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CISCO SYSTEMS, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, an agency of the State of California,

Plaintiff,

v.

CISCO SYSTEMS, INC., a California Corporation; SUNDAR IYER, an individual; RAMANA KOMPELLA, an individual,

Defendants.

Case No. 20CV372366

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRERS BY CISCO SYSTEMS, INC.

Date: TBD March 9, 2021
Time: TBD 9:00 AM
Dept.: 6
Judge: Honorable Maureen A. Folan

Complaint Filed: October 16, 2020

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I. INTRODUCTION AND STATEMENT OF ISSUES

The claims and allegations presented by the Department of Fair Employment and Housing ("DFEH") suing on behalf of Real Party in Interest John Doe are defective and meritless on their face.[1] The entire Complaint is barred by the statute of limitations. DFEH filed a substantially similar action in federal district court on the last day of the limitations period, then more than three months later voluntarily dismissed it immediately after Cisco asked it to stipulate to arbitration pursuant to Doe's arbitration agreement. DFEH's filing of this action on the same date that it dismissed the federal action is untimely because the pendency of the federal action did not toll the statute of limitation. In fact, the leading California case has described as "preposterous" the argument that the first action tolls the statute when the plaintiff voluntarily dismisses it and refiles.

The Complaint fails for additional, independent reasons. The basic foundation of Doe's allegations is that, although he was hired into a coveted and highly lucrative engineering position by a manager who at that time knew him and his caste, that manager and his successor later discriminated on that basis, discussing his caste and criticizing his work, and promoting others of Indian descent. As Doe acknowledges, Cisco, which does not tolerate discrimination of any sort, investigated Doe's contention. Doe further acknowledges that, at Doe's request, Cisco conducted a second level review of the investigation's findings.[2]

Doe fails to state legally viable claims. As explained in Cisco's concurrently filed Motion to Strike, neither caste nor ethnicity are among the protections of the FEHA, and he has not exhausted the required administrative remedies as to religion, national origin, and color. Doe's discrimination claim, which relies upon these unexhausted protections, fails to state a claim and also fails because Doe does not credibly allege discriminatory adverse actions. Doe's harassment claims are predicated on personnel management activities which plainly do not constitute harassment as a matter of law, the alleged statements and actions are not sufficiently severe or

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[1] Cisco files herewith its Motion to Compel Arbitration pursuant to a binding arbitration agreement between Real Party in Interest John Doe and Cisco. If the Court grants that Motion to Compel Cisco will address the arguments herein to the Arbitrator.

[2] That Doe disagrees with the findings does not negate that Cisco thoroughly, and in accordance with its policies, investigated his complaint.

pervasive to alter Doe's working conditions, and the allegations are time barred.[3] The retaliation claim also fails to state a claim, including because the allegations show that Doe failed to engage in protected conduct. Because the freestanding FEHA claims fail, so too do the derivative failure to prevent claims. For all of these reasons, the Complaint should be dismissed in its entirety.

II. RELEVANT FACTS

A. Doe's Employment at Cisco

Doe is a current, five-year Cisco employee recruited and hired into a highly coveted and highly lucrative position by one of the very individuals who allegedly harbored animus against him. *See* Compl. (Complaint) ¶ 18. As Doe admits, in 2015, Defendant Iyer recruited Doe to work for him in one of Cisco's internal technology startups. *Id.* at ¶ 30. When Iyer recruited and hired Doe, Iyer allegedly knew Doe was a Dalit. *Id.* ¶¶ 18, 30, 31. Doe was not hired as a manager. *See id.* ¶ 18.

The Complaint does not explicitly allege the religion, ancestry, ethnicity, or race/color of Iyer and Co-Defendant Kompella, nor of any other employees. Instead, the Complaint alleges only that Iyer and Kompella are Indian Brahmins, or at least of a higher caste than Doe. *Id.* ¶¶ 4, 30, 35. The DFEH further alleges without any factual support that all of Doe's team was comprised of Indian immigrants from "high castes." *Id.* ¶ 3.

