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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JANET CONNEY, Plaintiff and Respondent, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Appellant.	B179099 c/w B180451 (Los Angeles County Super. Ct. No. BC297766)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

Pine & Pine, Norman Pine and Beverly Tillet Pine; Law Offices of Michael Baltaxe and Michael F. Baltaxe; Law Offices of Shannon M. Foley and Shannon M. Foley; Law Offices of James K. Autrey and James K. Autrey for Plaintiff and Respondent.

Reed Smith, Paul D. Fogel and Raymond A. Cardoza; Lewis Brisbois Bisgaard & Smith and Alan R. Zuckerman for Defendant and Appellant.

Dennis J. Herrera, City Attorney, Elizabeth S. Salveson, Chief Labor Attorney and Jonathan C. Rolnick, Deputy City Attorney, Attorneys for Amicus Curiae City and County of San Francisco, The League of California Cities, and The California State Association of Counties.

The Regents of the University of California (appellant), appeal from a judgment entered in favor of plaintiff Janet Conney, M.D (plaintiff). Appellant also challenges the order denying its motion for judgment notwithstanding the verdict, and the post-judgment order awarding plaintiff attorney's fees.[1]

The case is based on actions and tactics taken against plaintiff as she aspired to attain a position as an assistant clinical professor at the University of California at Los Angeles Hospital, in its Neuropsychiatric Institute. The jury found that plaintiff's gender, as well as her having complained about sexual harassment or discrimination, were motivating reasons for appellant's failure to promote, appoint or discharge her, and further found that appellant's actions and tactics were a substantial factor in causing plaintiff harm.[2] The jury determined that plaintiff's past and future economic and non-

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[1] The appeals were consolidated pursuant to order of this court.

[2] Plaintiff's causes of action for gender discrimination, and for unlawful retaliation because of plaintiff's complaining about sexual harassment and gender discrimination, are based on the California Fair Employment and Housing Act (Govt. Code, § 12900 et seq., "the Act"). Unless otherwise noted, all references herein to statutes are to the Act.

economic damages amounted to $2,950,000. Thereafter, the trial court, using a multiplier of two on the lodestar amount of fees determined by the court, awarded plaintiff attorney's fees in the amount of $515,450.

In this appeal, appellant contends plaintiff voluntarily abandoned a portion of the process to obtain a position as an assistant clinical professor (an interview), and therefore her claims of gender discrimination and retaliation are precluded as a matter of law. Alternatively, appellant contends plaintiff failed to produce substantial evidence that appellant's actions affected her future earnings capacity. Additionally, appellant asserts prejudicial errors in the admission of evidence. Lastly, appellant asserts error in the trial court's use of a multiplier in determining attorney's fees for plaintiff.

We reject all of those arguments and affirm both the judgment and the orders issued by the trial court.

Section 12940 of the Act makes it an unlawful employment practice for an employer to discrimination against an employee because of the employee's gender and to discriminate/retaliate against a person for opposing practices forbidden by the Act. Oversight of the provisions in the Act is the responsibility of the Department of Fair Employment and Housing ("DFEH").

Section 12960, subdivision (b) of the Act requires that persons claiming to be aggrieved by an unlawful employment practice must file with DFEH a verified administrative complaint. Subdivision (d) of section 12960 provides that except in circumstances not relevant here, persons filing an administrative complaint must do so within one year of the date the alleged unlawful practice occurred. However, under the continuing violation doctrine, unlawful conduct that occurred outside of the limitations period may also constitute actionable conduct if it is sufficiently connected to the unlawful conduct that occurred within the limitations period. (*Richards v. CH2M Hill, Inc*. (2001) 26 Cal.4th 798, 802, 812.)

Plaintiff filed her DFEH administrative complaint against appellant on December 16, 2002.

PROCEDRUAL BACKGROUND OF THE CASE

Plaintiff filed this case in June 2003, naming as defendants the appellant and the University of California at Los Angeles Neuropsychiatric Institute and Hospital (hereinafter sometimes UCLA). Thereafter, three doctors who practice medicine at UCLA, David Reuben, M.D., Randall Espinoza, M.D., and Barry Guze, M.D., were named as Doe defendants.

The operative (second amended) complaint was filed in February 2004. It alleges eight causes of action against various of the defendants. By the time of trial, only the case against appellant remained to be tried, and it was tried on plaintiff's causes of action for violation of the Act (gender discrimination and retaliation).

FACTUAL BACKGROUND[3]

1. *Plaintiff's Success Prior to Coming to UCLA*

Edward Demet, M.D., a professor of psychiatry at the University of California at Irvine (UCI), testified he worked with plaintiff at UCI when she was a resident there from 1994 to 1998. He worked with her indirectly the whole four years of her residency, and he worked with her directly for two years as the sponsor of her independent research project.

Plaintiff attained the position of chief resident at UCI, which is a position that acts as a bridge between the faculty and the other residents. Dr. Demet testified plaintiff's work as chief resident was truly exceptional because the residency program

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[3] The facts we recite are taken from the evidence presented at trial viewed in the light most favorable to the plaintiff.

ran smoothly and was of a very high quality during her tenure, and that was unusual in a residency program. His opinion of plaintiff's success as chief resident was based on his 24 years of work at UCI and UCLA (21 years at UCI and three years at UCLA). He stated both the residents and faculty liked plaintiff "a great deal" and that was also unusual for the chief resident position. He felt that her "amiable manner" was instrumental in her success, and that she discharged her professional duties in a business-like manner.

Demet opined plaintiff was one of the most promising graduates the residency program at UCI ever produced, and he based that opinion on her ability as chief resident and her superlative performance in her research project. Regarding her research success, Demet stated that whereas he usually has to constantly supervise and prod his research residents, plaintiff acted independently, promptly did everything she was required to do, and did it well. Her research earned her the departmental research award in 1998.[4]

2. *Plaintiff's Beginnings at UCLA*

Plaintiff testified that during her residency, she developed an interest in geriatrics psychiatry because she was comfortable dealing with older patients and she felt this was a population she could serve. She became aware that UCLA had a geriatric psychiatry fellowship program in which she could receive more training in that area of psychiatry

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[4] Plaintiff testified that in her fourth year of residency, the faculty voted her resident of the year, which is an honor bestowed on the resident making the most outstanding contribution to the residency program. Additionally, she published two papers during her residency, and had "first authorship" credit on both of them, which means she did the bulk of the work and would receive most of the credit for them.

and so she applied for the fellowship. A fellowship provides an entry into academic medicine. In academic medicine she would work primarily in a hospital or affiliated clinics, would be on a track to teach and do research, and that would enable her to help thousands of people. She stated the UCLA program is one of the world's leading geriatric programs, with "a reputation for being an outstanding academic institute and place to train."

In the spring of 1998 plaintiff received the honor of a one-year fellowship for the UCLA program. The fellowship meant she would work with many of the geriatric psychiatry faculty members, and her mentor would be Gary Small, M.D., who is a leading research expert in Alzheimer's disease. When she received the fellowship, her aspiration was to begin working her way up the ladder of professorships at UCLA. She hoped to receive a position as an assistant professor and then promote to associate professor and eventually to the top "rung" of full professor.

In her first year at UCLA, when she was on the fellowship in the geriatric psychiatry division in the Department of Psychiatry and Behavioral Sciences at UCLA's School of Medicine, she got along very well with her mentor Dr. Small. He was very accessible – willing to help her with grants and papers and answer questions. He also gave her career advice. As her fellowship year was coming to a close, plaintiff sought to obtain grants and awards so that she could continue her research at UCLA.

Dr. Small told her he wanted to appoint her to the position of assistant clinical professor and said the appointment would give her an opportunity to move up the ladder

to a secure position at UCLA.[5] He said the salary for the position generally starts in the low *$100,000* range. Plaintiff was thrilled with the prospect of being an assistant clinical professor. Additionally, she received a letter of nomination, dated February 11, 1999, from Dr. Peter Whybrow, chairman of the Department of Psychiatry and Behavioral Sciences at the UCLA School of Medicine, in which he stated the intent of the Department that plaintiff join the faculty on a full time basis and the Department's "long-term commitment to her career," and he nominated her for a certain fellowship award. He praised her talents and efforts as a researcher and clinician, stated she works well with peers and supervisors, and stated she would be an asset as a member of the faculty.[6]

Plaintiff also spoke with the head of the geriatric psychiatry division in the Department of Psychiatry and Behavioral Sciences, Dr. J. Edward Spar, and he told her she would receive a position as an assistant clinical professor. She received a letter dated May 20, 1999 offering her appointment to that position of assistant clinical professor at the salary of *$75,000*, to be effective July 1, 1999. The letter states it was from Dr. Fawzy I. Fawzy (professor and executive vice chair of the Department of

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[5] At trial, plaintiff and appellant disputed the point whether the positions in the clinical professor series (assistant clinical professor, associate clinical professor and clinical professor) could lead to tenure.

