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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 U.S. EQUAL EMPLOYMENT
12 OPPORTUNITY COMMISSION,

13 Plaintiff,

14 ELSA PEREZ

15 Plaintiff-Intervenor

16 v.

17 PC IRON, INC.,

18 Defendant.
19

Case No.: 16-cv-02372-CAB-(WVG)

**ORDER RE MOTIONS FOR
SUMMARY JUDGMENT**

[Doc. Nos. 48, 50, 51, 54]

20 This matter is before the Court on a total of four motions for partial summary
21 judgment. The motions have been fully briefed, and the Court deems them suitable for
22 submission without oral argument. Each motion is addressed below.

23 **I. Background**

24 Plaintiff-Intervenor Elsa Perez worked for Defendant P.C. Iron, Inc. (“PCI”)
25 between 2003 and 2011¹ in the position of Assistant Office Manager. Her job
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¹ Perez left PCI for another job in 2006, and PCI rehired her in 2007.

1 responsibilities included answering the phone, bookkeeping, filing, and general clerical
2 work. [Doc. No. 54-5 at 16.] In February 2011, Perez became pregnant. According to
3 Perez and Plaintiff Equal Employment Opportunity Commission (“EEOC”), PCI’s Chief
4 Executive Officer Jerry Anderson and Office Manager Marlene Suits subjected her to a
5 hostile work environment on the basis of her pregnancy. During her deposition, Perez was
6 asked: “Has anyone at PC Iron ever made any comments to you that you believe were
7 inappropriate?” [Doc. No. 50-3 at 11.] In response, she said that Anderson and Suits made
8 between 5 and 20 inappropriate comments between 2003 and 2011 when she worked at
9 PCI. [Doc. No. 50-3 at 12-15.] She attributed “six or more” such comments to 2011.
10 [Doc. No. 50-3 at 18.] However, she was only able to provide details about the following
11 comments that occurred in 2011 during her pregnancy:

- 12 • When Perez told Anderson and Suits in March 2011 that she was pregnant,
13 Suits “said that it was a stupid idea; that [Perez] shouldn’t be having any more
14 kids since [she] was a single mom already with two kids.” [Doc. No. 50-3 at
15 16, 22.]
- 16 • While at work in June or July 2011, Perez discovered that she was bleeding
17 while in the restroom. When she told Suits, Suits “seemed like she didn’t
18 believe” Perez. Perez then went to the hospital, and while she was there, Suits
19 kept calling her asking when Perez would be coming back to work. [Doc. No.
20 50-3 at 17, 23.]
- 21 • In June or July 2011, Suits asked Perez questions about her maternity leave
22 and when they looked up how much leave Perez was entitled to, Suits told
23 Perez, “why would [she] need that much time if all [she] d[id] was sit on [her]
24 butt all day and don’t do nothing, that [she] didn’t need that much time off.
25 And [Suits] would ask [Perez] constantly what [her] plan was because [Suits]
26 didn’t want to be left holding the bag. So [Suits] wanted to know what [Perez]
27 was going to do with [her] baby when the baby was born.” [Doc. No. 50-3 at
28 20, 24.]

- 1 • In June or July 2011, Suits told Perez that she would not be allowed to work
2 part-time and that she would have to find someone to take her baby to
3 appointments because PCI was not going to let Perez leave all the time. [Doc.
4 No. 50-3 at 20-21, 24-25.]

5 At her deposition, Perez was unable to remember any other inappropriate comments made
6 by PCI in 2011. [Doc. No. 50-3 at 22, 25.]

7 Perez’s last day of work before maternity leave was September 28, 2011. [Doc. No.
8 50-3 at 30.] She was scheduled to return to work on December 12, 2011. At the end of
9 November or beginning of December 2011, Suits called Perez to confirm that Perez
10 intended to return to work at the conclusion of her maternity leave. According to Perez,
11 Suits said that she needed to know for sure because PCI wanted to hire the temporary
12 employee who had been filling in while Perez was on leave. [Doc. No. 50-3 at 30.] When
13 Perez confirmed her intent to return, Suits told her that she needed to have childcare in
14 place. [*Id.* at 31.]

15 On or around Monday, December 5th, Perez went to PCI’s office to ask Suits to
16 complete some forms that would help Perez get childcare through a low-income program
17 at the YMCA. [*Id.* at 31-32.] Perez told Suits that she needed the forms by Wednesday,
18 December 7th. In response, Suits told Perez that “she was trying to run a business and that
19 she would try to have it done for [Perez] by Wednesday.” [*Id.* at 32-33.] Perez called Suits
20 the next day to see if she had completed the forms, and Suits told her that she had not, but
21 that she would try to have it done by Wednesday. [*Id.* at 33.] According to Perez, on
22 Friday, December 9th, Suits called and told her that she “didn’t need to return back to work
23 that following Monday; that [Perez] was being let go because [Suits] liked the temp better;
24 that [Suits] was doing [Perez] a favor by letting [Perez] stay home to be home with [Perez’s
25 baby].” [*Id.* at 34.]