According to Doe, in or around October 2015, Iyer confirmed to Doe's colleagues that Doe was "not on the main list" at university in India, a fact Iyer allegedly knew because he attended university with Doe. *Id.* ¶¶ 30, 31, 38, 41. This alleged statement was made outside of Doe's presence. When Doe heard of it from some unnamed source a year after Iyer allegedly made the statement, Doe claims that he spoke with Iyer about it and alleges that Iyer denied making this statement. *Id.* ¶¶ 32, 41. Doe reported this alleged statement to Employee Relations (ER) on or around November 21, 2016. *See id.* ¶ 33. Iyer allegedly reorganized the engineering team and promoted Kompella, who received a raise, and another colleague to supervisor positions. *Id.* ¶ 34-35. As part of this reorganization, Iyer moved team members from the technology Doe was working on, and "did not formally integrate the third technology into either

[3] Individual defendants Iyer and Kompella are represented by their own counsel.

team" headed by the new supervisors. *Id.* ¶ 36. Doe claims his role was "reduced" and that he was "isolated" as a result of this reorganization. *Id.*

On December 8, 2016, Doe complained to ER about Iyer's alleged disclosure of his caste by confirming that Doe wasn't on the "main list" at university, the team reorganization, and Iyer allegedly making unspecified inappropriate comments about a Muslim employee and applicant (this is not Doe's religion). *Id.* ¶ 37. ER investigated Doe's complaint, did not substantiate his allegation, and closed the investigation. *Id.* ¶ 39. Doe requested and Cisco agreed to review ER's findings shortly thereafter. *Id.* ¶ 41. Doe claims that Iyer "disparaged" Doe to employees at some unspecified later time (he does not allege what this "disparagement" consisted of or how often it occurred), misrepresented Doe's performance (he does not specify when, how, or how often), and told unspecified colleagues they should avoid working with Doe (he does not specify who said this, who this was said to, or when or how often it was said). *Id.* ¶ 40. After a re-review of Doe's complaint by a different investigator, which involved re-interviewing employees and re-reviewing documents, Cisco was again unable to substantiate Doe's allegations of caste discrimination and retaliation. *Id.* ¶¶ at 41-43.

Over a year after the November 2016 reorganization, on February 26, 2018, Kompella became the Interim Head of Engineering after Iyer stepped down from the role. *Id.* ¶ 45. According to Doe, in this role, Kompella "continued to discriminate, harass, and retaliate against Doe by, for example, giving him assignments that were impossible to complete under the circumstances. Kompella also began requiring Doe to submit weekly status reports to him and Senior Vice President/General Manager Tom Edsall." *Id.*

According to Doe, a new manager, Rajeev Gupta, took over for Kompella on May 21, 2018. *Id.* ¶ 46. In July 2018, Doe applied for a director position which he did not obtain. *Id.* ¶¶ 47. Doe alleges that he was unable to secure this position because Gupta was "improperly influenced" by Iyer's "criticisms about Doe's work product, social skills, and insubordination" (which Doe does not dispute are true). *Id.* No adverse employment actions are alleged to have occurred after July 2018 and Doe remains a Cisco engineer (a highly respected position in the field) in a different technology group. *See id.* ¶ 18.

B. Doe's Administrative Charge and the DFEH's Lawsuit

Doe filed an initial administrative charge with the DFEH on July 30, 2018, alleging only claims against Cisco based on race and ancestry. *Id.* ¶ 11. On or around October 9, 2018, Doe filed an amended administrative charge, again only alleging claims based on race and ancestry, this time against Cisco, Iyer, and Kompella. *Id.* The DFEH alleges that it served the amended charge on Cisco, Iyer, and Kompella on or about October 9, 2018.[4] *Id.* No additional charges have been filed. As is statutorily required for DFEH to have standing to sue, the DFEH convened a mediation between Doe, Cisco, Iyer, and Kompella on February 11, 2020, but the case did not settle. *Id.* ¶ 13. The parties tolled the DFEH's deadline to file a civil lawsuit to June 30, 2020. The DFEH filed a substantially similar action in federal court on June 30, 2020 ("Federal Action") and served Cisco with that federal complaint on September 28, 2020. Request for Judicial Notice, Ex. C.[5] After receiving notice of Cisco's intention to file a motion to compel arbitration based on Doe's valid arbitration agreement with Cisco, the DFEH voluntarily dismissed the Federal Action on October 16, 2020, *Id.*, Ex. E, and on the same day refiled this action.