[6] Also on that date, plaintiff received a letter from professor Lissy Jarvik, M.D., Ph.D. wherein Jarvik stated her recommendation of plaintiff was of "[the] highest level." This was a letter of recommendation for another grant award. Jarvik also praised plaintiff's abilities as a researcher and clinician, saying plaintiff is "sought out by patients and peers" and "is much in demand as a teacher to residents and medical students." The letter ends saying plaintiff "is clearly the most outstanding member of this year's geriatric fellowship program."

Psychiatry and Biobehavioral Sciences), Dr. Peter Whybrow (professor and chair of that same department), and Dr. Spar, but was signed only by Spar. The letter stated that although the appointment was subject to review procedures, "we are confident that approval will be forthcoming." The letter ended by stating "we are enthusiastic about the prospect of your joining us, and look forward to working with you."[7] The letter also stated that two-thirds of plaintiff's salary ($50,000) would have to come from grants and the other $25,000 would come from her earnings from clinical work in the "Geriatric Firm."

Despite these very favorable recommendations by the Department professors, plaintiff was not given the assistant clinical professor position. In June 1999, she was told that a doctor in another department (defendant, Dr. David Reuben), was insisting that plaintiff could not have both the position of assistant clinical professor and the two-year grant she had recently been awarded. She was the only person ever chosen from the psychiatry department to receive this grant, the "Hartford Grant," and Dr. Reuben was in charge of the Hartford research.

No one gave her the choice of giving up the Hartford Grant to keep the professorship position. Essentially, plaintiff had to choose between keeping the grant and not being an assistant clinical professor, or letting the grant go and still not being

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[7] Plaintiff testified that as an assistant clinical professor, she would be an attending doctor on the inpatient geriatric psychiatric unit. She would be the doctor capable of admitting and discharging patients, and she would supervise residents. She would also see outpatients in clinics, teach seminars and hold monthly meetings of residents, fellows and faculty members to discuss a topic. Additionally, she would rotate in the weekend and evening call schedule with other attending doctors.

able to keep the assistant clinical professor position since the position required that two-thirds of her salary come from a grant and she had already told the people connected with the other grant for which she had applied that she had received the Hartford grant.

In the end, she kept the Hartford grant and was offered the position of clinical *instructor*. She would have all the same duties as she would have had as an assistant clinical professor and receive a salary of $71,400, with $46,400 of that sum coming from the Hartford Grant and $25,000 from her clinical work. Devastated, she accepted the position.

3. *After Two Years Pass At UCLA*

Plaintiff worked in the clinical instructor position for two years. Dr. Spar was her clinical supervisor. Dr. Small was still her mentor on her research project. In February 2001, Dr. Small gave her an excellent review for the academic year 2000-2001. Of the 30 areas in which plaintiff was ranked (ranking scale of one to five, with five being the best ["excellent, no criticism"] and four being second best ["above average, very capable"]), plaintiff was ranked a five in 20 areas and a four in the other ten areas. Small told her she was doing everything she needed to do to continue in academia at UCLA and he would recommend her for a career there. She was thrilled with the evaluation. Also, Dr. Small had her fill in for him twice as a guest speaker and he was pleased with her presentations.

As plaintiff's two-year Hartford Grant was coming to a close, Dr. Spar spoke with her in February 2001 and again offered her a position as an assistant clinical

professor, the same position she had been offered by him two years earlier and then denied. This new offer made plaintiff very happy, as she thought she had paid her dues for the department and had done everything they asked of her.

She and Spar signed a faculty compensation worksheet, dated February 28, 2001, which stated that her compensation would be $103,000 for the position of assistant clinical professor for the academic/fiscal year July 2001 through June 2002. Plaintiff thought the appointment was a done deal. Part of her compensation was to come from grants, and two weeks prior to her and Spar signing the worksheet, plaintiff e-mailed Spar saying that if research grants did not come through for her, she would be willing to renegotiate her compensation if that would help with the assistant clinical professor appointment. Spar e-mailed back saying that if plaintiff's grants did not materialize, *she would receive the appointment of assistant clinical professor anyway*, her payroll title would be "staff physician" (which Spar remarked in his e-mail was "nobody's business but yours"), and her compensation would be renegotiated. He stated "*[t]his is a standard way of handling situations like yours* and the only option we have." (Italics added.) Her position as assistant clinical professor was to begin July 1, 2001.

However, a week before she was to start, the rug was once again pulled out from under her and she was denied the position and even demoted. She was taken off the academic track and given the titles "associate physician," "associate research physician," and volunteer assistant clinical professor." She stated she had never heard of the first two titles she was given, and essentially she was put in a dead end job. Her salary was reduced to $66,000, and in order to keep working at UCLA, she had to write

a letter in which she stated she would accept the reduction. No one provided an explanation as to why she had been denied the assistant clinical professor position a second time.

Plaintiff testified that despite being denied the position of assistant clinical professor, she "worked for the next year in exactly the same clinical and research areas that [she] had negotiated with [Dr.] Spar in February with the title assistant clinical professor. [She] did all the work exactly the same." She felt ashamed and embarrassed. She felt abandoned by her supervisor Dr. Spar because he did not protect her.

Asked why she stayed at UCLA instead of leaving after being so abused a second time, plaintiff stated she wanted to continue training there because UCLA "had by far and away one of the best geriatric training programs in the country. I wanted to learn. I wanted to be successful. I wanted to have as much knowledge as I could possibly have to help as many people as I could."

4. *Events Leading Up To This Second Denial of an Assistant Clinical Professor Position*

Testimony at trial showed that in the months leading up to the second denial of an associate clinical professor position for plaintiff, she was inflicted, by male members of the Department, with inappropriate, disrespectful and discriminatory conduct, and her complaints about such matters fell on unsympathetic ears.

Defendant Dr. Reuben, who had insisted in 1999 that plaintiff could not retain both her Hartford Grant and an assistant clinical professor position, was a professor in the geriatric medicine department rather than the department of psychiatry and behavior

sciences where plaintiff worked. In the months that followed the February 2001 representations by Dr. Spar to plaintiff that she would receive an assistant clinical professor position for the 2001-2002 academic year, Dr. Reuben began criticizing plaintiff regarding things that were not of her own doing. First, plaintiff's faculty members lost interest in teaching a lecture series that Reuben wanted for his geriatric fellows and students, and the students also lost interest. So plaintiff and the other faculty members decided as a group to cancel the lecture series, but only plaintiff received criticism from Reuben regarding the lecture series. Reuben was not her supervisor or in any manner in charge of her work. Also, he had a habit of referring to plaintiff as "girl." These things made plaintiff believe he did not respect her and view her as a peer. Reuben also made false statements about plaintiff in faculty meetings in the department where he worked, including the comment that plaintiff was a bad doctor. These remarks were put in the minutes of the meetings of that department. Also, Reuben became cold and hostile to plaintiff.

Beginning in late 2000 or early to mid 2001, plaintiff received similar treatment from defendant Dr. Espinoza, who worked in plaintiff's department as an assistant clinical professor. Espinoza made false statements about plaintiff to other people in their department, including Dr. Spar, and Espinoza seemed to become more distant and uncomfortable around plaintiff. In contrast, Espinoza was warmer to and more respectful of men.[8]

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[8] Sharma Bennett, who worked at UCLA from 1998 to 2000 as a psychotherapist with members of plaintiff's department, testified that when she observed Dr. Espinoza

Because she believed she was being discriminated against because of her sex, in April or May 2001 plaintiff complained to Dr. Spar about the behavior of Drs. Reuben and Espinoza. Spar minimized the problems that plaintiff believed she was having. Spar acknowledged that the negative comments about plaintiff were unfounded but Spar did not believe that they had anything to do with plaintiff being a woman.[9]

Plaintiff also testified she was sexually harassed by a Dr. Ibriham Gunay, who was an assistant clinical professor in geriatric psychiatry. Beginning in late 1999 or early 2000, Gunay insisted on commenting on the shape of plaintiff's legs, telling her they are pretty. Plaintiff said nothing to him initially because she was relatively new to the department, but in 2001 Gunay began also making comments about plaintiff's breasts and she told him she did not appreciate the comments and he should stop making them. He made the comments about her breasts seven to ten times over a period of approximately six months. There were doctors who overheard these comments, including defendant Espinoza, and their response was to laugh about the comments rather than tell Gunay to stop making them. Plaintiff felt degraded and humiliated, and did not want to be around those doctors anymore. Additionally, Gunay began paging

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interact with female members of the department, he was curt and hostile at times and at other times he ignored them. He was not that way with male members of the department. He was critical of her work and the work of other women but she never saw him criticize any men.

[9] It does not escape our notice that whereas plaintiff and Spar met at the end of February 2001 to determine her salary, it was not until months later that concern was expressed about her ability to generate clinical earnings, and in between those two events regarding her salary, plaintiff expressed her belief to Spar that she was the victim of sexual discrimination by Drs. Reuben and Espinoza.