26 On August 24, 2012, Perez filed a charge of discrimination with the EEOC. [Doc.
27 No. 50-3 at 38.] On the same day, the California Department of Fair Employment and
28 Housing (“DFEH”) issued a notice to PCI and Perez that Perez’s complaint was referred

1 by the EEOC and that the EEOC would be responsible for processing the complaint. [Doc.
2 No. 51-3 at 47.] The DFEH's notice also notified Perez that it was her right-to-sue notice,
3 and any civil action "must be brought within one year from the date of this notice," but that
4 "this one-year period will be tolled during the pendency of the EEOC's investigation of
5 your complaint." [Id.]

6 On June 1, 2016, after conducting an investigation, the EEOC issued a letter of
7 determination to PCI that stated:

8 The Commission finds that there is reasonable cause to believe that the
9 Charging Party was discharged because of her sex (female, pregnancy) in
10 violation of Title VII of the Civil Rights Act of 1964, as amended.

11 During the course of the investigation, the Commission found evidence that
12 the Charging Party was subjected to a hostile work environment because of
13 her sex (female, pregnancy) in violation of Title VII of the Civil Rights Act
14 of 1964, as amended. During the course of the investigation, the Commission
15 also found evidence of commingling of medical information in Charging
16 Party's personnel file.

17 The Commission finds reasonable cause to believe that Respondent subjected
18 the Charging Party to a hostile work environment because of her sex (female,
19 pregnancy). The Commission also finds reasonable cause to believe that the
20 Respondent failed to maintain confidential medical records in a separate
21 medical file, i.e., commingling of medical information with personnel files, in
22 violation of 29 C.F.R. § 1630.14(b)(1) and the ADA.

23 [Doc. No. 51-3 at 49.] After conciliation efforts between the EEOC and PCI were
24 unsuccessful, the EEOC filed the complaint in this matter on September 9, 2016. [Doc.
25 No. 1.] On December 15, 2016, the EEOC filed a first amended complaint (the "FAC"),
26 which remains the operative complaint, asserting claims for a hostile work environment
27 and discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964, based
28 on PCI's treatment of and discharge of Perez due to her pregnancy. [Doc. No. 5.]

On August 1, 2017, Perez filed a motion to intervene [Doc. No. 12], and the Court
granted the motion on August 31, 2017 [Doc. No. 19]. On September 5, 2017, Perez filed
her intervenor complaint asserting, in addition to the two Title VII claims in the FAC, six
state law claims: (1) discrimination based on pregnancy; (2) sex discrimination; (3)

1 harassment/hostile work environment; (4) failure to prevent discrimination and
2 harassment; (5) wrongful discharge; and (6) intentional infliction of emotional distress.
3 [Doc. No. 20.]

4 Four summary judgment motions are currently pending. PCI moves for summary
5 judgment on the EEOC's Title VII hostile work environment claim on the grounds that it
6 is time-barred. PCI also moves for summary judgment on Perez's Title VII hostile work
7 environment claim and her six state law claims on the grounds that they are time-barred.
8 The EEOC moves for summary judgment on eleven of PCI's affirmative defenses. Finally,
9 Perez moves for summary judgment on her wrongful discharge claim.

10 **II. Legal Standards on Summary Judgment**

11 Under Federal Rule of Civil Procedure 56, the court shall grant summary judgment
12 "if the movant shows that there is no genuine dispute as to any material fact and the movant
13 is entitled to judgment as a matter of law." Fed. R. Civ. P 56(a). To avoid summary
14 judgment, disputes must be both 1) material, meaning concerning facts that are relevant
15 and necessary and that might affect the outcome of the action under governing law, and 2)
16 genuine, meaning the evidence must be such that a reasonable judge or jury could return a
17 verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
18 (1986); *Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1229 (9th Cir.
19 2000) (citing *Anderson*, 477 U.S. at 248). When ruling on a summary judgment motion,
20 the court must view all inferences drawn from the underlying facts in the light most
21 favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
22 U.S. 574, 587 (1986). "Disputes over irrelevant or unnecessary facts will not preclude a
23 grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809
24 F.2d 626, 630 (9th Cir. 1987).