III. LEGAL STANDARD

A civil complaint is intended to frame and limit the issues and apprise the defendant of the basis upon which the plaintiff seeks recovery. *See Fuentes v. Tucker*, 31 Cal. 2d 1, 4 (1947); *Perkins v. Superior Court*, 117 Cal. App. 3d 1, 6 (1981). A complaint must be sufficiently clear to apprise the defendant of the alleged legal wrongs. *See Metzenbaum v. Metzenbaum*, 86 Cal. App. 2d 750, 753 (1948) (requiring "reasonable precision and [] sufficient clarity and particularity [so] that the defendant may be apprised of the nature, source and extent of his cause of action.").

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[4] The DFEH did not attach to the Complaint copies of Doe's original or amended DFEH charge. See Complaint. Cisco requests that the Court take judicial notice of the DFEH charges and files its request for judicial notice (which is proper, see *Louie v. BFS Retail & Commercial Operations, LLC*, 178 Cal. App. 4th 1544, 1554 (2009)) with this motion. Moreover, Iyer and Kompella were not served with the charge on October 9, 2018. Instead, they were not served with the charge until late March 2019, but that fact is not material to this motion.

[5] Cisco attaches as Exhibits C-E to its Request for Judicial Notice the relevant portions of the federal court docket in the case *Department of Fair Employment and Housing v. Cisco Systems, Inc.*, No. 5:20-cv-04374 EJD. See Request for Judicial Notice; *Hines v. Lukes*, 167 Cal. App. 4th 1174, 1181 n.4 (2008) (taking judicial notice of complaint in related action); *City of Sacramento v. State Water Res. Control Bd.*, 2 Cal. App. 4th 960, 968 n.3 (1992) (taking judicial notice of court's file in another action).

A demurrer is appropriate where a complaint "does not state facts sufficient to constitute a cause of action." Cal. Code Civ. Proc. § 430.10(e). In evaluating a demurrer, a court must "admit[] all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law." *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985); *Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th 962, 967 (1992) ("The court does not, however, assume the truth of contentions, deductions or conclusions of law" in ruling on demurrer). To survive a demurrer, Plaintiff must show that it "pleaded facts sufficient to establish *every element of that cause of action*." *Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 879 (1992) (emphasis added). "Doubt in the complaint may be resolved against plaintiff and facts not alleged are presumed not to exist." *Kramer v. Intuit Inc.*, 121 Cal. App. 4th 574, 578 (2004). A defendant may demur on statute of limitations grounds when the face of the complaint shows the action is time-barred. *Carter v. Prime Healthcare Paradise Valley LLC*, 198 Cal. App. 4th 396, 412 (2012).

IV. ARGUMENT

A. The Entire Complaint is Barred by the Statute of Limitations

When the DFEH files a civil action under the FEHA, it must do so within one year after the employee files his administrative complaint. Cal. Gov't Code § 12965(a). Here, Doe filed an amended administrative complaint on October 9, 2018. Compl. ¶ 11. Thus, in the absence of a tolling agreement, DFEH's deadline to file a civil action was October 9, 2019. There were, however, several tolling agreements that extended the deadline to June 30, 2020. *See* Compl. ¶ 13. DFEH filed the Federal Action on June 30, 2020, the *last possible date* remaining in the statute of limitations. Compl. ¶ 14; RJN, Ex. C. On October 16, 2020, DFEH voluntarily dismissed the Federal Action. Compl. ¶ 14; RJN, Ex. D.