Further, Spar admitted at trial that *every time he recommended someone for an assistant clinical professor position, that person obtained the job*.

plaintiff in the evenings and on weekends, and even somehow obtained her home telephone number and began calling her at her house, and during these times he would ask her to meet him at a bar. She would always tell him "no" and she would ask him to stop calling her. Plaintiff testified she complained to her supervisor Dr. Spar in July or August 2001 about Gunay's sexual harassment, telling him that the harassment had been escalating. She asked Spar to put a stop to it. However, Spar minimized the importance of Gunay's conduct and he did nothing about it. Plaintiff felt betrayed and alone.

Plaintiff also testified to sexual discrimination by Dr. Gunay. Dr. Small asked plaintiff to train Gunay in some of the research Small and plaintiff were doing, and when Gunay failed to show up on two occasions for the training, plaintiff remarked to Small that she did not think Gunay liked taking instruction from a woman.

Plaintiff testified she also experienced discrimination in connection with treatment of a patient. In June 2001, plaintiff was helping Dr. Small with his research, and a patient's daughter complained that plaintiff and Small were not being completely forthcoming about the research study, and the daughter called plaintiff "a bitch." Later, Small told plaintiff that the patient and her daughter were "VIPs" who donated large sums of money to UCLA and therefore not only did plaintiff have to tolerate being called such a name, but *plaintiff* would have to apologize. When plaintiff told Small that she did not believe men would have to tolerate such behavior, Small remarked it had nothing to do with her being a woman. Thereafter, Small told Dr. Spar that he would not hire plaintiff and he wanted nothing to do with plaintiff anymore.

As noted above, in June 2001 plaintiff was denied the assistant clinical professor position for a second time and demoted. Dr. Small wrote a letter supporting plaintiff's appointment to a demoted position.

5. *Plaintiff Works Another Year at UCLA and Is Told She Has to Participate in a Search Committee Procedure if She Wants the Position That She Was Twice Promised and Denied*

a. *Plaintiff Performs Assistant Clinical Professor Duties in Her "Three Title" Position and Is Again Denied Promotion*

After she was denied the associate clinical professor position a second time, plaintiff worked for a year in the "three title" position to which she had been demoted. As already noted, despite that demotion in position and salary, during that year she was given the same research and clinical duties she had negotiated for with Dr. Spar in February 2001 for the position of associate clinical professor. These were the same duties performed by the assistant clinical professors with whom she worked.

Moreover, plaintiff testified that Dr. Gunay left UCLA in September 2001. He had been an assistant clinical professor there, and had also had the position of medical director of the geriatric psychiatry inpatient unit. With his leaving, those two positions opened up. Plaintiff talked to Dr. Spar about her having those positions. Spar told her "no" to both positions. Regarding the medical directorship position, Spar told her it was a position that had been created solely for Gunay and thus it would not be filled. However, several months later she learned that defendant Espinoza had been given the medical directorship position.

Regarding the assistant clinical professor position that was vacated when Gunay left, Spar told plaintiff those positions are filled in the spring and thus it was too late to do so in the fall of 2001. As for the duties Gunay had been performing in his position as assistant clinical professor, those were divided between the persons remaining in the division, including plaintiff.

b. *Plaintiff Learns She Must Interview for the Assistant Clinical Professor Position*

Plaintiff testified that in February and March 2002, at the time of the year when faculty positions were being considered for the coming academic year, she left telephone messages and e-mails for Dr. Spar, who was still her supervisor. Her intent was to speak with him to go over her duties, title and salary for the new academic year. Not until March 19 did he respond. He e-mailed her telling her the geriatric division was in the process of searching for a junior faculty member. He told plaintiff he thought she should apply for the position but said it was "by no means certain that you will be selected." He stated it depended on who else would apply and how the search committee "feels about you." His e-mail stated the members of the search committee were Drs. Kumar, Small, Espinoza and Reuben.[10]

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[10] Plaintiff testified that some months earlier Spar had mentioned a search committee to her but she did not understand its import. The reference was made at the very end of an e-mail from Spar to plaintiff, dated November 26, 2001, in which he addressed an entirely different topic. Spar simply mentioned a "search committee (charged with filling the position that I hope you will be applying for) next Spring." Plaintiff testified that when she read the November 2001 e-mail from Spar, she did not understand what the term search committee meant as applied to her because the term had never been applied to her previously. She did not understand its function. A few days after she received that e-mail, Spar had her meet with him in his office and they

When she read Spar's March 19 e-mail plaintiff thought that "junior faculty member" might mean the assistant clinical professor position. She was very surprised that he was telling her she should interview for the position because it had been offered to her twice before without any interview, and because Espinoza and Reuben were people she had complained about several times.[11] She felt she had no chance to receive the position because she did not think that three of the members of the search committee (Espinoza, Reuben and Small) were unbiased towards her. For two weeks she tried to reach Spar by telephone. When she reached him and expressed her concerns, he did not say much. No one ever explained to her why there was a search committee.[12]

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discussed the main topic of his e-mail (which was his response to Dr. Reuben's letter to him regarding plaintiff) but they did not discuss his brief e-mail reference to a search committee.

[11] Eventually, Reuben was replaced with Dr. Helen Lazretsky, and Small was replaced with Dr. Andrew Leuchter.

[12] Prior to this point, Spar's division had never had a search committee for a candidate for a position. Spar testified that if he thought the search committee's recommendation about an applicant for the position was inappropriate in any way, he did not have to accept it. He also acknowledged that every time he recommended someone for an assistant clinical professor position, they received the job.

An ad was place in two or three trade journals to advertise the position. Prior to plaintiff being terminated from employment by UCLA, she and two other people applied for the position. The other two were not good enough to obtain an interview. Eventually, an Ebrahim Haroon was hired for the position and he began working in February 2003.

Dr. Helen Lazretsky, who was a replacement on the search committee, testified at trial she did not receive any resumes for the position except from plaintiff and she did not interview anyone for the position. This was the first search committee she had ever known the division of geriatric psychiatry to use. At her deposition she testified that of the four members of the revised search committee, she and Dr. Espinoza "were on the negative side" and the other two members were neutral. At trial she stated that she and two of the other members had already worked with plaintiff and they had extensive

experience with plaintiff's style, qualifications and academic background. She stated the members of the search committee met and she indicated to them she had concerns about plaintiff and the standard of care with respect to three patients' cases, but she acknowledged that when she was discussing two or three of the cases with Dr. Spar he indicated to her he had no concerns about them. She also acknowledged that she was aware that an investigation into at least one of the incidents had determined that plaintiff had done nothing wrong.

Asked whether discussing the cases with the two neutral members without plaintiff being there to defend herself had the potential of poisoning their mind she stated she did not believe it did. She was not aware that Spar had already recommended plaintiff for that position on two prior occasions. She stated she would be offended if a doctor made comments about her legs or breasts and would probably be offended if she had to apologize to a patient's relative who called her a bitch.

Dr. Whybrow, director of the neuropsychiatric institute and chairman of the department of psychiatry and biobehavioral sciences, testified he instituted a policy of having search committees for all positions. He stated he came to UCLA in early 1997 and the policy was started within 18 months of that time. However, it was not a written policy, and when Whybrow was asked whether hiring Dr. Kozart in 1999 into Whybrow's department without a search committee process would have been against that policy, Whybrow stated "[i]t depends on when in 1999. Dr. Small had earlier testified that plaintiff was the first person required to sit for a search committee interview.

Asked why plaintiff did not receive the assistant clinical professor position the first time she was given a letter-offer of that job (May 1999), Whybrow stated it was because there was no search. Plaintiff was given the title clinical instructor instead, but Whybrow did not state she sat for a search committee for that position.

Asked what policy he instituted regarding gender diversity when he came to UCLA, Whybrow stated the people in the neuropsychiatric institute needed to have a clear understanding that the institute was going to comply with UCLA's rules and his own sentiment regarding gender diversity. To that end, there was a series of meetings to help the faculty understand "the importance of these things." He denied that the institute had a problem of there not being enough women on the faculty when he arrived at UCLA, but he did feel that the institute should open its doors and focus on individual opportunity and talent regardless of gender. It became one of his administration's cornerstones. Asked about the department of psychiatry and biobehavioral sciences, which he chairs, he disputed the figure for 2003, from the gender diversity chancellor, that the number of women in the associate and full professor range in that department is zero.

c. *Plaintiff Tries to Obtain Relief from Human Resources*

On April 8 plaintiff wrote a letter to Cindy Cohen who works in human resources in the department. She did that as an initial step in making a grievance about the harassment and discrimination she was experiencing at UCLA, thinking that because her prior complaints to Spar had not produced relief, perhaps directing her concerns to human resources would produce results. Wanting to test the waters in terms of what results she might obtain from human resources, she limited the letter to complaints of work related harassment and defamatory statements by Dr. Reuben and his wife, Dr. Gail Greendale, both of whom worked in the geriatric medicine department. She included the names of witnesses in her letter and then on April 16 she e-mailed Cindy Cohen the names of two additional witnesses. Later, when plaintiff asked these several witnesses whether they had been contacted by human resources, they told plaintiff they had not. Towards the middle of April, Cohen set up a meeting between herself, plaintiff and the human resources person for the geriatrics medicine department. The meeting lasted an hour, plaintiff explained her concerns but did not have a chance to present her physical evidence and so she expected someone from human resources would contact her for the evidence but that never happened, and as noted, her witnesses were not contacted.

