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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CARMEN HANSEN, Plaintiff and Appellant, v. THE PERMANENTE MEDICAL GROUP, INC., et al., Defendants and Respondents.	C036339 (Super. Ct. No. 98AS02293) OPINION ON REHEARING

Plaintiff Carmen Hansen, in propria persona, appeals from a summary judgment in favor of defendants The Permanente Medical Group (PMG), and its employees Clifford Skinner, Kevin Keck, and Stuart Hahn, on her complaint which asserted numerous causes of action arising out of her employment as a pool physician at PMG from 1989 to 1992.

Plaintiff contends the court overlooked triable issues of fact with respect to her claims for sex discrimination, denial of fair procedure, defamation, and punitive damages. She further asserts the trial court committed various procedural errors in connection with the motion for summary judgment. We affirm.

SEE CONCURRING OPINION

FACTUAL BACKGROUND

Plaintiff worked as a pool physician for PMG from December 1989 to September 1992; her direct supervisor was defendant Dr. Stuart Hahn. According to PMG's guidelines, pool physicians are "employed on a temporary, intermittent basis to fill temporary need. They are compensated on a per unit or hourly basis without fringe benefits."

It is undisputed that several times during plaintiff's tenure at PMG, Dr. Hahn spoke to her with concerns about her interpersonal relations with patients, staff, and colleagues. Specifically, the following incidents occurred:

On December 7, 1990, Dr. Hahn met for one hour with plaintiff to discuss complaints from medical assistants, nurses, and physicians about her behavior, including rudeness, stubbornness, and inflexibility, playing the radio while other physicians were working, using crude language, and acting in a demeaning manner toward nurses and staff. Dr. Hahn expressed his hope that by bringing the complaints to her attention, plaintiff would change her behavior. However, according to Dr. Hahn, plaintiff "appeared to be very defensive about the criticism, and did not appear to have much ability to see any validity to the concerns."

In late April 1992, Dr. Hahn received a letter from a patient complaining about plaintiff's behavior. The letter alleged that plaintiff had called the patient's complaints

“ridiculous,” was verbally abusive, “slammed my registration papers down” and had refused to examine the patient. On May 12, 1992, Dr. Hahn again met with plaintiff to relay his concerns about plaintiff's interactions with coworkers and patients. He discussed patient complaints about plaintiff, including the April letter, as well as concerns expressed by fellow physicians. He told plaintiff that, while she clearly had some good qualities as an employee, she needed to get along with her coworkers and patients. He warned that if plaintiff's difficulties involving relations with coworkers and patients continued, PMG would not be able to continue her employment.

During the first half of August 1992, Dr. Hahn was advised that on two occasions, plaintiff had refused to answer calls from nurses who were staffing the medical advice line. He was also advised that, contrary to PMG policy, plaintiff was refusing to see certain patients whom she believed were coming in to get narcotics. On August 25, Dr. Hahn sent plaintiff a handwritten note advising plaintiff of the reports and reminding her that all pool physicians were required to assist the advice nurses and to see “difficult, possibly drug seeking patients.” The note concluded “I am expecting your cooperation in this area.”

Plaintiff sent Dr. Hahn a written response, complaining that the nurses had engaged in “totally rude” behavior in ringing her phone; she also insisted that she

was not required to answer all phone calls, nor was she required to see “every patient that comes thru [*sic*] here.” The letter concluded “I know you won’t back me up if I get a patient complaint. Slavery was abolished in 1864!”

In September 1992, Dr. Hahn telephoned plaintiff and informed her she was being laid off as of October 1, 1992. The decision was based on budgetary considerations, as well as plaintiff's longstanding interpersonal difficulties with coworkers and patients.

From 1993 until 1997, plaintiff worked as a physician for Sutter Ambulatory Care Corporation (Sutter). In May 1994, PMG physician-in-chief Dr. Clifford Skinner received an evaluation form from Sutter, entitled “Credentials Committee Evaluation Form - Other Affiliations” (credentials form). The credentials form was utilized by Sutter to obtain information about the fitness, qualifications, and character of physicians who were either applying for employment or currently employed at Sutter. It was accompanied by a written release from plaintiff, authorizing PMG to provide information to Sutter.

In addition to requesting an evaluation of plaintiff's performance in various aspects of medical practice, the credentials form posed the following question:

“Has the applicant been subject to any disciplinary action such as admonition, reprimand, suspension, reduction of privileges, or termination?”