25 **III. PCI's Motion for Partial Summary Judgment Against EEOC**

26 PCI argues that it is entitled to summary judgment on the EEOC's hostile work
27 environment claim because Perez did not file her charge within the period required by the
28 statute. Pursuant to Title VII, an aggrieved party must file a charge with the EEOC either

1 180 or 300 days “after the alleged unlawful employment practice occurred.” 42 U.S.C. §
2 2000e-5(e)(1). “In a State that has an entity with the authority to grant or seek relief with
3 respect to the alleged unlawful practice, an employee who initially files a grievance with
4 that agency must file the charge with the EEOC within 300 days of the employment
5 practice; in all other States, the charge must be filed within 180 days. A claim is time
6 barred if it is not filed within these time limits.” *Nat’l R.R. Passenger Corp. v. Morgan*,
7 536 U.S. 101, 109 (2002) (hereinafter, “*Amtrak*”). Courts have found that because
8 California’s DFEH has a work-share agreement with the EEOC, the 300 day period applies
9 to claims in California. *See Tumbling v. Merced Irrigation Dist.*, No. CV F 08-1801 LJO
10 DLB, 2010 WL 11450406, at *5 (E.D. Cal. Sept. 27, 2010). Neither party argues to the
11 contrary here.

12 PCI argues that Perez’s charge to the EEOC was untimely with respect to the
13 EEOC’s Title VII hostile work environment claim. “In order for [a hostile work
14 environment] charge to be timely, the employee need only file a charge within 180 or 300
15 days of any act that is part of the hostile work environment.” *Amtrak*, 536 U.S. at 118.
16 The “court’s task is to determine whether the acts about which an employee complains are
17 part of the same actionable hostile work environment practice, and if so, whether any act
18 falls within the statutory time period.” *Amtrak*, 536 U.S. at 120.

19 Here, Perez filed her charge on August 24, 2012. The date 300 days before August
20 24, 2012, is October 29, 2011. Perez’s only contact with PCI after October 29, 2011,
21 consisted of: (1) Suits’ telephone call on or around December 2, 2011, asking if Perez
22 intended to return to work at the end of her maternity leave; (2) Perez’s visit to PCI’s offices
23 on December 5, 2011, to ask Suits to complete forms for low-income childcare; (3) Perez’s
24 telephone call to Suits on December 6, 2011, to ask if Suits had completed the forms; and
25 (4) Suits’ telephone call on December 9, 2011, notifying Perez that she was being
26 terminated. Suits’ inquiry about Perez’s return from maternity leave and her failure to
27 immediately complete Perez’s childcare forms are not discriminatory or abusive acts and
28 did not interfere with the conditions of her employment. *Brooks v. City of San Mateo*, 229

1 F.3d 917, 923 (9th Cir. 2000) (“A hostile work environment claim involves a workplace
2 atmosphere so discriminatory and abusive that it unreasonably interferes with the job
3 performance of those harassed.”). Regardless of Perez’s subjective perception of her
4 December 2011 interactions with Suits, viewed objectively, none of these acts could form
5 part of any “actionable hostile work environment practice” that Perez allegedly
6 experienced while working at PCI before going on maternity leave. *Id.* (stating that to
7 prevail on a hostile work environment claim, “[t]he working environment must both
8 subjectively and objectively be perceived as abusive.”) (quoting *Fuller v. City of Oakland*,
9 47 F.3d 1522, 1527 (9th Cir. 1995)). As a result, because none of the other acts about
10 which Perez and the EEOC complain as constituting a hostile work environment occurred
11 within 300 days of Perez filing her charge with the EEOC, Perez’s Title VII hostile work
12 environment charge to the EEOC was untimely. Accordingly, PCI’s motion for summary
13 judgment on the EEOC’s hostile work environment claim is granted.

14 **IV. PCI’s Motion for Partial Summary Judgment Against Perez**

15 PCI moves for summary judgment against Perez on her Title VII hostile work
16 environment claim on the same grounds as its motion against the EEOC. The above
17 analysis as to the untimeliness of the Title VII hostile work environment claim is equally
18 applicable to Perez’s identical claim, so PCI is entitled to summary judgment on that claim
19 in Perez’s intervenor complaint as well.

20 PCI also moves for summary judgment on Perez’s six California state law claims on
21 the grounds that they are time-barred. The timeliness of the six state law claims is
22 addressed below.