Plaintiff testified that in late April or early May she left a message for Cindy Cohen, asking the status of her investigation, but Cohen never responded. She also left messages for Dr. Spar but he did not respond. She felt abandoned. Male doctors that used to have lunch and coffee with her ignored her. One doctor,

Anad Kumar, whom plaintiff stated had been "somewhat of a mentor to me," and who was on the search committee, told her he was sorry that things were not going well for her, and he said she had "become persona non grata around here."

On Thursday May 2, a department secretary, Ava Martin, sent an e-mail to plaintiff stating she would like to schedule plaintiff for an interview with the search committee, which the e-mail stated was comprised of doctors Kumar, Leuchter, Lavretsky and Espinoza. Martin's e-mail asked whether there was "anytime in the next 6-8 weeks during which you are not available to interview?" Plaintiff sent a return e-mail on Tuesday May 7 stating she would be available for an interview the week of June 10, and that Monday mornings and Thursday and Friday afternoons would be best. Martin returned the e-mail that same day and asked if plaintiff would be available on Friday June 14 in the morning, and plaintiff e-mailed back on May 11 saying she could not interview on June 14 in the morning.

On Monday May 13, Martin e-mailed plaintiff and asked her availability during the week of June 17-21. Then the next day, Martin e-mailed plaintiff asking if she could interview Thursday June 13 from 1-2:30 p.m. with three of the search committee members and on Monday June 17 from 1-1:30 p.m. with the fourth member. *Plaintiff did not get back to Martin to confirm Martin's suggested interview dates and times because plaintiff felt the process was not fair and she was still trying to get in touch with Dr. Spar to see if something fair could be worked out.*

Because she had not heard anything from human resources regarding her initial complaint to that department, plaintiff wrote a second letter of complaint to Cindy

Cohen, dated June 6, 2002. This time plaintiff set out her accomplishments during her years at UCLA, and related how she was assured of promotions to assistant clinical professor status and then denied the promotions, the last time being demoted and suffering a salary cut. She explained that she was given the same duties as an assistant clinical professor each time even though she was denied the status and pay, and she stated she is paid less than male colleagues for the same amount of research work. She related how male members of the department set her up to look as though she was not a responsible clinician but investigations showed this was not true, and how she has been blamed for patients being misbooked and her medical records being delinquent, when she was not behaving irresponsibly in such matters. She noted that she was told the medical directorship that Dr. Gunay left would not be refilled, but in reality two male doctors competed to fill it and it was refilled with one of them, and she noted she has been denied promotion to assistant clinical professor in the past seven months even though two men left those positions during that period of time. She explained she is being told to interview for a position when the position entails the duties she has been doing all along, and is a position she was twice told she could have and indeed essentially is a position she already has. She related that members of the search committee have defamed and harassed her and discriminated against her. Plaintiff asserted to Cindy Cohen that this treatment is a pattern of gender based discrimination.

Plaintiff followed that letter with another one to Cindy Cohen, dated June 11, wherein she set out a recent example of how she was being harassed, to wit, that the previous day she had given a verbal order to a nurse regarding internal medicine

coverage of one of plaintiff's patients. Operating procedures require that her verbal order be signed within 24 hours, but five hours after she gave the verbal order, Dr. Spar paged her to tell her not to forget to sign her order. Plaintiff asserted to Cohen that her activities were being excessively scrutinized, there was anticipation that she would make a mistake, and this demonstrated how her reputation was being damaged. *Plaintiff ended the letter by stating that the interview that secretary Ava Martin had wanted plaintiff to attend on June 13 would not be fair nor meaningful so long as there was this type of perception of her clinical performance*.

d. *Plaintiff Does Not Attend the Interviews But Attends a Meeting Regarding Her Human Resources Complaints*

An e-mail from Cindy Cohen to Spar, dated June 13, states that Cohen received a message from plaintiff the previous day stating plaintiff would not attend the interviews because she did not think the interviews would be fair. Plaintiff testified at trial that she did not go to the scheduled interviews because she did not think she could get a fair opportunity with people who would be interviewing her.

Also on June 13, Cohen and Spar set up a meeting to discuss plaintiff's human relations complaints. The meeting was held on June 19, attended by plaintiff, plaintiff's fiancé, Cohen, and Spar, and lasted approximately 60 to 90 minutes. Thereafter, Cohen delivered her finding that the matters set out in plaintiff's April 8 complaint had no

merit. However, Cohen admitted she never talked to plaintiff's witnesses. Regarding plaintiff's June 6 letter, plaintiff testified it was discussed only briefly.[13]

The main topics of the June 19 meeting were plaintiff's current work assignment and the search committee interview. Regarding the former, Spar stated he felt bad that plaintiff had the duties of an employee working 100 percent time even though she had been demoted to a payroll title of 66 percent time and he asserted he was not aware of the discrepancy. Regarding the search committee interview, plaintiff testified Spar told her if she wanted the position that was open, she would have to mend fences and interview, and she asked Spar if the interview was a true interview or a meeting to mend fences because she did not see how it could be both. Plaintiff testified she and Spar talked a bit about that and she told him she would interview if the interviews would be fair and not biased against her because she wanted to keep her job. Spar told her he thought she is a good doctor and he would like her to stay on staff but she was not guaranteed the job.

e. *Plaintiff Is Terminated From Employment Despite Having Received Two Prior Notifications That Her "Associate Physician" Position Would Be Renewed*

Plaintiff testified that after the June 19 meeting she received no communications from the department secretary, or anyone else at UCLA, to set up the interviews that she had agreed with Spar to have. Cindy Cohen acknowledged that at the June 19 meeting, Spar never told plaintiff that she (plaintiff) should set up the interviews with the search

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[13] Plaintiff never received any communications from Cindy Cohen regarding her June 6 and June 11 letters of complaint.

committee. Cohen also stated that at UCLA it is the university that is responsible for putting together the interview process, not the person being interviewed.[14]

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[14] Appellant contends plaintiff had already planned, prior to the June 19 meeting, to leave UCLA and go into private practice and thus had no intention of completing the application process for the assistant clinical professor position. Appellant's contention is based on the following several matters:

One, plaintiff failed to appear for the June 13 interview.

Two, in late April 2002 Dr. Rueben directed, in writing, that plaintiff was to be excluded from participating in a visit by the Hartford Grant people at UCLA. Plaintiff was asked whether she ever asked Rueben why he excluded her, and she stated she did not "because I only had about a month and a half left at UCLA. I don't know if I ever saw him after this." We observe that her answer can easily be interpreted to mean that the exclusion came about six weeks before she was terminated from employment and in that intervening six weeks she never ran into Reuben to ask him why she was excluded.

Three, when contacted by Ava Martin on May 2 for interview scheduling, plaintiff limited her interview availability to the week of June 10. However, the record shows plaintiff was both a very busy physician and she was trying to make sense of yet another offer of an assistant clinical professor position for which she would have to interview even though she had been performing the duties of that position for a long time.

Four, in her June 6, 2002 letter to Cindy Cohen (which, as noted above, plaintiff testified she wrote to test the waters), plaintiff asked for letters of reference, stated her reputation at UCLA had been irreparably damaged and any future she had at UCLA had been eliminated, and stated she saw no positive outcome if she interviewed for the position.

Five, plaintiff's own personal physician, Dr. Alice Agzarian, saw plaintiff on June 21, 2002, and made a note in plaintiff's medical record that plaintiff felt the stress she was experiencing was related to working at UCLA. The note continues: "[Plaintiff g]oing into private practice in July so will be able to re-evaluate." (Plaintiff started her own private practice in August 2002.) Asked about that note at trial, plaintiff testified she told her physician that since she did not have letters of recommendation, she might have to go into private practice, and when Spar did not set up any interviews after the June 19 meeting, she concluded she probably would not have a job at UCLA. Appellant argues on appeal that plaintiff never explained how she knew, only two days after the June 19 meeting, that a substitute interview would not be scheduled for her.

Regarding matters four and five, a jury could reasonably conclude that having repeatedly been told she would be appointed to the position she coveted only to later be told each time that the position would not be hers, plaintiff could have developed a fatalistic, "foregone conclusion" premonition that nothing good would come from yet another attempt at achieving that goal.

Plaintiff testified she received no communications from Spar or Cohen after the June 19 meeting except for a letter she received from Spar in which he told her that her "associate physician" position would end on June 30. He wished her luck with her future endeavors, and he directed her to contact a certain person in human resources "regarding sign-out procedures, terminal vacation, etc." The letter was dated June 25, 2002.