After consulting with Dr. Hahn and Dr. Hahn's immediate supervisor Dr. Keck regarding plaintiff's employment history, Dr. Skinner responded "Yes," with the notation "See below." In the space below captioned "COMMENTS," Dr. Skinner wrote a comment, which included the following:

"Doctor Hansen had some interpersonal difficulties both with patients as well as fellow physicians and professional staff."

In 1996, plaintiff filed a lawsuit against Sutter for sex discrimination and related claims. In May 1997, in response to a request for production of documents in the Sutter case, PMG produced a copy of the credentials form questionnaire completed by Dr. Skinner. Plaintiff contends this was the first time she became aware of the form.

PROCEDURAL BACKGROUND

Two months after finding out about the comment on the credentials form, plaintiff filed this action against PMG, Dr. Keck, and Dr. Skinner. The complaint was amended six times and discovery was conducted until cut off by the trial court nearly three years later.

Plaintiff's seventh amended complaint (the complaint) posits 12 causes of action including wrongful discharge, common law sex discrimination, defamation, denial of fair procedure, negligence, and infliction of emotional distress. All arise from plaintiff's discovery, in May 1997, that PMG considered her prior conversations with her

superiors during her employment to be “disciplinary action” as reported on the credentials form.

PMG filed a motion for summary judgment, asserting that all of the asserted causes of action were barred for various reasons. Plaintiff's opposition emphasized her sex discrimination claim. She claimed to have “amassed evidence demonstrating that male physicians were not subjected to ‘disciplinary action’ (as defined by Defendants) even though their conduct was either comparable or, in many instances, much more egregious than the conduct that Defendants have contended that Plaintiff engaged in.”

The trial court granted the motion, in a multi-page order. Its reasons may be summarized as follows: (1) plaintiff's defamation and negligence claims are untenable because Dr. Skinner’s statements in the credentials form were absolutely privileged; (2) her wrongful termination, breach of contract, and breach of implied covenant of fair dealing claims fail because she did not establish her employment was anything other than as an “at will” temporary pool physician; (3) her fraud claim was not viable because PMG owed no duty to disclose to plaintiff that admonishments by her superiors constituted “discipline”; (4) her sex discrimination claim fails for lack of evidence and is barred by the statute of limitations; (5) her “fair procedure” claim is unsustainable because plaintiff was not subject to exclusion from practicing medicine and such claim is not

available against an employer on behalf of a former employee; (6) her retaliation claim was abandoned; and (7) her "wrongful discipline in violation of public policy" claim fails because she did not produce admissible evidence that PMG engaged in conduct repugnant to public policy.

In an effort to forestall final entry of judgment, plaintiff filed a flurry of motions for relief pursuant to Code of Civil Procedure sections 473, 657, and 663, for leave to amend and for reconsideration. Each of these motions was denied.

DISCUSSION

Plaintiff's appeal may be segregated into two components: (1) substantive challenges to the summary adjudication as to several causes of action, and (2) various assignments of procedural error in connection with the summary judgment proceedings.

I

Substantive Claims of Error

Although the trial court issued a ruling adjudicating adversely to her every one of the 12 causes of action in the complaint, on appeal plaintiff contests only the dismissal of her claims for defamation, sex discrimination, denial of fair procedure, and punitive damages. We discuss each seriatim.

A. Applicable Principles

A motion for summary judgment is properly granted "if all the papers submitted show that there is no triable issue as to any material fact and that [they are] entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A summary judgment motion is directed to the issues framed by the pleadings. (*Ann M.* v. *Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673; *Addy* v. *Bliss & Glennon* (1996) 44 Cal.App.4th 205.) Further, the moving party must establish he or she is entitled to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Union Bank* v. *Superior Court* (1995) 31 Cal.App.4th 573, 579.) A defendant proves a claim has no merit if he or she establishes one or more of the elements of the cause of action cannot be separately established. (Code Civ. Proc., § 437c, subd. (n)(1); *Harper* v. *Wausau Ins. Co.* (1997) 56 Cal.App.4th 1079, 1085.)

"We review the trial court's decision de novo, considering all of the evidence the parties offered in support of and against the motion, and the uncontradicted inferences reasonably deducible from the evidence, except that to which the court sustained objections. [Citation.]" (*Paz* v. *State of California* (2000) 22 Cal.4th 550, 557.) The trial judge's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale. (*Szadolci* v. *Hollywood Park Operating Co*. (1993) 14 Cal.App.4th 16, 19.)