DFEH filed this action on October 16, 2020. On its face, the filing of this lawsuit is time-barred because DFEH filed it well after the June 30, 2020 statute of limitation deadline. It is black-letter law that when a plaintiff voluntarily dismisses a first lawsuit, the time period during which the first lawsuit was pending does not toll the statute of limitations; if a plaintiff files a second action after the untolled statute of limitations has run, the second action is time-barred. *Thomas v. Gilliland*, 95 Cal. App. 4th 427 (2002). *Thomas* addressed this precise issue, and held

as follows:

> In this appeal we review the contention that the statute of limitations is tolled when a complaint is filed so that a plaintiff may dismiss the complaint and refile the same action long after the statute of limitations has expired. We affirm the trial court's rejection of this preposterous proposition.

Thomas, 95 Cal. App. 4th at 429. Commenting on the common-sense reason for this rule, the court observed "[i]f Thomas's proposition had any validity, plaintiffs could start and stop an action at will, without regard for the expense, delay, and frustration such conduct would impose on the court and the defendants." *Id.* at 433.

There is no basis for DFEH to avoid this result.[6] It is legally significant that this result is self-inflicted by DFEH. Cisco had not filed any motions in the Federal Action, and the federal court did not involuntarily dismiss the Federal Action. Rather, DFEH simply chose to voluntarily dismiss, apparently for tactical reasons. In this circumstance, the law is clear: no tolling applies, and the entire complaint is time-barred and must be dismissed with prejudice.

B. Plaintiff's FEHA Discrimination Allegations Fail to State a Claim

The FEHA discrimination claims fail on the factual allegations here.

First, as Cisco explains in its concurrently filed Motion to Strike, because caste is not a protected class the DFEH cannot bring caste-based discrimination claims. Cal. Gov't Code 12940(a). Second, and as also explained in Cisco's Motion to Strike, Doe did not exhaust his allegations of religion, national origin/ethnicity, and color animus, and so cannot allege discrimination on those bases. *See* 2 C.C.R. § 10000, *et seq.* Third, as to ancestry and race -- the only exhausted and statutorily protected categories -- the DFEH does not even attempt to allege that Iyer or Kompella (or anyone else) are of a different ancestry or race, or that they harbored animus on these bases. Instead, the DFEH alleges that Iyer, Kompella, and others were of different castes than Doe, allegations outside of the statutory schemes. Compl. ¶¶ 29, 34.

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[6] DFEH cites 28 U.S.C. § 1367(d) in the Complaint, ¶ 15, apparently to show that re-filing the action in state court is timely. But Section 1367(d) does not apply to a voluntary dismissal; it applies only if a case is dismissed pursuant to Section 1367. *Centaur Classic Convertible Arbitrage Fund Ltd. v. Countrywide Fin. Corp.*, 878 F. Supp. 2d 1009, 1019 (C.D. Cal. 2011). Because DFEH voluntarily dismissed pursuant to Rule 41, and the federal district court did not dismiss pursuant to section 1367, that section cannot save the action from dismissal.

In addition, Doe does not sufficiently allege that he suffered an adverse employment action within the meaning of the FEHA. The DFEH alleges that Doe suffered discrimination when Cisco, through Iyer and/or Kompella: (1) reassigned Doe's job duties and isolated him from his colleagues, (2) denied him a raise, (3) denied "him work opportunities that could have led to a raise," (4) denied him a promotion to the Head of Engineering, and (5) denied him a promotion to the Director of Research and Development Operations. Compl. ¶ 53. The DFEH also vaguely references unspecified "discriminatory comments and conduct." *Id.* ¶ 54. Doe further alleges that Iyer telling colleagues that he was not on the "main list" was discriminatory. *Id.* ¶ 31.

An allegation of "isolating" Doe from colleagues cannot be an adverse employment action. *See Kelley v. Conco Companies*, 196 Cal. App. 4th 191, 212 (2011) ("ostracism in the workplace is insufficient to establish an adverse employment decision"). As to Iyer allegedly reassigning Doe's duties as part of a teamwide reorganization, allegedly denying Doe a raise, or denying unspecified work opportunities, such allegations do not allow the Court to reasonably infer that (to the extent any of these actually happened) they were caused by an intent to unlawfully discriminate against Doe. *Cantu*, 4 Cal. App. 4th at 879. This is especially true given that Iyer actively recruited and hired Doe to work with him in a highly coveted position at Cisco earning top compensation, even by Silicon Valley standards. *Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243, 273 (2009) (when same allegedly discriminatory actor previously selected plaintiff for favorable treatment, this creates "an inference of nondiscrimination").