Spar's representation to plaintiff that her "associate physician" position would end on June 30 was at odds with two written confirmations she had previously received saying she had been reappointed for a period of time past July 2002. One was a letter to plaintiff dated February 16, 2002 from Dr. Andrew Leuchter, chief of staff of the neuropsychiatric hospital. It was "cc'd" to several people, including Dr. Spar. The letter states in relevant part that her reappointment period would run from February 27, 2002 through January 31, 2004. Another letter to plaintiff, this one from Doctor Barbara Kaytel, chief of staff of the UCLA medical center, dated March 8, 2002, states in relevant part that plaintiff was reappointed as a member of the courtesy staff for a period from March 1, 2002 to February 29, 2004.[15]

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[15] Despite the fact that plaintiff received the two letters telling her she had been reappointed *into 2004*, Spar testified that plaintiff was terminated from her current position "long before" plaintiff would have had the interviews after the June 19 meeting. Spar stated termination of her position "was determined a year in advance."

Moreover, Spar acknowledged that he penned, signed and turned into UCLA a document that states plaintiff's position in the 2001-2002 academic year as an associate physician was "being terminated. [Plaintiff] has applied for a faculty position which will replace this position."

We observe that Spar turned in the document despite the fact that (1) he had told plaintiff it was not a sure thing she would receive the position for which he wanted her

Plaintiff testified that no one told her that if she applied for the associate clinical professor position she would be giving up the "three title" position she was currently holding. And of course, arguably she never applied for the associate clinical professorship since she never was scheduled for interviews after the June 19 meeting with Cohen and Spar.

Plaintiff kept working at UCLA until July 5 so that she could complete transfer and/or discharge summaries for her patients because they would be transferred to other doctors. About ten days later she wrote to Cindy Cohen to ask for help with her situation. Cohen never responded. By letter dated July 31, 2002, she wrote to Dr. Fawzy. She enclosed the three letters/complaints she had sent to Cohen, and she asked Fawzy to review them and investigate her complaints, stating she believed her grievances had not been addressed. She never heard from him.

6. *UCLA Refuses to Give Plaintiff Letters of Recommendation*

Plaintiff testified she requested letters of recommendation from UCLA but received none. She stated the letters were important to her because prospective employers would need to know that her superiors at UCLA trusted her, had faith in her, and would vouch for her, and without the letters of reference, it would be nearly impossible to obtain a position at another hospital or in academia. As noted above, after

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to interview because it depended on who else applied and how the search committee felt about her, and (2) plaintiff had not yet interviewed with the search committee. Moreover, despite the fact that he told plaintiff of these potential obstacles to her receiving the job, he testified plaintiff would have received a position to replace her current one if she had interviewed with the search committee.

she left UCLA, she set up a private psychiatry practice and began seeing patients on her own.

DISCUSSION[16]

1. *The Record Refutes Appellant's Repeated Assertion That Plaintiff Abandoned Scheduled Interviews and the Interview Process*

Appellant contends plaintiff abandoned the interview process with the search committee and therefore she has no valid claim that appellant unlawfully failed to hire her. Appellant contends that by not interviewing, plaintiff essentially asked the jury to speculate that if she had interviewed, she would have been denied the position of assistant clinical professor due to gender discrimination and retaliation. Appellant contends case law prevents such speculation.

Appellant relies on *Levy v. Regents of University of California* (1988) 199 Cal.App.3d 1334 and *Ibarbia v. Regents of University of California* (1987) 191 Cal.App.3d 1318, which address the failure of a plaintiff to actually go through the application process for the employment position the plaintiff claims was denied to him because of his protected status. For example, in *Ibarbia* the plaintiff failed to complete the application process because he refused an interview.

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[16] We begin our analysis of appellant's contentions in this appeal with the observation that judgments are presumed to be correct, persons challenging them must affirmatively show reversible error, and the record is presumed to contain sufficient evidence to support the determinations of the trier of fact. (*Walling v. Kimball* (1941) 17 Cal.2d 364, 373; *Boeken v. Philip Morris, Inc*. (2005) 127 Cal.App.4th 1640, 1658).

We reject the notion that plaintiff abandoned the interview process. To begin with, because plaintiff felt the interview process was not going to be fair to her and because she was trying to get in touch with Dr. Spar to see if something fair could be worked out, it appears that plaintiff did not get back to secretary Ava Martin to confirm Martin's suggested interview dates and times. Instead, Martin just pressed on with dates she proffered to plaintiff and set up an interview schedule without verification from plaintiff that the dates would be acceptable to her. So truly, without plaintiff's consent to the dates chosen by Martin, the interviews that appellant insists plaintiff abandoned were not even effectively scheduled.

Moreover, rather than refusing per se to interview, plaintiff doggedly sought to insure that the search committee process would be fair to her. Prior to the June 19 meeting between herself, Cohen and Spar, she asserted to both of them that she was worried the interview process would be unfair because of the makeup of the search committee, and she told Cohen she was passing on the initial interview dates that secretary Martin wanted her to attend because she perceived a lack of fairness about them. She attended the meeting on June 19 and agreed to attend interviews so long as the interviews were fair to her. This is reasonably viewed as her having postponed the interview process rather than abandoned it.

Further, it was a department secretary who had attempted to set up the search committee interviews with plaintiff and there is no evidence that anyone indicated to plaintiff that the tables were turned and henceforth plaintiff would have to schedule the post-June 19 interviews herself. After the June 19 meeting, she received no

communications from the department secretary, or anyone else at UCLA, to set up the interviews that she had agreed with Spar to have. Cindy Cohen testified that at the June 19 meeting, Spar never told plaintiff that plaintiff should set up the interviews with the search committee. Cohen also stated that at UCLA it is the university that is responsible for putting together the interview process, not the person being interviewed. Thus, appellant's position that plaintiff was supposed to bear the logistics burden of contacting each of the four members of the search committee to determine when each of them could interview her is without merit.

Additionally, on June 25, only six days after plaintiff, Spar and Cohen met to discuss the open assistant clinical professor position that had no stated date as to when it absolutely had to be filled, Spar wrote a letter to plaintiff stating that the position plaintiff had been working in (actually, as noted earlier, three positions) was going to end on June 30 and she should contact human relations to wind up her employment at UCLA. Spar's termination of her *employment* with UCLA (employment in positions that she had previously twice been notified in writing she was entitled to have until early 2004) was reasonably viewed by plaintiff as his decision that she would (again) not be given the position of assistant clinical professor.

In sum, there was no abandonment by plaintiff of the interview process and therefore, plaintiff was entitled to claim unlawful conduct with respect to the 2002 denial of appointment to the assistant clinical professor position. And, since appellant's similar denial in mid-2001 is reasonably seen as part of appellant's course of conduct to discriminate/retaliate against plaintiff, the mid-2001 denial comes within the scope of

the continuing violation doctrine (discussed in fn. 2, *ante*), and is also actionable conduct.

2. *From the Evidence the Jury Could Conclude the Required Interview Was a Sham*

Having found wanting appellant's contention that plaintiff abandoned the interview/application process, it next bears noting that the search committee/interview process has all the aspects of being a sham as it was applied to plaintiff, and the jury could reasonably so conclude.

One of the members of the reconstituted search committee, Dr. Lazretsky, observed that UCLA did not have to search for plaintiff since plaintiff had been working at UCLA and it was clear plaintiff wanted the position. Moreover, plaintiff had been working for years in the very department that was offering the employment position, and there was evidence she had been doing the very work that she would do if she obtained the position being offered. Clearly she was a known quantity.

Further, Spar testified that never before had an internal candidate, such as plaintiff, been interviewed by a search committee. Lazretsky acknowledged it was the first time she had ever seen a search committee used in the division of geriatric psychiatry.

Thus, the jury had evidence that (1) plaintiff, who had complained about discriminatory treatment and retaliation, was being made to go through a process no one else had been made to use, and (2) she was being made to use that process even though she and her work were already a known quantity and had been for years. The jury could

conclude the interview process was a form of gender discrimination and/or retaliation against plaintiff.

Moreover, the jury also heard evidence that Dr. Spar was free to accept or reject the search committee's findings and recommendations, and that he was quite aware of plaintiff's qualifications for the position, having twice before written to her to state he approved her for that position. Thus, the jury could conclude that plaintiff did not need to interview for his benefit.

The jury also heard testimony from plaintiff that during the June 19 meeting, Spar told her to go to the interview and mend fences, and in November 2001, he told her she should figure out a way to get along better with her male colleagues. Also, Spar also acknowledged that everyone he had recommended for a position as an assistant clinical professor actually received the position. The jury could conclude that essentially plaintiff was being sent to the search committees to apologize to the members against whom she had made complaints of gender bias.

3. *Appellant Has Not Met Its Burden of Demonstrating That There Is Insufficient Evidence to Support the Award of Future Economic Damages*

a. *Appellate Review Principles*

We have a duty to "uphold an award of damages whenever possible." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 61.) "It is well settled that damages are excessive only where the recovery is so grossly disproportionate to the injury that the award may be presumed to have been the result of passion or prejudice. Then the reviewing court must act." (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259.)