B. Defamation

The complaint alleges that on or about May 24, 1994, defendants Drs. Skinner, Hahn, and Keck defamed plaintiff by publishing that she had been subjected to disciplinary action while at PMG. The defamation was allegedly concealed from plaintiff for three years and was not discovered until May 1997.

The evidence showed that the only publication to which this allegation could refer was the credentials form answer completed by Dr. Skinner. The trial court determined, however, that nothing contained in the form could provide the basis for a defamation claim because all statements therein were protected by the absolute privilege of Civil Code section 43.8 (section 43.8). We agree.

Section 43.8 provides in pertinent part, that "there *shall be no monetary liability* on the part of, and *no cause of action for damages shall arise* against, any person on account of the communication of information in the possession of such person to any hospital, hospital medical staff, . . . professional licensing board or division, committee or panel of such licensing board, . . . peer review committee, [or] quality assurance committees . . . when such communication is intended to aid in the evaluation of the qualifications, fitness, character, or insurability of a practitioner of the healing . . . arts." (Italics added.)

The privilege set forth in this section is unconditional and absolute; it is not affected by the existence of malice. (*Johnson* v. *Superior Court* (1994) 25 Cal.App.4th 1564, 1569 (*Johnson*).) It is undisputed that the credentials evaluation form was sent by Sutter to PMG for the precise purpose of aiding in the evaluation of plaintiff's qualifications, fitness, and character. Thus, the answers contained therein were cloaked with the privilege and cannot give rise to a tort cause of action.

Plaintiff's only rejoinder is that Dr. Skinner's response did not communicate "information" within the meaning of the statute. She refers us to a dictionary definition of "information" as "knowledge . . . concerning a particular fact" and the definition of "fact" as "something known to exist or to have happened." Plaintiff would thus limit the protection of section 43.8 to communications only if they are truthful and accurate. We are satisfied the Legislature did not intend to restrict the statute in such a drastic manner.

As *Johnson* points out, the history of section 43.8 reveals that the legislative immunity provided therein was intended to be ***absolute***, i.e., unqualified. Indeed, the Legislature overrode the lobbying effort of the Union of American Physicians and Dentists, who "urged that no immunity be granted to persons who 'knowingly [provide] false or malicious information.'" (25 Cal.App.4th at p. 1569.)

Plaintiff's proposed definition of “information” (i.e., communications which are factual in the sense of being truthful) would effectively eviscerate the purpose of section 43.8’s grant of absolute immunity since, under it, the privilege could be defeated by a showing that the information communicated was *false*. That interpretation of the statute is directly contrary to what the Legislature intended when it decided to make the privilege absolute. (*Johnson*, *supra,* 25 Cal.App.4th at p. 1569.)

Because the privilege in section 43.8 is absolute, it is irrelevant whether the information communicated by Dr. Skinner on the credentials form was false or uttered maliciously. Plaintiff cannot maintain an action for defamation.

C. Denial of Fair Procedure

We must construe the absolute privilege set forth in section 43.8 as preclusive, not only of plaintiff's defamation count, but all derivative tort claims based on information conveyed in the credentials form, including the fair procedure cause of action. Although there is no case construing section 43.8 directly on point, we find a strong analogy in cases interpreting another closely related absolute privilege, Civil Code section 47, subdivision (b), which protects statements made in the course of, or to further the object of judicial or quasi-judicial proceedings. (See *Rothman* v. *Jackson* (1996) 49 Cal.App.4th 1134, 1140.)

The California Supreme Court has consistently held that the purpose of Civil Code section 47, i.e., to guarantee freedom of access to the courts without fear of being harassed by subsequent litigation, protects the maker of a privileged statement not only from defamation and related claims, but from all derivative tort liability. (*Silberg* v. *Anderson* (1990) 50 Cal.3d 205, 213, 218; *Heller* v. *Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 45.) As one appellate court put it, "[t]he conclusion that defendants' actions were privileged (even if, as alleged, wrongful and harmful) necessarily means plaintiff *has no tort remedy against them*." (*O'Keefe* v. *Kompa* (2000) 84 Cal.App.4th 130, 135, italics added.)