23 **A. Section 12960 Limitations Period**

24 PCI first argues that Perez’s state law claims for harassment and failure to prevent
25 harassment are time-barred because Perez did not timely file her administrative charge.
26 Pursuant California’ Fair Employment and Housing Act (“FEHA”), a complaint must be
27 filed with the DFEH within one year of the date of the alleged unlawful practice. Cal. Gov.
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1 Code § 12960(d). With respect to the timeliness of Perez’s FEHA harassment charge,² the
2 analysis is similar to the Title VII claim insofar as acts that constitute part of the harassment
3 must have occurred within the limitations period. *See generally Davis v. California Dep’t*
4 *of Corr. & Rehab.*, 484 F. App’x 124, 130 (9th Cir. 2012) (citing to the principles of *Amtrak*
5 while discussing the timeliness of a sexual harassment charge under Title VII and FEHA);
6 *Hastie v. Home Depot U.S.A., Inc.*, No. SACV16993JLSDFMX, 2016 WL 4414770, at *4
7 (C.D. Cal. Aug. 18, 2016) (noting that “it is well-established that ‘California courts
8 consistently look to Title VII for guidance in interpreting FEHA.’”) (quoting *Kohler v.*
9 *Inter-Tel Technologies*, 244 F.3d 1167, 1172 (9th Cir. 2001)). The primary difference in
10 the analysis here is that the limitations period extends back one year from Perez’s initial
11 administrative complaint instead of 300 days. Thus, the question is whether any actionable
12 harassment occurred after August 24, 2011, which was one year before Perez made her
13 initial charge with the EEOC.

14 As discussed above, none of Perez’s interactions with PCI while she was on
15 maternity leave were harassing, so just as these interactions do not make her Title VII
16 hostile work environment claim timely, they do not save her FEHA harassment claim
17 either. Because these are the only acts by PCI that Perez recalled in her deposition that
18 occurred after August 24, 2011, Perez’s initial administrative charge was not timely with
19 respect to any harassment that may have occurred before August 24, 2011.

20 Third party witness Elaine Rossi’s declaration about PCI’s treatment of Perez in
21 September 2011 does not change this result. Rossi’s declaration recounts comments
22 allegedly made by Suits to Rossi about Perez, as well as comments that Rossi recalls Suits
23 allegedly making directly to Perez while Rossi temporarily worked at PCI in September
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26 ² PCI appears to contend in its opposition to the EEOC’s summary judgment motion that Perez never
27 made a charge of hostile work environment with the EEOC. [Doc. No. 63 at 10.] Although the specific
28 allegations in Perez’s charge may support this argument, because PCI did not make the argument in PCI’s
summary judgment motion, the Court assumes as true that Perez’s original charge encompassed a Title
VII hostile work environment or FEHA harassment claim.

1 2011. [Doc. No. 48-4.] Perez, however, did not recall any of the events described in
2 Rossi’s declaration, or at a minimum did not consider them to be inappropriate, when asked
3 at her deposition to describe any comments made by someone at PCI that Perez believed
4 were inappropriate. [Doc. No. 50-3 at 22, 25.] That Perez did not recall or perceive these
5 comments as hostile or abusive means she cannot use those comments as part of the
6 harassment pattern to bring her claim within the applicable limitations period. *See*
7 *generally Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 284 (2006) (“[A]
8 plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even
9 if it objectively is so.”).

10 In sum, all of the acts that Perez identified as inappropriate occurred more than one
11 year before she filed her initial charge with the EEOC. Her harassment claim is therefore
12 time-barred pursuant to California Government Code section 12960. As a result, her
13 derivative failure to prevent harassment claim is also time-barred. *See Tumbling*, 2010 WL
14 11450406, at *19 (holding that failure to prevent harassment claim was untimely to the
15 extent it was based on claims of discriminatory conduct that were untimely).

16 **B. Section 12965 Limitations Period**

17 PCI also argues that all of Perez’s FEHA claims³ are time-barred because Perez did
18 not file her complaint in this action within the time period set by FEHA. California
19 Government Code § 12965(b) states that a “person claiming to be aggrieved may bring a
20 civil action under this part against the person, employer, labor organization, or employment
21 agency named in the verified complaint within one year from the date of [the right-to-sue]
22 notice.” *Salgado v. Atlantic Richfield Co.*, 823 F.2d 1322, 1324 n.1 (9th Cir. 1987).
23 Considering that Perez received her DFEH right-to-sue letter on August 24, 2012 [Doc.
24 No. 51-3 at 47], and did not move to intervene in this lawsuit until August 1, 2017 [Doc.

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27 ³ These claims include the harassment and failure to prevent harassment claims discussed in the previous
28 section, as well as Perez’s claims for discrimination based on pregnancy, discrimination based on sex, and
wrongful discharge.

1 No. 12], there is no dispute that Perez did not bring a civil action against PCI within one
2 year. Thus, absent any tolling of this statute of limitations, Perez’s claim would be time-
3 barred.

4 That being said, two types of tolling applied here to give Perez additional time to
5 bring her claims. Yet even with the tolling of this limitations period, Perez’s FEHA claims
6 are still untimely. First, the one-year limitations period is tolled pursuant to section 12965
7 itself when the following three requirements are met:

8 (A) A charge of discrimination or harassment is timely filed concurrently with
9 the Equal Employment Opportunity Commission and the Department of Fair
10 Employment and Housing.