Here, appellant asserts we should set aside the *entire* future economic damages portion of the judgment because there is no substantial evidence that appellant's actions affected plaintiff's future earnings capacity. Before we begin our analysis of that assertion, we note that appellant made a motion for a new trial, which was denied, and one of the grounds for the motion was appellant's contention that the award of future economic damages was contrary to the weight of the evidence. In its ruling on that motion, the trial court stated that "[a]fter weighing the evidence, the Court is convinced from the entire record, including reasonable inferences, that the jury could not have reached a different verdict. There was substantial evidence supportive of the verdict for damages which are not excessive under the facts as proved."

In *Fortman v. Hemco, Inc*., *supra*, 211 Cal.App.3d at p. 259, the court observed that a "trial court's determination [in ruling on a motion for new trial] of whether damages were excessive 'is entitled to great weight' because it is bound by the 'more demanding test of weighing conflicting evidence than our standard of review under the substantial evidence rule . . . .' [Citation.]" In *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-507, the court made the following observations: the amount of damages to be awarded is a fact question, judges who decide motions for new trial actually see and hear the witnesses, a decision on a new trial motion is entitled to great weight, and "all presumptions are in favor of the decision of the trial court."[17]

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[17] Despite the fact that appellant argued in its motion for new trial that the award of future economic damages was contrary to the weight of the evidence, at oral argument appellant's attorney asserted that weighing evidence is a function of a trial court in deciding a motion for judgment notwithstanding the verdict, and therefore the trial court

b. *The Jury Understood That Plaintiff Needed Letters of Recommendation from UCLA*

Appellant contends "there was no evidence that by the time of trial [plaintiff's] earning potential was restricted in any way." However, as already noted, plaintiff testified that after she was terminated from employment at UCLA she requested letters of recommendation from there but received none. She stated the letters were important to her because prospective employers would need to know that her superiors at UCLA trusted her and would vouch for her, and without the letters of reference, it would be nearly impossible to obtain a position at another hospital or in academia. She also testified that because she had neither a job at UCLA nor letters of reference, she determined she would have to go into private practice. She began seeing private patients in August 2002.

When the jury was deliberating, it submitted to the court the question whether it could award plaintiff nonmonetary damages, specifically, a letter of recommendation from UCLA.[18] It is reasonable to infer that by its question, the jury demonstrated it believed that (1) plaintiff needed references from UCLA to pursue her desire to work in academia and/or a hospital, (2) she deserved such references both because she should

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erred when it stated it had weighed the evidence when it decided appellant's motion for a new trial.

The purpose of granting a motion for judgment notwithstanding the verdict is to correct a verdict which has *no* foundation or support. (*Sukoff v. Lemkin* (1988) 202 Cal.App.3d 740, 743.) In contrast, when a new trial motion is based on an assertion that damages are excessive or inadequate, the trial court is required to weigh the evidence. (*Fortman v. Hemco, Inc*., *supra,* 211 Cal.App.3d at pp. 257-258.)

[18] The court responded that only monetary damages could be awarded to plaintiff.

not be forced to work in some other area of psychiatric practice, and because her work and efforts at UCLA were worthy of recommendation, and (3) UCLA had refused to give her the references.

It is also reasonable to infer that the jury understood that favorable letters written about plaintiff with respect to her research and residency at the University of California Irvine, whether written upon her departure from UCI in 1998 or written after her departure from UCLA in 2002, while arguably helpful in a search for hospital or academia work, would not be sufficient as replacements for letters of recommendation from doctors at UCLA since it would be plaintiff's most recent experience, that is, her work at UCLA, that a prospective hospital or learning institution would be most interested in when determining whether to hire plaintiff. Likewise, favorable letters written in earlier years by doctors at UCLA would arguably be helpful for plaintiff's future employment *if* accompanied by letters of recommendation from UCLA doctors written after she left. However, absent letters of recommendation written after she left, appellant's presentation to a prospective employer of only the earlier letters from UCLA doctors would raise questions about her later work at UCLA.

Essentially, the jury found that appellant exercised control over plaintiff's earnings and earning capacity when it denied her the assistant clinical professor position, terminated her employment, and then declined to give her letters of recommendation. This fact permeates both types of plaintiff's economic losses the jury was asked to decide–her past economic loss (plaintiff's lost earnings/lost earning capacity prior to trial) and her future economic loss (her lost earnings/lost earning

capacity after trial). Regarding future economic loss, Civil Code section 3283 states that "[d]amages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, *or certain to result in the future*." (Italics added.) In *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995, the court, citing section 3283, stated that "[a] plaintiff may recover for detriment *reasonably certain* to result in the future." (Italics added.) The court added that "there is no clearly established definition of 'reasonable certainty'." *Bihun*, which was disapproved on another point in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664, involved a plaintiff who sued her former employer under the Act on grounds she had been sexually harassed by a supervisor and then suffered retaliation when she complained of the harassment. In *Scott v. Pacific Gas & Electric Co*. (1995) 11 Cal.4th 454, 468, disapproved on another point in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352, fn. 17, the court described recoverable future earnings as "reasonably anticipated future earnings, less [amounts attributable to the doctrine of avoidable consequences]." That doctrine is discussed next.

c. *Appellant Has Not Demonstrated That Plaintiff's Future Economic Damages Fall Within the Doctrine of Avoidable Consequences*

Despite the jury's indication that it understood that plaintiff needed current letters of recommendation from UCLA, appellant argues that plaintiff could have relied on the earlier UCLA letters or letters from doctors at UCI to obtain a position in a hospital or academia. That contention is based on appellant's asserted *affirmative defense* that plaintiff can, but has failed to, avoid the negative consequences of what

happened to her at UCLA. That is, she failed to mitigate her damages. We observe that those negative consequences would result from plaintiff being denied the assistant clinical professor position, fired, and denied letters of recommendation.

In *State Dept. of Heath Services v. Superior Court* (2003) 31 Cal.4th 1026, an employee sued under the Act alleging sexual harassment in the workplace by her supervisor. Noting that the plaintiff could recover damages that are generally recoverable in a noncontractual action, the court stated her recovery would be governed by the common law doctrine of avoidable consequences, which provides that a person injured by another's tort is not permitted to recover damages for harm he could have avoided by the use of reasonable effort or expenditure after the tort was committed. The reasonableness of the plaintiff's efforts are judged in light of the circumstances at the time, not with hindsight, and the standard used to measure the reasonableness of those efforts is not as high as the standard used in other areas of law. The defense works only to diminish damages and does not negate the cause of action. *The defendant claiming avoidable consequences must plead and prove that defense*. (*Id*. at pp. 1042-1044.)

In *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 595, the plaintiff sued under the Act alleging sexual orientation harassment by coworkers and a supervisor. "[T]he jury implicitly determined that, but for the harassment, Hope would have been employed by the state until retirement age. Hope testified that he accepted the offer to work [for the state] because he was looking for a permanent, lifetime job." The jury determined the plaintiff would never be able to work again because of his injuries and awarded future economic damages accordingly. The reviewing court, in

affirming the judgment, reminded the defendant employer that it is a defendant's responsibility to affirmatively prove that the doctrine of avoidable consequences has application to a case.

In the instant case, jury instructions on the matter of avoidable consequences in connection with plaintiff's claim of future lost earnings were given to the jury.[19] The

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[19] The following jury instructions are among those given on the issue of damages.

The jury was instructed that if it determined plaintiff proved her claims against appellant, it "also must decide how much money will reasonably compensate [plaintiff] for the harm," but plaintiff "does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages." (CACI No. 2941.)

Regarding future lost earnings, the jury was instructed that "[t]o recover damages for future lost earnings, [plaintiff] must prove the amount of income/earnings/salary/wages she will be reasonably certain to lose in the future as a result of the injury." (CACI No. 3903C; The use note in the Judicial Council of California Civil Jury Instructions (2006) for CACI No. 3903C states the instruction "is not intended for use in employment cases." Assuming arguendo it was actually error for the trial court to use this instruction in the instant case, neither plaintiff nor appellant has so contended.)

Additionally, the jury was instructed that plaintiff "is not entitled to recover damages for future economic losses that [the defendant] proves [plaintiff] will be able to avoid by returning to gainful employment as soon as it is reasonable for her to do so. [¶] If you decide that [plaintiff] will be able to return to work, then you must not award her any damages for the amount [she] will be able to earn from future gainful employment. To calculate the amount of damages you must: [¶] 1. Determine the amount [plaintiff] would have earned from the job she held at the time she was injured; and [¶] 2. Subtract the amount [plaintiff] is reasonably able to earn from alternate employment. [¶] The resulting amount is [plaintiff's] damages for future lost earnings." (CACI No. 3962.)

