conducted a workplace violence assessment following the briefcase incident. (See *Baptist*, *supra*, 143 Cal.App.4th at p. 169 [ratification is generally applied where the employer fails to investigate or respond to charges that an employee committed an intentional tort].) Because CDCR did not ratify Rose's conduct and there was no triable issue of fact as to whether Rose intended to injure Lee, defendants were entitled to summary judgment on Lee's assault and battery claim.

C. *Government Claims Act*

Pursuant to the Government Claims Act (Gov. Code, § 810 et seq.; the Act), a "public entity is not liable for any injury caused by the act or omission of the public entity or a public employee unless such liability is imposed by statute." (*San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 433.)

Specifically, Government Code section 815 provides that "[e]xcept as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." This statute "abolishes common law tort liability for public entities." (*Miklosy, supra*, 44 Cal.4th at p. 899.) Consequently, under the Act, "a public entity is *not* liable '[e]xcept as otherwise provided by statute.' [Citations.] If the Legislature has not created a statutory basis for it, there is no government tort liability." (*State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1009.)

Lee argues negligent and intentional infliction of emotional distress claims are the "offshoot" of negligence codified in Civil Code section 1714,[6] and the trial court erred by concluding those claims cannot be pled against CDCR as a matter of law. Preliminarily, Lee did not raise this theory in her opposition to defendants' motion for summary judgment, and "possible theories that were not fully developed or factually presented to the trial court cannot create a 'triable issue' on appeal." (*American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1281.) In any event, the argument is without merit. Our Supreme Court has held that "direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, *and not on the general tort provisions of Civil Code section 1714*. Otherwise, the general rule of immunity for public entities would be largely eroded by the routine application of general tort principles." (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183, italics added.) The trial court therefore properly concluded Lee's emotional distress claims cannot be brought directly against CDCR.

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[6] Civil Code section 1714, subdivision (a) states in relevant part: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself."

Though Lee correctly observes Government Code section 815.2[7] provides for a public entity's vicarious liability for its employees' torts, she gives no argument for how CDCR may be held vicariously liable in tort for Rose's (or another employee's) conduct under the Act. "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699–700.) We are not required to examine undeveloped claims, supply arguments for Lee, or address issues raised without cogent legal argument. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115–1116; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived"]; Cal. Rules of Court, rule 8.204(a)(1)(B) [each brief must "support each point by argument and, if possible, by citation of authority"].)

II. Evidentiary Rulings

Lee challenges the trial court's ruling sustaining defendants' objection to documents Lee submitted in opposition to defendants' motion for summary judgment.[8]

Lee filed a declaration with 14 attached exhibits in support of her opposition to defendants' motion for summary judgment. The attached exhibits included Lee's "just discovered copies of [her] work notes" chronicling her concerns while working at CCWF and work-related emails. Defendants objected to several of Lee's exhibits on various

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[7] "Public employees generally are liable for injury caused by their own acts or omissions to the same extent as private citizens (Gov. Code, § 820, subd. (a)), and the public employer is vicariously liable unless the employee is immune from liability (Gov. Code, § 815.2, subd. (b))." (*County of Los Angeles v. Superior Court* (2024) 107 Cal.App.5th 160, 179; see *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 980.)

[8] The trial court overruled defendants' objection to Lee's declaration for lack of a signature. Lee expressly does not challenge that ruling. The court also declined to disregard Lee's opposition, separate statement or declaration although they were filed late.

grounds, including that certain exhibits contained documents responsive to document requests propounded as part of discovery and were the subject of a motion to compel but were not produced until Lee's opposition to summary judgment. Because Lee evaded discovery responses and belatedly produced these documents only to defeat summary judgment, the trial court sustained defendants' objection to these exhibits.

Although our review of a summary judgment motion is de novo, we review the trial court's rulings on evidentiary objections for abuse of discretion. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122.)[9] The party challenging an evidentiary ruling has the burden of establishing the trial court's order exceeds the bounds of reason. (*DiCola, supra,* 158 Cal.App.4th at p. 679.)