11 (B) The investigation of the charge is deferred by the Department of Fair
12 Employment and Housing to the Equal Employment Opportunity
13 Commission.

14 (C) A right-to-sue notice is issued to the person claiming to be aggrieved
15 upon deferral of the charge by the Department of Fair Employment and
16 Housing to the Equal Employment Opportunity Commission.

17 Cal. Gov. Code § 12965(d)(1). However, “[t]he time for commencing an action for which
18 the statute of limitations is tolled under paragraph (1) expires when the federal right-to-sue
19 period to commence a civil action expires, or one year from the date of the right-to-sue
20 notice by the Department of Fair Employment and Housing, whichever is later.” Cal. Gov.
21 Code § 12965(d)(2). Notably, this language states when the right to commence an action
22 expires, and not when the tolling period expires. If it was the latter, a plaintiff would have
23 a year from the end of the tolling period to file suit.⁴

24 PCI does not dispute that the one-year statute of limitations was tolled pursuant to
25 section 12965(d)(1).⁵ Nor can there be any dispute that more than one year passed from

26 ⁴ The decision on which Perez relies misstates section 12965(b)(2) in this manner, holding that “the tolling
27 period set forth in Section 12965(b)(1) [sic] ends when the federal right to sue period to commence a civil
28 action expires” *E.E.O.C. v. Kovacevich “5” Farms*, No. 1:06 CV 0165 OWW TAG, 2006 WL
3060149, at *8 (E.D. Cal. Oct. 27, 2006).

⁵ More precisely, PCI’s position with respect to the harassment and failure to prevent harassment claims
is that Section 12965(d)(1) tolling does not apply because Perez did not timely file her charge, and the

1 the date of the DFEH’s right-to-sue notice. Thus, the question before the Court is on what
2 date “the federal right-to-sue period to commence a civil action” expired, because that is
3 the date on which Perez’s time for commencing an action on her FEHA claims expired.
4 *See* Cal. Gov. Code § 12965(d)(2).

5 PCI argues that the federal right-to-sue period expired when the EEOC filed its
6 complaint in this action based on the Supreme Court’s pronouncement that when “the
7 EEOC files suit on its own, the employee has no independent cause of action, although the
8 employee may intervene in the EEOC’s suit.” *E.E.O.C. v. Waffle House, Inc.*, 534 U.S.
9 279, 291 (2002). Perez, meanwhile, argues that the federal right-to-sue period did not
10 expire until her ability to intervene as a matter of right in a lawsuit filed by the EEOC
11 expired.

12 PCI’s argument is more persuasive. When the EEOC filed its complaint here, Perez
13 no longer had a right to commence a civil action on her Title VII claims. Thus, pursuant
14 to section 12965(d)(2), her time for commencing a lawsuit on her FEHA claims, to the
15 extent those claims were tolled pursuant to 12965(d)(1), expired on that date as well.
16 Accordingly, Perez’s claims were untimely even with the statutory tolling provided by
17 section 12965(d)(1). The statute of limitations analysis, however, does not end here.

18 Perez’s FEHA claims were also subject to equitable tolling during the period of the
19 EEOC’s investigation. *See Mitchell v. California Dept. of Public Health*, 1 Cal. App. 5th
20 1000, 1008 (Cal. Ct. App. 2016). This raises the question of when this equitable tolling
21 period expired. Most of the cases addressing the application of equitable tolling of FEHA
22 claims while Title VII claims are being investigated by the EEOC involve circumstances
23 when the EEOC issued a right-to-sue letter and did not file a lawsuit itself, and several of
24 these decisions were issued before the California legislature enacted section 12965(d)(2).
25 *See, e.g., Salgado v. Atlantic Richfield Co.*, 823 F.2d 1322, 1325 (9th Cir. 1987) (holding
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28 Court agrees with that position. *See* Section IV.A., *supra*. Thus, with respect to these two claims, PCI
argues in the alternative that they are time-barred pursuant to Section 12965.

1 that 12965(d)(1) limitations period was equitably tolled “until . . . the EEOC completed its
2 investigation and issued its right-to-sue letter”); *Downs v. Dept. of Water & Power*, 58 Cal.
3 App. 4th 1093, 1102 (Cal. Ct. App. 1997) (holding that “the one-year period to bring a
4 FEHA action is equitably tolled during the pendency of the EEOC investigation until a
5 right-to-sue letter from the EEOC is received”). In fact, the legislature’s enactment of the
6 tolling requirements of section 12965(d)(2) was intended to codify the holding in *Downs*.
7 Cal. Gov. Code § 12965(d)(3). None of these cases considered when the equitable tolling
8 period should end when, instead of issuing a right-to-sue letter, the EEOC files suit itself,
9 as happened here.