Additionally, the jury was instructed (1) it must pay careful attention to all of the jury instructions the court was giving it, (2) "[a]ll the instructions are important because together they state the law that you will use in this case," and (3) "[y]ou must consider all of the instructions together." (CASI No. 5000.) It was also instructed that "[t]he arguments of the attorneys are not evidence of damages. Your award must be based on

first two paragraphs of CACI No. 3962 instructed the jury on the whole of the doctrine of avoidable consequences. Thus, the jury was instructed that plaintiff would not be entitled to recover damages for future economic losses that *appellant proved* plaintiff would be able to avoid by returning to gainful employment as soon as it was reasonably possible for her to do so, and therefore if the jury decided that plaintiff would be able to return to work, it must not award her any damages for the amount she would be able to earn from such future gainful employment.

The remainder of CACI No. 3962 set out the sequence of the shifting burdens of proof connected with that affirmative defense. It told the jury that to calculate plaintiff's damages for future lost earnings, it would first have to determine the amount of money plaintiff would have earned from the job she held at UCLA at the time she was injured (*plaintiff's burden of proof*), and then subtract from that amount of money the amount plaintiff is reasonably able to earn from alternate employment (which the initial paragraph in CACI No. 3962 stated was *appellant's burden to prove*).

Given this shifting burden of proof, it is clear to this court that appellant errs when it relies on *Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241 to support its contention that plaintiff should not have been awarded any future damages. In *Martin*, a middle school science teacher was arrested in April 1996 on charges of cultivating marijuana and possession of methamphetamine. That same

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your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial." (CACI No. 3925.)

Absent convincing evidence to the contrary, it must be presumed that "the jury understood the instructions and correctly applied them to the evidence." (*Zuckerman v. Underwriters at Lloyd's* (1954) 42 Cal.2d 460, 478-479.)

month the defendant school district placed her on an unpaid leave of absence for the duration of the criminal proceedings. Initially the plaintiff's teaching credential was suspended but it was reinstated retroactive to May 1996. Prosecution of her case was delayed for several years. In January 1999 she was referred to a diversion program and in August of that year the charges against her were dismissed because she successfully completed that program. She then made a demand on the defendant to reinstate her to her former employment status and provide her with all back pay and benefits.

The *Martin* court found that because the charges were dismissed, the plaintiff teacher came within provisions in the Education Code which, on their face, would entitle her to payment of her full compensation for the time she spent on compulsory leave from employment. However, because the school district successfully asserted the doctrine of avoidable consequences, the court held the plaintiff could not recover damages she could have avoided "by exercising reasonable diligence in seeking comparable employment during the period of her suspension when comparable employment was available." (*Martin v. Santa Clara Unified School Dist*., *supra*, 102 Cal.App.4th at p. 246.)[20]

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[20] Regarding the qualification that the plaintiff was required to seek *comparable* employment, the *Martin* court cited *Parker v. Twentieth Century-Fox Film Corp*. (1970) 3 Cal.3d 176, 181-182. In *Parker*, the court observed that it is not the prospect of just any future employment that will support application of the doctrine of avoidable consequences. Rather, "the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages. [Citations.]" The *Parker* court also observed that while the plaintiff employee must be reasonable in her efforts to obtain other employment that is not different or inferior from the job she was

The defendant school district in *Martin* argued that since the plaintiff's teaching credential had been reinstated retroactive to May 1996, the plaintiff had a duty to seek comparable employment beginning with the 1996-1997 school year. The defendant presented evidence that (1) during the years after her suspension from employment with defendant and before she was reinstated to her position as a teacher with the defendant, there were "numerous middle school science teacher positions available in various school districts throughout the county" and plaintiff was aware of those openings; (2) she had a 29-year career as a teacher that was unblemished but for the pending drug charges; and (3) a Labor Code section provided that employers could not consider, as a factor in determining whether to hire someone, an arrest not resulting in conviction or a record concerning the participation in a diversion program. The evidence further showed that plaintiff made no effort, either through formal job applications or informal inquiries, to obtain a teaching job in another school district or a private school because

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doing, courts have *not* held that an employee must be reasonable in rejecting employment that is different or inferior. (*Id*. at p. 182, fn. 5.) In *Parker*, the court held the plaintiff was not required to accept the female lead as a dramatic actress in a western style motion picture as a mitigation of the damages she suffered from being deprived of her contractual right to star in a musical that would call upon both her talents as an actress and a dancer. (*Id*. at p. 183.)

Without citing any authority to support its position, appellant contends that *Parker's* requirement that available employment be comparable or substantially similar to the employment the plaintiff lost is only applicable to a claim of past lost earnings and is not applicable to a claim of future lost earnings. Applying that contention to the instant case would mean that UCLA can, with impunity, take unlawful actions against plaintiff that deprive her of a future in her chosen life's work and then assert that she be required to earn a living at whatever other work she can find. We reject that unfair result and note that the court in *Hope v. California Youth Authority*, *supra*, 134 Cal.App.4th at p. 595, applied the *Parker* comparable/substantially similar requirement to the plaintiff's claim for lost future earnings.

she " 'just assumed' " she was unhirable. No employer had told her it would not hire her. The *Martin* court concluded the defendant had presented substantial evidence to avail itself of the doctrine of avoidable consequences and the plaintiff had not presented substantial evidence that she was reasonably diligent in seeking employment or that efforts by her to mitigate would have been futile. (Accord *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 245 et seq., holding that the damage claims of a wrongfully discharged public employee whose rights and responsibilities are determined by statute is governed by the doctrine of avoidable consequences the same as an employee whose rights and responsibilities are determined by contract, and applying the general rule that the defendant has the burden of proving the amount the employee might have earned from comparable or substantially similar employment.)[21]

In the instant case, after plaintiff presented evidence at trial of the income she would have earned had UCLA not denied her the assistant clinical professor position

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[21] Federal employment and anti-discrimination law also puts the burden on the employer to produce evidence sufficient to show that a plaintiff has failed to avoid the consequences of the employer's wrongful conduct. (*Jones v. Consolidated Rail Corp*. (6th Cir. 1986) 800 F.2d 590, 594, [a Federal Employers' Liability Act (FELA) case where the court saw "no reason . . . to create in FELA cases an exception to the general rule that the defendant has the burden of proving that the plaintiff could, with reasonable effort, have mitigated his damages."]; *Coleman v. City of Omaha* (8th Cir. 1983) 714 F.2d 804, 808, [an Age Discrimination in Employment Act (ADEA) case, where the court stated: "The burden is on the defendant to prove failure to mitigate damages. [Citation.] The defendant has to show that the plaintiff failed to use reasonable care and diligence and that there were jobs available which the plaintiff could have discovered and for which the plaintiff was qualified. [Citation.]" Regarding the concept of reasonable efforts to secure other employment, the *Coleman* court rejected the notion that the plaintiff should have to move to another town to take a job " 'in order to reduce damages caused by the [defendant's] unlawful acts.' "])

and terminated her employment (that evidence is discussed *infra*), the burden of proof shifted to appellant to prove the amount of future lost earnings plaintiff would be able to avoid by obtaining comparable employment. However, unlike the defendant employer in *Martin* that presented evidence of both available comparable employment and factors tending to show plaintiff Martin was qualified for that available employment, appellant failed to present evidence on the issue of avoidable consequences.

Instead, appellant argues on appeal that there was no evidence presented at trial to show that (1) "UCLA-type compensation is unavailable to [plaintiff] in the market," (2) plaintiff "had difficulty in seeking or finding employment due to anything that happened at UCLA," and (3) plaintiff "had searched for any other position as an alternative to engaging in private practice." Thus appellant asserts a position that shifts, to plaintiff, appellant's own burden of proof for its mitigation of damages defense. Appellant seeks to relieve itself of the burden of proving that (1) comparable work is available at learning institutions and/or hospitals in the Los Angeles area, and (2) plaintiff would arguably be qualified for those positions. Proof of the latter would include testimony from persons with hiring authority at other hospitals or learning institutions that the letters singing plaintiff's praises for her work at UCI, and/or her early work at UCLA, would suffice as letters of reference for offering employment to her after she was terminated from UCLA, and no letters of recommendation from UCLA regarding her more recent work there would be needed. It is not enough for appellant to argue that there was no evidence that plaintiff could not use the earlier

reviews and letters from doctors for searching for a job. The issue was not whether she could *supplement* letters of recommendation from UCLA with those other documents.[22]

Thus, appellant's heavily pressed position that plaintiff failed to present evidence to support the jury's award of future lost earnings is itself doomed to failure because it is appellant who failed to demonstrate that plaintiff could have, but did not, mitigate those damages.[23]

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[22] Lawrence Albers, M.D., the acting chief of the mental health care group at the VA hospital in Long Beach, and an associate clinical professor at UCI, testified that he found plaintiff's work at UCI so good, and found her so favorable as a human being, that if plaintiff had not chosen to move from UCI to UCLA in 1998 to accept a fellowship and continue her training and study, she would have been offered a position as an attending staff psychiatrist where her duties would have been teaching, research, and clinical care. He stated the position would have paid "well over $100,000." He further testified plaintiff did not contact him and request a job. Nevertheless, rather than finding that plaintiff failed to mitigate her damages by not contacting Dr. Albers to seek work, the jury impliedly indicated its belief in plaintiff's testimony that without current letters of reference to show that her most recent supervisors trusted her and would vouch for her, it would have been nearly impossible to obtain work at a hospital or learning institution.