Here too, section 43.8's overriding goal, which is to provide medical practitioners and staff the utmost freedom to communicate with peer review committees, quality assurance boards and the like without fear their disclosures could be used against them as the basis for a lawsuit, would be subverted if it could be evaded by the simple device of artful or imaginative pleading. Consequently, the absolute nature of the privilege embraces within its scope "'all torts other than malicious prosecution, . . .'" [1] (*Rubenstein* v. *Rubenstein* (2000) 81

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[1] Although our courts have held that Civil Code section 47 does not immunize a defendant from a malicious prosecution suit (e.g., *Harris v. King* (1998) 60 *[Continued]*

Cal.App.4th 1131, 1147, quoting *Harris* v. *King, supra,* 60 Cal.App.4th at p. 1188; accord, *Edwards* v. *Centex Real Estate Corp*. (1997) 53 Cal.App.4th 15, 28-29.)

At the heart of plaintiff's claim that her right to fair procedure was violated lies the allegation that she was "disciplined" by PMG without proper procedural safeguards. Yet the only evidence of "discipline" is the answer to the credentials form question "Has the applicant been subject to any *disciplinary action* such as admonition, . . ." etc. (Italics added.) Indeed, in discovery, plaintiff freely admitted that she was unaware of any "disciplinary action" against her until 1997, almost five years after her separation from PMG, when she discovered the entry *on the credentials form,* indicating that she had been disciplined.

In other words, plaintiff's entire fair procedure claim hinges upon Dr. Skinner's *characterization* of plaintiff's interactions with her supervisors as "discipline." Without the entries on the credentials form, plaintiff's fair procedure claim evaporates. However, as demonstrated, the contents of the form are absolutely protected —— plaintiff cannot recover in tort based on anything written therein.

Cal.App.4th 1185, 1188), it is difficult to imagine applying that exception in the context of a medical evaluation communication, which is the focus of section 43.8. In any event, malicious prosecution is not among plaintiff's causes of action.

Since, without the form plaintiff has no claim, summary judgment was properly granted on this cause of action.

The fair procedure claim is also untenable because plaintiff failed to provide competent evidence that PMG took action to *exclude* or *expel* her from any private professional organization (*Hackethal* v. *California Medical Assn*. (1982) 138 Cal.App.3d 435, 441), or "foreclosed [her] from pursuing [her] trade or profession with another employer." (*Crosier* v. *United Parcel Service, Inc*. (1983) 150 Cal.App.3d 1132, 1141.) A single sentence on an evaluation form regarding a former employee does not, as a matter of law, constitute the type of exclusionary conduct sufficient to trigger a denial of fair procedure cause of action.

D. Sex Discrimination

Plaintiff's complaint included a cause of action for "common law" sex discrimination, as distinguished from a statutory claim of employment gender bias under the California Fair Employment and Housing Act (FEHA). (Gov. Code, § 12900 et seq.)[2] The trial court dismissed that claim. We concur, on two grounds: (1) the privilege of

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[2] The California Supreme Court has ruled that the enactment of the FEHA did not displace pre-existing traditional common-law remedies for discriminatory employment practices which violate this state's public policy. (*Rojo* v. *Kliger* (1990) 52 Cal.3d 65, 79-82.)

section 43.8 bars the cause of action, and (2) the claim is also barred by the statute of limitations.

1. Application of Section 43.8

Plaintiff contends the trial court improperly overlooked evidence of "rampant preferential treatment" of male physicians at PMG. She argues that, in opposition to summary judgment, she produced an impressive array of evidence from the personnel files of PMG indicating that male physicians who engaged in misconduct at least as bad or worse than hers did not suffer the stigma of having been subjected to "disciplinary action," as plaintiff had been. According to plaintiff, this evidence was sufficient to justify an inference by a trier of fact that plaintiff was unfairly singled out because of her gender.

But, as plaintiff is eager to point out, there is nothing in her personnel file indicating she was "disciplined" *during* her employment with PMG. Under plaintiff's own theory of recovery, no one at PMG characterized her interactions with superiors as "discipline" until the response to the Sutter credentials form, written two years after she left PMG's employ. Plaintiff's cause of action thus runs afoul of section 43.8's privilege. Dr. Skinner's communication cannot form the basis of a sex discrimination claim any more than it could a cause of action for defamation. The privilege protects defendants from exposure to tort liability, *regardless of the legal theory of relief*. Thus,

plaintiff's sex discrimination claim, to the extent it is based on the “discipline” characterization appearing in the credentials form, is subsumed by the absolute privilege set forth in section 43.8.