The DFEH's other discrimination allegations similarly fail to state a claim. There is no reason to believe that other employees were unaffected by a reorganization, or that Doe was the only employee who did not receive a raise. Compl. ¶¶ 35, 36, 42. And there is no elaboration as to what alleged "work opportunities" Doe was denied as a result of Cisco, Iyer, or Kompella's conduct. *Id.* ¶ 53; *Aubry*, 2 Cal. 4th at 967 ("court does not, however, assume the truth of contentions, deductions or conclusions of law" in ruling on demurrer). Indeed, Doe does not allege that he was equally qualified for the Head of Engineering role (or indeed, that he wanted it). Instead, Doe's complaint generally is about the reorganization. *Id.* ¶ 35; *Guz v. Bechtel Nat. Inc.,* 24 Cal. App. 4th 317, 366 (2000) (plaintiff must show that similarly situated persons outside

his protected class were "treated more favorably.").

Nor does the DFEH allege that the person who received the Director job for which Doe applied in July 2018 was outside of protected classes Doe pleads. *Id.* ¶ 47; *Wills v. Superior Court*, 195 Cal. App. 4th 143, 173 (2011) (affirming dismissing discrimination claim where plaintiff failed to identify any similarly situated employees treated more favorably); *Lin v. Potter*, No. C-10-03757-LB, 2011 WL 1522382, at *11-12 (N.D. Cal. Apr. 21, 2011) (Title VII: dismissing discrimination claim where plaintiff failed to allege comparator employee who received promotion was similarly situated regarding eligibility, and failed to allege he was of a different race). Because the DFEH fails to establish multiple elements of the discrimination claim, it should be dismissed, and so should the derivative failure to prevent discrimination claim.[7] *Cantu*, 4 Cal. App. 4th at 879 (plaintiff must plead facts sufficient to establish every element of cause of action).

C. Plaintiff's FEHA Harassment Claim Fails On Multiple Grounds

1. DFEH Failed to Administratively Exhaust The Harassment Claim

As explained above, Doe did not exhaust remedies on religion, national origin/ethnicity, and color claims, and cannot allege harassment on those bases.

2. DFEH Fails to State the Elements of a Harassment Claim

To state a *prima facie* case of harassment, a plaintiff must plead facts to show that (1) he is a member of a protected class; (2) was subjected to unwelcome harassment; (3) the harassment was based on the protected class; (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive environment; and (5) *respondeat superior*. *Fisher v. San Pedro Peninsula Hospital,* 214 Cal. App. 3d 590, 608 (1989). The harassment claim should be dismissed because the DFEH fails to plead facts supporting the first four elements of harassment. *Cantu*, 4 Cal. App. 4th at 879 (plaintiff must plead facts sufficient to establish every element of cause of action).

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[7] If the Court does not dismiss each of the freestanding FEHA claims (discrimination, harassment, and retaliation), Cisco respectfully requests that to the extent it dismisses any of them, it also strike the corresponding failure to prevent allegations; *i.e.*, if the Court dismisses the discrimination claim, that it strike the failure to prevent discrimination allegations in Claims 4 and 5. Cal. Code Civ. Proc. § 436(a).

First, as discussed in the accompanying Motion to Strike, caste is not a protected category.