10 “Equitable tolling—extending the deadline for a filing because of an event or
11 circumstance that deprives the filer, through no fault of his own, of the full period accorded
12 by the statute—seeks to vindicate what might be considered the genuine intent of the
13 statute.” *McQuiggin v. Perkins*, 569 U.S. 383, 409 (2013). Thus, when a plaintiff is
14 pursuing a remedy in another forum, the statute of limitations is equitably tolled when three
15 factors are satisfied: “(1) timely notice to defendants in filing the first claim; (2) lack of
16 prejudice to defendants in gathering evidence to defend against the second claim; and (3)
17 good faith and reasonable conduct by plaintiffs in filing the second claim.” *Downs*, 58 Cal.
18 App. 4th at 1100; *see also Cervantes v. City of San Diego*, 5 F.3d 1273, 1275 (9th Cir.
19 1993) (same).

20 In her opposition, Perez conflates the statutory tolling period in section 12965(d)(2)
21 with the “judicially created doctrine” of equitable tolling. *See Mitchell*, 1 Cal. App. 5th at
22 1008 (holding that the plaintiff was entitled to equitable tolling despite not being entitled
23 to statutory tolling pursuant to section 12965(d)(2)). These are separate tolling periods
24 with separate requirements. Section 12965(d)(2) “grants the plaintiff who complies with
25 the federal right-to-sue period the benefit of statutory tolling without having to meet the
26 equitable tolling requirement of reasonable and good faith conduct.” *Id.* at 1010. As
27 discussed above, the period to file suit in light of the tolling provided by section
28 12965(d)(2) ended when the EEOC filed this lawsuit. On the other hand, to be entitled to

1 equitable tolling, Perez is required to demonstrate that she acted reasonably and in good
2 faith. She has not satisfied this requirement.

3 The equitable tolling doctrine is applied “sparingly” and in “extreme cases” on a
4 “case-by-case analysis.” *Scholar v. Pacific Bell*, 963 F.2d 264, 267 (9th Cir. 1992). Thus,
5 “[c]ourts have been generally unforgiving . . . when a late filing is due to claimant’s failure
6 to exercise due diligence in preserving his legal rights.” *Id.* at 268. Because the DFEH’s
7 right-to-sue letter stated that the one year statute of limitations in section 12965(d)(1) “will
8 be tolled during the pendency of the EEOC’s investigation of your complaint,” it was
9 reasonable for Perez to wait until to the end of the EEOC’s investigation to file a lawsuit.
10 But this language from the right-to-sue letter does not justify or explain Perez’s wait of
11 almost a year after the EEOC filed this lawsuit to intervene and state her FEHA claims for
12 the first time. The mere fact that the Court granted Perez’s motion to intervene after this
13 delay does not make the delay any more reasonable for equitable tolling purposes. That
14 Perez was able to intervene and assert her claims does not mean that those claims are not
15 time-barred.

16 There is no justification for Perez’s delay here. Because Perez did not act reasonably
17 and in good faith by waiting more than a year after the EEOC issued its letter of
18 determination and almost eleven months after the EEOC filed its complaint to assert her
19 FEHA claims, the doctrine of equitable tolling does not save her FEHA claims from being
20 time-barred. Accordingly, PCI is entitled to summary judgment on Perez’s state law claims
21 for sex discrimination, pregnancy discrimination, harassment, failure to prevent
22 discrimination, and wrongful discharge on the grounds that they are time-barred.

23 C. Intentional Infliction of Emotional Distress Claim

24 PCI argues that Perez’s intentional infliction of emotional distress claim is subject
25 to a separate two-year statute of limitations that is not subject to any tolling like Perez’s
26 FEHA claims. Perez’s opposition brief does not mention this claim or dispute that it is
27 time-barred, so any such argument is waived. Regardless, for all the reasons discussed
28 above, Perez’s delay in raising this claim undermines any argument for equitable tolling.

1 Accordingly, Perez’s intentional infliction of emotional distress claim is time-barred as
2 well.

3 **V. EEOC’s Motion for Summary Judgment**

4 The EEOC moves for summary judgment on eleven of PCI’s eighteen affirmative
5 defenses. Because the Court has granted summary judgment for PCI on the Title VII
6 hostile work environment claim, the EEOC’s motion is denied as moot with respect to the
7 applicability of these defenses to that claim. Thus, the discussion below primarily focuses
8 on whether the EEOC is entitled to summary judgment on these defenses with respect to
9 the Title VII discrimination claim.