2. Statute of Limitations

To the extent plaintiff’s sex discrimination claim is based on conduct which took place *during* her employment at PMG from 1989 to 1992, the trial court ruled the action, filed in 1997, was barred by the statute of limitations. Plaintiff insists her action was timely under the doctrine of equitable tolling. The trial court was correct.

A one-year statute of limitations applies to claims of discrimination in violation of public policy. (Code Civ. Proc., § 340, subd. (3); *Barton* v. *New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1209.)

Under the doctrine of equitable tolling in a discrimination case, “[i]f a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information [s]he needs.” (*Santa Maria* v. *Pacific Bell* (9th Cir. 2000) 202 F.3d 1170, 1178 (*Santa Maria*).) Plaintiff asserts that she could not, with reasonable diligence, have discovered that she was subject to sex discrimination until 1997. Yet, as the trial court pointed out, her discovery admissions show inquiry notice of such a claim much earlier.

Plaintiff never denied that she received oral reprimands while employed at PMG. Moreover, in her written response to Dr. Hahn, she protested that the complaints about her were unjustified and complained that her supervisors would not back her up. Her deposition testimony also established that (1) while she was working at PMG she was subject to a sexually hostile work environment, and (2) on many occasions she complained to her superiors about a sexually hostile work environment while working there, all of which went unheeded. Taken together, these are more than sufficient facts to give plaintiff reasonable suspicion of a potential sex discrimination claim as early as 1992.

In the delayed discovery context, "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. *So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her*." (*Jolly* v. *Eli Lilly & Co*. (1988) 44 Cal.3d 1103, 1111, italics added.)

We likewise reject plaintiff's claim that equitable tolling of her claim is available because PMG misled her into believing that the admonishment did not constitute

"discipline," thereby disguising the discriminatory nature of its conduct.

Alleged concealment of the employer's true discriminatory motives for its adverse employment actions cannot form the basis for application of the doctrine of equitable tolling. Acceptance of such a concept would "merge the tolling doctrine with the substantive wrong, and would virtually eliminate the statute of limitations" in discrimination cases unless the employer overtly characterized its actions as arising from discriminatory animus. (*Santa Maria*, *supra*, 202 F.3d at p. 1177; *Cada* v. *Baxter Healthcare* Corp. (7th Cir. 1990) 920 F.2d 446, 451.)

Furthermore, "[f]raudulent concealment [as a basis for tolling] necessarily requires *active conduct by a defendant*, above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time." (*Santa Maria*, *supra*, 202 F.3d at p. 1177, italics added.) Plaintiff's concealment theory is not predicated on active conduct. Rather, she bases her concealment claim on PMG's *failure* to tell her during her term of employment, that she had been subject to "discipline." Such nonfeasance cannot form the basis for a tolling of the statute.

For all the above reasons, plaintiff's sex discrimination claim was properly dismissed.

E. Punitive Damages

We have concluded that none of plaintiff's causes of action was improperly adjudicated adversely to her. Because the net result is that she is not entitled to compensatory damages, we dismiss as moot plaintiff's argument that the trial court erroneously struck her cause of action for punitive damages. (*Kizer* v. *County of San Mateo* (1991) 53 Cal.3d 139, 147 [“In California, as at common law, actual damages are an absolute predicate for an award of exemplary or punitive damages.”].)

II

Procedural Claims

Plaintiff raises a number of procedural claims in connection with the summary judgment order. None have merit.

1. Striking Rebuttal and Supplemental Opposition Papers

Plaintiff first contends the court erroneously ordered stricken her rebuttal and supplemental opposition papers in response to summary judgment. We detect no error. As the court correctly noted, there is no provision in the summary judgment statute for the filing of supplemental or rebuttal opposition papers without leave of court merely because the court, sua sponte, has continued the date of the hearing on the motion.

In any event, we have reviewed the cited supplemental papers, and conclude none would have affected defendants’

entitlement to judgment under the analysis we have set forth. Thus, any error in striking them was not prejudicial.