Second, the allegations here consist of personnel management that cannot be harassment under the FEHA. As a matter of law, harassment does not include personnel or business management actions such as performance reviews, work criticisms, hiring and firing, job or project assignments, promotion or demotions, and other personnel management duties. *Reno v. Baird*, 18 Cal. 4th 640, 645-47 (1998) (citing with approval *Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55, 62-65 (1996)). In so holding, *Reno* approved *Janken*, which affirmed dismissal of claims against individual defendants and explained that harassment does not include "commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings" etc. *Reno*, 18 Cal. 4th at 646-47. The proper claim from such facts is one for discrimination. *Id.* at 647. Instead, "harassment consists of conduct outside the scope of necessary job performance," such as "verbal epithets or derogatory comments, slurs, physical interference with freedom of movement, derogatory posters or cartoons, and unwanted sexual advances." *Id.* at 645-46 (*citing Janken*, 46 Cal. App. 4th at 62-63).

Here, the DFEH alleges that Iyer and/or Kompella, and through them Cisco: (1) revealed his caste to colleagues, (2) disparaged him to the team, (3) subjected Doe to "offensive comments and other misconduct," (4) isolated him from the team, (5) reduced his role to that of an individual contributor, (6) gave "him assignments that were impossible to complete under the circumstances," and (7) required "him to submit weekly status reports." Compl. ¶ 63. None of this shows actionable harassment.

The fourth through seventh allegations are plainly personnel management. *Reno*, 18 Cal. 4th at 646-47. As for the wholly conclusory allegation of subjecting Doe to "offensive comments and other misconduct," no specific actions whatsoever are pled, including any offensive comments directed at Doe. A conclusory allegation is insufficient as a matter of law. *Czajkowski v. Haskell & White, LLP*, 208 Cal. App. 4th 166, 173 (2012) (contentions, deductions or conclusions of fact or law insufficient); *Fisher*, 214 Cal. App. 3d at 613-14 (sustaining demurrer

on conclusory harassment claim).

Finally, as for the allegation of "disparaging Doe" to the team, again no specifics are pled. *Id.* Cisco assumes that this refers to Iyer allegedly communicating in October 2015 that Doe was from a "Scheduled Caste" by confirming that Doe was not on the "main list," which he knew because they were students at university at the same time (according to Doe, this communicated to his colleagues that he had been admitted to IIT through affirmative action designed for those in "Scheduled Castes" or who were outside of the caste system). *Id.* ¶¶ 31-32, 38. But a statement of a fact without editorial is not a harassing slur or epithet. *Reno*, 18 Cal. 4th at 645-46 (defining commentary that may constitute harassment).

Third, even assuming *arguendo* that caste *is* a protected category, the allegations do not plead causation; in other words, they do not sufficiently suggest that anything happened based on Doe's caste. Doe assumes, without factual support, that events he perceived as negative were based on caste – whether it be not getting a raise, or promotion to supervisor or Head of Engineering positions (which he doesn't allege he requested or wanted), or receiving performance counseling (which he fails to allege was unnecessary). But aside from the single alleged "confirmation" of his caste, he cannot point to **any** event where his caste was mentioned or referenced, and certainly not any of these actions about which he complains. Doe's speculation that his caste had anything to do with him purportedly not getting a raise or being subject to a teamwide reorganization is unsupported by any well-pled facts. *Aubry*, 2 Cal. 4th at 967 ("The court does not, however, assume the truth of contentions, deductions or conclusions of law" in ruling on demurrer).

Fourth, the allegations are not actionable as harassment because they are not severe or pervasive. *See Fisher,* 214 Cal. App. 3d at 610 (sustaining demurrer: "harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature."). Here, DFEH alleges one statement over 3 years; moreover, the alleged Iyer comment was not even alleged to be made to Doe or in his presence. *Id.* at 611 (comment not made to plaintiff or in his presence cannot contribute to hostile environment). In any event, the comment is not sufficiently severe, and of course is not