10 **A. First (Failure to State a Claim), Second (Estoppel), Third**
11 **(Waiver), Seventeenth (Unjust Enrichment), and Eighteenth**
12 **(Additional Affirmative Defenses) Affirmative Defenses**

13 The EEOC moves for summary judgment on each of these defenses. Based on its
14 opposition brief, PCI appears to have abandoned these defenses because it did not make
15 any arguments against their dismissal. Accordingly, these defenses are dismissed.

16 **B. Fourth Affirmative Defense – Statute of Limitations**

17 The EEOC moves for summary judgment on this defense, arguing that it is not
18 subject to any statute of limitations restriction on its ability to file a lawsuit in federal court.
19 The EEOC is correct insofar as there is no time limit on when the EEOC may institute a
20 lawsuit *provided the initial charge was timely filed*. See *Occidental Life Ins. Co. of*
21 *California v. EEOC*, 432 U.S. 355, 366 (1977) (noting that “the benchmark, for purposes
22 of statute of limitations, is . . . the commencement of the proceeding before the
23 administrative body”). As discussed above, Perez did not timely file her charge to the
24 extent she was claiming a hostile work environment. In light of the entry of summary
25 judgment in favor of PCI on the hostile work environment claim, the EEOC’s motion is
26 moot to the extent it argues for summary judgment on this defense of that claim. However,
27 because PCI did not oppose the motion with respect to the applicability of this defense to
28

1 the remaining Title VII discrimination claim, the EEOC is entitled to summary judgment
2 on this defense as it applies to that claim.

3 C. Seventh Affirmative Defense – Conciliation Failure

4 With its seventh affirmative defense, PCI asserts that the EEOC’s claims are barred
5 “[t]o the extent that [it] failed to fulfill its statutory duties to conciliate its claims brought
6 under Title VII and the Pregnancy Discrimination Act.” [Doc. No. 6 at 7.] When the EEOC
7 finds “reasonable cause” to think that a discrimination charge has merit, it must first
8 ‘endeavor to eliminate [the] alleged unlawful employment practice by informal methods
9 of conference, conciliation, and persuasion.’” *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct.
10 1645, 1649 (2015) (quoting 42 U.S.C. § 2000e-5(b)). The scope of the Court’s review of
11 whether the EEOC complied with this requirement is “narrow” and the EEOC has
12 “extensive discretion to determine the kind and amount of communication with an
13 employer appropriate in any given case.” *Id.* “The appropriate scope of review enforces
14 the statute’s requirements . . . that the EEOC afford the employer a chance to discuss and
15 rectify a specified discriminatory practice—but goes no further.” *Id.* at 1653. “[T]he
16 Commission may use in each case whatever ‘informal’ means of ‘conference, conciliation,
17 and persuasion’ it deems appropriate. And the EEOC alone decides whether in the end to
18 make an agreement or resort to litigation: The Commission may sue whenever ‘unable to
19 secure’ terms ‘acceptable to the Commission.’” *Id.* at 1654 (citing 42 U.S.C. § 2000e-
20 5(f)(1)) (internal citation omitted; *emphasis* added in *Mach Mining*).

21 Here, the EEOC provided a letter of determination stating that there was reasonable
22 cause to believe that Perez “was discharged because of her sex (female, pregnancy) in
23 violation of Title VII of the Civil Rights Act of 1964, as amended.” [Doc. No. 48-8 at 2.]
24 PCI argues that this letter is impermissibly vague and does not “properly describe[] both
25 what [PCI] has done and which employees (or what class of employees) have suffered as
26 a result.” *Mach Mining*, 135 S.Ct. at 1656. As to the hostile work environment claim, PCI
27 has a point. The letter of determination simply states that there was “evidence that [Perez]
28 was subjected to a hostile work environment.” [Doc. No. 48-8 at 2.] This vague and

1 conclusory statement is particularly inadequate considering that Perez’s charge of
2 discrimination does not allege a hostile work environment or make any allegations other
3 than that she was terminated because of her sex and pregnancy. [Doc. No. 48-5 at 3.] With
4 its motion, the EEOC offers no evidence that PCI was aware of any charge of a hostile
5 work environment or that the EEOC was investigating such a claim. The conclusion that
6 evidence of a hostile work environment was found did not serve to inform PCI of what
7 allegations of a hostile work environment were made. Nevertheless, these deficiencies are
8 harmless based on the entry of summary judgment on the hostile work environment claim
9 above.

10 With respect to the discrimination claim, the letter of determination is hardly more
11 informative. However, because PCI was already aware of Perez’s allegations based on the
12 charge of discrimination, and based on evidence that PCI in fact made an offer to resolve
13 the matter in response [Doc. No. 48-10], the EEOC’s efforts to conciliate the discrimination
14 charge survives the “relatively barebones review” required of the Court. Accordingly, this
15 defense is dismissed as to the discrimination claim.