2. Motion for Reconsideration

The order granting summary judgment was filed on June 1, 2000. Plaintiff filed a motion for reconsideration on June 15. Judgment was entered the same day. Plaintiff claims the court erred in filing the judgment before ruling on the reconsideration motion. She cites *APRI Ins. Co.* v. *Superior Court* (1999) 76 Cal.App.4th 176, 181 for the principle that a court should not enter judgment before ruling on a pending motion for reconsideration.

However, *APRI* also recognized that, where judgment is entered before the court rules on a motion for reconsideration, such entry cuts off the court's jurisdiction to rule on the motion. (76 Cal.App.4th at p. 181 ["'Once judgment has been entered, . . . the court may not reconsider it and loses its unrestricted power to change the judgment.'"].)

This brings us to the issue of prejudice. The only way plaintiff could have suffered prejudice by the court's failure to rule on the motion for reconsideration would be if the motion had any merit. It did not. The moving papers are simply a rehash of plaintiff's contentions made previously in the trial court. Plaintiff did not set forth any "'"newly discovered evidence, material for the party making the application, which [she] could not, with

reasonable diligence, have discovered and produced"'" prior to the hearing. (*Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1467.) Thus, no harm, no foul.

3. Refusal to Vacate Judgment

Plaintiff contends the court abused its discretion in failing to afford her relief from the judgment because she was "surprised" by the court's ruling that damages were not available as a remedy for her fair procedure cause of action. She notes that defendants never raised this as a ground in their moving papers.

Again, plaintiff raises harmless error, at best. As indicated in part I, section C, *ante*, plaintiff's fair procedure cause of action suffered from defects far more serious than the unavailability of a money damages remedy. We therefore need not address this issue further.

4. Reopening Discovery

Plaintiff claims the court erred in refusing to grant a continuance and reopen discovery, in order to properly authenticate certain documents she filed in opposition to summary judgment. The documents pertained to PMG's allegedly disparate disciplinary treatment of male physicians as compared to plaintiff, and were objected to by defendants as not having been properly authenticated. Plaintiff first requested the continuance in a supplemental memorandum filed in response to defendants' opposition.

As shown in part I, section D, *ante*, plaintiff's sex discrimination cause of action was barred on grounds of

privilege and the statute of limitations. Regardless of whether properly authenticated files of PMG's male physicians showed disparate treatment based on gender, defendants were entitled to judgment. Consequently, plaintiff suffered no prejudice by the court's failure to grant the sought-after continuance.

5. Leave to Amend

Finally, plaintiff contends the trial court erred in refusing to allow her to amend her complaint in several different ways, in order to cure defects in the complaint which the trial court assertedly identified and ruled on as a motion for judgment on the pleadings. She also sought to add new causes of action for violation of Labor Code section 132a and unfair competition. Plaintiff relies on the general rule liberally allowing amendments before trial.

"A motion for summary judgment may effectively operate as a motion for judgment on the pleadings." (*Hejmadi* v. *AMFAC, Inc*. (1988) 202 Cal.App.3d 525, 535.) On summary judgment "[w]here the complaint is challenged and the facts indicate that a plaintiff has a good cause of action which is imperfectly pleaded, the trial court should give the plaintiff an opportunity to amend." (*Kirby* v. *Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1067.) That was not the case here.

Plaintiff's causes of action were not viable owing to defects of substance, not pleading. None of the offered

amendments would help plaintiff escape from the twin prohibitions of section 43.8's absolute privilege and the statute of limitations.

"Moreover, 'even if a good amendment is proposed in proper form, unwarranted delay in presenting it may —— of itself —— be a valid reason for denial.'" (*Record* v. *Reason* (1999) 73 Cal.App.4th 472, 486, citing *Roemer* v. *Retail Credit Co.* (1975) 44 Cal.App.3d 926, 939-940.) The record shows plaintiff was permitted to amend her complaint six times, over the course of three years. The trial court did not abuse its discretion in refusing to grant plaintiff yet another opportunity to delay the inevitable.

DISPOSITION

The judgment is affirmed.

CALLAHAN

_____, J.

I concur:

DAVIS

_____, Acting P.J.

Morrison, J.

I concur in the result. However, I disagree that the privilege conferred by Civil Code section 43.8 is an absolute privilege. The privilege is qualified by the statutory requirement that the communication must be "intended to aid in the evaluation . . . ." This qualification excludes from the protection of the privilege information that is knowingly false or known not to be relevant to the subject's qualifications.

MORRISON
_____, J.