pervasive. Far more serious conduct than the single alleged Iyer comment has been held plainly insufficient to state a harassment claim. *See e.g.*, *Hughes v. Pair*, 46 Cal. 4th 1035, 1049 (2009) (two incidents, including defendant's threat of sexual assault, insufficient to establish severe and pervasive harassment); *Manatt v. Bank of Am., NA*, 339 F.3d 792, 798 (9th Cir. 2003) (Title VII case: racial jokes, and other mocking behavior insufficient to show hostile work environment); *Yoshimoto v. O'Reilly Auto., Inc.*, No. C 10-5438 PJH, 2013 WL 6446249, at *14-15 (N.D. Cal. Dec. 9, 2013) (FEHA harassment claim: reaffirming *Manatt* and granting summary judgment, finding once a year offensive comments not sufficiently severe or pervasive to constitute harassment). Even if the alleged conduct were not personnel management, it was "occasional, isolated, sporadic, and trivial" rather than severe or pervasive. *See Fisher*, 214 Cal. App. 3d at 610; *Mokler v. County of Orange*, 157 Cal. App. 4th 121, 144-45 (2007) (three incidents over five weeks with minor touching on one occasion not severe or pervasive); *Soares v. California*, No. 2:16-cv-00128 WBSEFB, 2016 WL 3519411, at *3-4 (E.D. Cal. June 28, 2016) (dismissing FEHA harassment claims with "general allegations" that (1) similarly situated males were better treated and not subjected to the same treatment, and (2) individual defendant made negative comments about female colleague). The harassment claims should be dismissed.

3. The Harassment Claims Are Time-Barred

The harassment claims also fail because they are time-barred. To bring a harassment claim under FEHA, an employee must exhaust administrative remedies within the prescribed time. Cal. Gov. Code § 12960, former subdivision d (before January 1, 2020, one year under the FEHA). Doe filed his DFEH charge on July 30, 2018. To be timely, the last instance of harassment must have occurred on or after August 1, 2017. Compl. at ¶ 11. But the only events occurring after that time were Kompella's promotion to Head of Engineering, Doe's failure to obtain a Director position, Kompella's alleged provision of "impossible" assignments, and the requirement that Doe submit weekly reports. Compl. ¶¶ 45-47. All are acts of personnel management. *Reno*, 18 Cal. 4th at 646-47. There are no allegations of *timely* harassment occurring on or after August 1, 2017. *Thompson v. City of Monrovia*, 186 Cal. App. 4th 860, 879-80 (2010) (affirming summary judgment where only personnel management – not harassment – occurred during limitations

period); *see Rabara v. Heartland Emp. Servs.*, No. 17-CV-03770-LHK, 2019 WL 1877351, at *19-20 (N.D. Cal. Apr. 26, 2019) (granting summary judgment where only alleged wrongdoing within limitations period was personnel management).

The harassment claim, and derivative failure to prevent harassment claim, should be dismissed.

D. Plaintiff's FEHA Retaliation Claim Fails for Lack of Essential Elements

The retaliation claim fails because the DFEH does not sufficiently allege protected conduct or adverse employment actions. To assert a *prima facie* retaliation claim under FEHA, DFEH must show that (1) Doe engaged in protected activity; (2) Cisco thereafter subjected him to an adverse employment action; and (3) a causal link exists between the two. *Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1453 (2002). The retaliation claim fails because Doe's allegations fail to meet these threshold requirements.

1. No Protected Activity

The DFEH conclusorily alleges that Iyer and Kompella retaliated against Doe "for opposing their discriminatory and harassing conduct by confronting Iyer" and states that he filed "internal discrimination complaints." Compl. ¶ 74. Specifically, DFEH alleges that in 2016 and the first half of 2017, Doe complained internally at Cisco that Iyer confirmed his caste to colleagues.[8] *Id.* ¶ 33, 37-39, 41-43. Regardless of whether this is true, the allegation is insufficient. Under the FEHA, Doe must complain of conduct made unlawful under that statute. Cal. Gov't Code § 12940(h) (illegal to retaliate against "any person because the person has opposed any practices forbidden under this part"). Because caste is not protected under the FEHA, Doe's allegations do not state a retaliation claim. As Doe acknowledges, however, Cisco nevertheless thoroughly investigated his complaint twice. In either instance, a different ER person investigated Doe's complaint. Compl. ¶¶ 33, 37-39, 41-43. Cisco could not substantiate Doe's complaints of caste-based discrimination and retaliation. *Id.* ¶¶ 39, 43.