16 **D. Ninth Affirmative Defense – Failure to Exhaust Administrative**
17 **Remedies**

18 With this affirmative defense, PCI contends that the claims in the FAC are barred
19 Perez’s failure to exhaust her administrative remedies. In its opposition brief, PCI argues
20 only that this defense is valid as to the hostile work environment claim because Perez did
21 not make any allegations of a hostile work environment in her charge and the EEOC did
22 not include any specific factual allegations of a hostile work environment in its letter of
23 determination. However, because PCI does not make any argument as to the applicability
24 of this defense to the Title VII discrimination claim, it is dismissed as to that claim.

25 **E. Eleventh Affirmative Defense – At-Will Employment;**
26 **Sixteenth Affirmative Defense – California Labor Code Violations**

27 With these defenses, PCI asserts that Perez was an at-will employee, and that she
28 did not satisfy statutory obligations imposed by California labor laws. In its opposition,

1 PCI asserts that these defenses are valid because there is a dispute of fact as to PCI's
2 reasons for terminating Perez. Whether Perez was an at-will employee is entirely irrelevant
3 to this dispute, and arguments and evidence supporting non-discriminatory grounds for
4 terminating Perez are not affirmative defenses because the burden rests with the EEOC to
5 prove that PCI is liable for discrimination. Accordingly, these defenses are dismissed.

6 Notwithstanding the foregoing, the burden remains on the EEOC to prove that PCI
7 terminated her because of her sex or pregnancy. PCI is free to present evidence and argue
8 at trial that it did not terminate Perez, or that it terminated her for a non-discriminatory
9 reason. In other words, the dismissal of these affirmative defenses should have little impact
10 on PCI's ability to defend against the EEOC's discrimination claim at trial.

11 **F. Fifteenth Affirmative Defense – Bona Fide Occupational**
12 **Qualification**

13 With this defense, PCI asserts that “any decision by [PCI] to take adverse
14 employment action against Ms. Perez, if any, was lawful because Defendant was entitled
15 to consider Ms. Perez's inability to perform essential job duties as a job requirement.”
16 [Doc. No. 6 at 9.] In its opposition brief, PCI argues that this defense is valid because the
17 position she held before going on maternity leave was eliminated and its duties were
18 consolidated into another position for which Perez was not qualified.

19 As stated in the previous section, PCI is free to argue and present evidence of non-
20 discriminatory reasons for any termination of Perez and need not assert an affirmative
21 defense to do so. Moreover, despite the label in the answer, it appears that PCI is not
22 actually asserting a bona fide occupational qualification (“BFOQ”) defense. The BFOQ
23 defense allows an employer “to discriminate on the basis of ‘religion, sex, or national origin
24 in those certain instances where religion, sex, or national origin is a bona fide occupational
25 qualification reasonably necessary to the normal operation of that particular business or
26 enterprise.’” *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am.,*
27 *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) (quoting 42 U.S.C. §2000e-
28 2(e)(1)). PCI is not arguing that Perez's pregnancy or sex precluded her from being

1 qualified for her job or that for other reasons it was permitted to discriminate against her
2 *because* of her pregnancy or sex. Accordingly, this affirmative defense is dismissed, but
3 once again its dismissal should have little impact on PCI's defense against the EEOC's
4 discrimination claim at trial.

5 **VI. Perez's Motion for Summary Judgment**

6 Because all of Perez's state law claims are time-barred, her motion for summary
7 judgment on her wrongful discharge claim is denied.

8 **VII. Disposition**

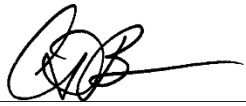
9 In light of the foregoing, it is hereby **ORDERED** as follows:

- 10 1. PCI's motion for partial summary judgment against the EEOC [Doc. No. 50] is
11 **GRANTED**;
- 12 2. PCI's motion for partial summary judgment against Perez [Doc. No. 51] is
13 **GRANTED**;
- 14 3. The EEOC's motion for summary judgment against PCI [Doc. No. 48] is
15 **DENIED AS MOOT** with respect to the applicability of PCI's affirmative
16 defenses to the EEOC's hostile work environment claim, and **GRANTED** with
17 respect to the applicability of PCI's affirmative defenses to the discrimination
18 claim; and
- 19 4. Perez's motion for partial summary judgment [Doc. No. 54] is **DENIED**.

20 It is further **ORDERED** that a status conference is set for **May 14, 2018** at **2:30**
21 **p.m.** in Courtroom 4C.

22 It is **SO ORDERED**.

23 Dated: May 1, 2018

24 
25 _____
26 Hon. Cathy Ann Bencivengo
27 United States District Judge
28