"A party opposing summary judgment may not move the target after the proponent has launched its arrow." (*Field v. U.S. Bank National Assn.* (2022) 79 Cal.App.5th 703, 707.) To be sure, there "is no general bar on introducing previously undisclosed evidence in opposition to a summary judgment motion." (*Biles v. Exxon Mobile Corp.* (2004) 124 Cal.App.4th 1315, 1329.) But "when a party repeatedly and willfully fails to provide certain evidence to the opposing party as required by the discovery rules, preclusion of that evidence may be appropriate, even if such a sanction proves determinative in terminating the plaintiff's case." (*Id.* at p. 1327; see Code Civ. Proc., § 2023.010, subd. (f) [making an evasive discovery response is sanctionable].)

Lee contends the trial court missed that defendants' statement in its reply to her opposition that Lee "falsely claims" she "just discovered" her work notes was itself a false statement by defendants without facts supporting this assertion. She claims the trial court summarily concluded Lee was not credible in saying she found her work notes and

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[9] Lee correctly observes the weight of authority holds that an evidentiary ruling is reviewed for abuse of discretion. (See *Mackey v. Trustees of California State University* (2019) 31 Cal.App.5th 640, 657.) Lee does not dispute this is the applicable standard.

instead credited defendants' "unsworn" assertion Lee had "falsely" declared she just found them.

We find no abuse of discretion in the trial court's evidentiary rulings. During her deposition, Lee denied she had notebooks or papers documenting incidents that happened at work. In verified discovery responses, Lee claimed she had produced all documents in her possession and her work notes had been lost or destroyed. Defendants filed a motion to compel production of Lee's work notes. Lee's initial responses at the hearing on the motion to compel were reportedly evasive regarding work-related emails and notes. She claimed she was too emotionally distraught to recall events or search for documents because "there are a lot of things she doesn't remember and a lot of things she wants to forget." The court admonished Lee at the hearing that she could not "just close [her] eyes and say I don't have them" for records that had not been produced and could not respond to requests for production by claiming that discovery was too emotionally difficult. Lee claimed in her declaration opposing summary judgment these documents were only recently discovered months after her verified discovery responses claiming she had produced all documents in her possession and her work notes had been lost or destroyed. Lee cannot salvage her claims from summary judgment through belated submission of documents she repeatedly and willfully failed to produce to defendants.

Lee does not clearly articulate why the trial court should have considered her work notes as evidence. She contends her failure to previously produce her work notes resulted from "attorney mistake," pointing to her attorney's many "disjointed, disheveled and late" filings as evidence of counsel's apparent ineptitude. As best we can surmise, Lee is alleging the assertion in her declaration that her notes were "just discovered" is attributable to her attorney, not Lee. In other words, Lee's attorney erroneously stated in Lee's declaration that her work notes were "just discovered," although they were not. If Lee is claiming she in fact previously had her notes in her possession and her declaration inaccurately stated she had only recently discovered those notes, this merely bolsters the

conclusion Lee was evasive in her discovery responses and only belatedly produced her notes to oppose summary judgment.[10]

Even assuming Lee's attorney made a mistake, Lee fails to cite any authority for the proposition that she may be relieved from the judgment in favor of defendants or the trial court's evidentiary rulings based on attorney mistake. We observe that Code of Civil Procedure section 473, subdivision (b) permits a party to seek discretionary relief from a motion granting summary judgment due to an attorney's mistake, inadvertence, surprise, or excusable neglect. (*Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 229–231.) But an application seeking such relief "shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (Code Civ. Proc., § 473, subd. (b).) Lee did not meet this time limit. The first time Lee raised the issue of attorney mistake was in her opening appellate brief, which was filed more than six months after the trial court's evidentiary rulings and the judgment. Lee is not entitled to relief for an attorney mistake under Code of Civil Procedure section 473, subdivision (b). (See *Loeb v. Record* (2008) 162 Cal.App.4th 431, 448.)

[10] Alternatively, Lee's argument in her briefing could be understood as claiming she had previously produced her notes to her attorney, and it was Lee's attorney who had "just discovered" those notes. This claim is speculative and unsupported by the record. While Lee's declaration may have been drafted by her attorney, the declaration was from Lee, based on her "personal knowledge," and signed by Lee. In the declaration, Lee expressly stated, "I just discovered copies of my work notes and they chronicle my concerns while working at CCWF." Even liberally construing Lee's declaration, as we must for a party's declarations opposing summary judgment, this statement is not plausibly attributed to her attorney.

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

FAIN, J.*

WE CONCUR:

HILL, P. J.

MEEHAN, J.

* Judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.