To the extent DFEH contends that Doe's complaints are protected based on a "reasonable

[8] Doe does not allege he was retaliated against for complaining that Iyer discriminated against Muslims. Compl. ¶¶ 72-81.

belief" that he was complaining about FEHA violations, the applicable case law disagrees. Under the FEHA, protected conduct may include opposing practices "that an individual reasonably believes to exist and believes to be a violation of" the FEHA. 2 C.C.R. § 11021(a)(1)(C). But to be a "reasonable belief", it must (among other things) invoke a protected class, which Doe did not do. *Miller v. Dep't of Corr.*, 36 Cal. 4th 446, 474-75 (2005) (finding that plaintiffs engaged in protected activity when they complained in good faith about sexual favoritism, which they believed violated FEHA). Doe did not reasonably believe he was complaining about conduct prohibited by the FEHA nor did he invoke a protected class, and so has not stated a *prima facie* retaliation claim. *Cantu*, 4 Cal. App. 4th at 879. Notwithstanding that Cisco thoroughly investigated Doe's complaint twice, the fact remains that for purposes of this case, Doe invoked no protected class through his internal complaint.

2. No Adverse Action

Separately, the retaliation claim fails because the DFEH has not alleged any actionable adverse action. The DFEH alleges that Iyer and Kompella subjected Doe to the following adverse actions: (1) "reassigning his job duties," (2) "isolating him from colleagues," (3) "giving him assignments that were impossible to complete under the circumstances," (4) "denying him work opportunities that could have led to a raise," (5) "denying him a raise," (6) "denying him promotions," (7) disparaged him, (8) mispresented his performance, (9) told employees that they should avoid working with him, and (10) required Doe to submit weekly status reports. Compl. ¶¶ 35-36, 40, 45, 74. But there is no explanation of what "reassigning" Doe's duties meant, except that members were moved from his team. *Id.* ¶ 35. As to "isolating" Doe from colleagues, there is no explanation what this means, but in any event, "isolating" Doe is not an adverse employment action. *Kelley*, 196 Cal. App. 4th at 212 (citing *Brooks*, 229 F.3d at 928 in FEHA action).

The DFEH's conclusory allegations that Defendants gave Doe unspecified assignments "impossible to complete under the circumstances," denied him "opportunities that could have led to a raise," denied him a raise and promotions, disparaged him, misrepresented his performance, told unspecified employees at unspecified times that they should avoid working with him, and required Doe to submit weekly status reports provide no supporting factual detail. The DFEH

does not specify what these assignments were, how Doe's performance was misrepresented, or what work opportunities were denied Doe. The Complaint fails to sufficiently apprise Cisco of the claims against it. *Metzenbaum v. Metzenbaum*, 86 Cal. App. 2d 750, 753 (1948) (complaint must include essential facts of case with reasonable precision and with sufficient clarity and particularity that a defendant may be apprised of the nature, source, and extent of the causes of action); *Czajkowski v. Haskell & White, LLP*, 208 Cal. App. 4th 166, 173 (2012) (contentions, deductions or conclusions of fact or law insufficient).

Moreover, as to the allegation that Doe should have received a raise, the only alleged denial of a raise occurred in October 2016, before Doe ever complained. Cisco could not have retaliated against Doe for complaints he had not yet made. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005). The retaliation claim, and derivative failure to prevent retaliation claim, should be dismissed.

3. No Causal Link

The retaliation claim also fails because there cannot be a causal link between non-existent protected activity and the purported adverse action, *Yanowitz*, 36 Cal. 4th at 1046, or protected activity that occurred before the adverse action. *Id.*

V. CONCLUSION

For the reasons stated above, Cisco respectfully requests that the Court sustain its demurrers in all respects.

Dated: November 3, 2020

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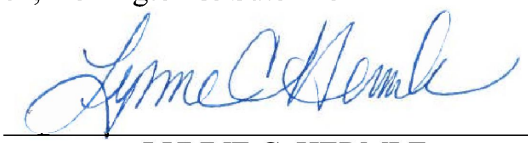
By 

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