The same can be said for the abovementioned Dr. Edward Demet, who, like Dr. Albers, wrote a letter of recommendation for plaintiff in June 2004. The jury indicated its belief that plaintiff needed more than just glowing reports from people who used to work with her. She needed references from people at UCLA who could say whether she was still as good and promising as she used to be when she was a resident in the late 1990's. We find it telling that appellant's attorney did not ask either Albers or Demet whether they would hire someone who had glowing letters of recommendation from people with whom they worked several years earlier but no letters of recommendation from their most current employer.

[23] We wish to make explicitly clear in this opinion what the opinions in cases cited herein (*State Dept. of Health Services v. Superior Court*, *supra*, 31 Cal.4th at p. 1042 et seq.; *Hope v. California Youth Authority*, *supra*, 134 Cal.App.4th at pp. 594-595); *Martin v. Santa Clara Unified School Dist.*, *supra*, 102 Cal.App.4th at pp. 255-257; and *California School Employees Assn. v. Personnel Commission*, *supra*, 30 Cal.App.3d at

d. *Appellant's Calculations Are Not Persuasive*

The jury determined plaintiff would have damages in the amount of $2,000,000 for future economic loss, including lost earnings, lost earnings capacity, and medical expenses. Solely for purposes of our analysis here on the matter of lost earnings/lost earning capacity, we assume that little of this award is for future medical expenses.

The jury was presented with evidence that in early 1999, five years prior to trial, Dr. Small told plaintiff he wanted to appoint her to the position of assistant clinical professor and he said the salary for the position generally starts in the low *$100,000* range. The jury could conclude that had plaintiff been appointed to that position in 2001, when UCLA said she was first eligible for it, by the time of trial her salary would

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p. 249 et seq. [as well as *Jones v. Consolidated Rail Corp.*, *supra*, 800 F.2d at p. 594 and *Coleman v. City of Omaha*, *supra*, 714 F.2d at p. 808]) can be read to impliedly state, to wit, that once a plaintiff puts on sufficient evidence to demonstrate the amount of his past and/or future lost earnings/lost earnings capacity (i.e., completes his showing on that element of his cause of action), he has met his initial burden of proof on the issue of damages and he can "sit down." At that point, the burden of proof shifts to the defendant claiming the affirmative defense of avoidable consequences, and it must present sufficient evidence to affirmatively prove what the plaintiff has earned, or with reasonable diligence, might have earned from comparable or similar employment prior to trial, or might earn in the future from comparable or similar work. If the defendant carries that burden, the plaintiff then has the opportunity to present a reasonable explanation for why he or she did not or could not take advantage of the employment opportunities the defendant demonstrated were available, or that efforts were made to obtain comparable or similar employment but to no avail.

In the case before us, because appellant never met its burden of proof when it asserted its affirmative defense of avoidable consequences, *the burden of proof never shifted back to plaintiff* and she retained the right to have the issue of future lost earnings/lost earning capacity decided on the evidence of what her earnings would have been had she remained at UCLA, obtained the assistant clinical professor position, and moved up the tenure ladder there, evidence which we discuss in the next portion of this opinion.

have been considerably more than that and would have grown from year to year as plaintiff moved on to more prestigious positions at UCLA.[24]

Plaintiff was 40 years old at time of trial. She observes that when the $2,000,000 awarded to her is divided by the 30 years that her attorney argued she would have worked at UCLA had she not been fired, that translates into a yearly salary for plaintiff at UCLA of only $66,666. Assuming she retired earlier, at age 65, the yearly salary represented by the $2,000,000 would be $80,000. As noted earlier, the jury was instructed that the attorney's arguments are not evidence. Nevertheless, the attorney's arguments point up the reasonable conclusion that the amount awarded to plaintiff for future economic injuries is not "so grossly disproportionate to [her] injury that the

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[24] As noted in footnote 5, *ante*, the parties disagree about whether positions in the clinical professor series (assistant clinical professor, associate clinical professor and clinical professor) can lead to tenure. However, the jury received evidence from several sources demonstrating that the doctors with whom plaintiff interacted at UCLA were very aware that she desired to join the ranks of academia at UCLA *and remain there*.

When Dr. Small offered the assistant clinical position to plaintiff in 1999, he told her the appointment would give her an opportunity to move up the ladder to *eventually have a secure position at UCLA*. Additionally, there were letters regarding plaintiff, from UCLA doctors, that stated (1) she was enthusiastic about becoming an academic and has the potential to make it (several letters); (2) congratulations on receiving the Hartford fellowship, which "is an excellent predictor of a successful academic trajectory" (from Dr. Small); (3) appointment of plaintiff in June of 1999 would "prepare her to embark on a successful academic career in geriatric psychiatry (Drs. Reuben, Fogelman and Territo) and (4) the department of psychiatry was "making a long-term commitment to her career" (Dr. Whybrow). Also, plaintiff testified that Dr. Spar told her that by becoming an assistant clinical professor she would eventually be available for tenure. Given the glowing letters about plaintiff written by her supervisors at UCI, and similar letters, reports and evaluations written about plaintiff in her early years at UCLA, the notion of her moving from a nontenured track to one leading to tenure is not as fantastic as appellant contends. Indeed, Dr. Spar testified that it was within the realm of possibility that plaintiff could have even occupied his position some day.

award may be presumed to have been the result of passion or prejudice." (*Fortman v. Hemco, Inc*., *supra*, 211 Cal.App.3d at p. 259.) Indeed, given the failure of appellant to prove avoidable consequences, appellant truly ought to be quite happy with the jury's computation, considering that a starting salary for an assistant clinical professor in 1999 was more than $100,000.

Moreover, although appellant asserts it was wrong for plaintiff's attorney to argue to the jury that the salaries Doctors Small, Spar and Whybrow were receiving at UCLA are an indication of how much money plaintiff would have received had she remained employed by UCLA, (apparently Dr. Spar's yearly income from UCLA was $235,000 at the time of trial and Small and Whybrow were earning considerably more), there is no evidence the jury relied on that argument by plaintiff's attorney when it determined a loss of future earnings for plaintiff that amounted to only $80,000 over a 25-year career.

Nor are we impressed with appellant's assertion that plaintiff has a lucrative private practice ahead of her and could earn as much or more in private practice as she would have earned with a career at UCLA. Not only did appellant not support that position with evidence at trial, but the position ignores the requirement that plaintiff's alternative employment be comparable or substantially similar to her UCLA work rather than different or inferior. While psychiatrists may differ on whether a private practice

in psychiatry is inferior to practicing that area of medicine in an academic or hospital setting, clearly the two venues are very different.[25]

4. *Appellant Has Not Demonstrated It Was Deprived of a Fair Trial*

a. *Introduction*

Appellant contends Dr. Spar was the "key decisionmaker with respect to [plaintiff's] employment" and therefore plaintiff's entire case turns on the question whether *Dr. Spar* intended to discriminate or retaliate "when he acted on [plaintiff's] employment." Appellant's assertion that Spar's intent is the key to this case is based on two things. One is Dr. Spar's testimony that all of the people he has recommended for the position of assistant clinical professor in the division of geriatric psychiatry have obtained the job, which he stated was four or five recommendations. The other is

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[25] Despite plaintiff's right to "sit down" after she presented evidence concerning what she could have earned at UCLA had she not been dismissed from employment there, she went forward and presented additional evidence. That evidence concerned her earnings between the day she was terminated from employment at UCLA and the time of trial.

Plaintiff testified that because she had neither a job at UCLA nor letters of reference, she determined she would have to go into private practice. She began seeing private patients in August 2002 and at that time she was under "a lot of emotional distress [and] had multiple physical symptoms, neck spasms and irritable bowl, but [she] had no other source of income, no other job, and [she] was single and had to work." In 2002, she generated approximately $20,000 to $35,000 in revenue from her private practice, but she was not able to pay herself a salary because that money went to pay her expenses. She lost between $20,000 and $30,000 in 2002. In 2003 she generated approximately $100,000 in revenue which resulted in her having approximately $35,000 in income, the difference in figures attributable to her expenses. Trial in this case was in 2004. For the first six months of 2004, she generated approximately $50,000 to $60,000, was able to realize approximately $32,000 to $35,000, and she opined that she was thus "doing pretty well." Given the size of the future earnings the jury awarded to plaintiff, it appears the jury may have factored in these private practice earnings when it calculated that award.

plaintiff's attorney's argument to the jury that the search committee was conceived as a cover for Dr. Spar because he had already recommended plaintiff twice for the position before plaintiff began to complain about sexual harassment and gender discrimination at UCLA, and it would not look good if Spar denied her the job; thus the search committee was devised, and plaintiff was told the appointment was not certain and it depended on the search committee, and even though Spar testified he had the right to accept or reject the search committee's recommendations, plaintiff was not told about this discretion that he held.

Although appellants contends that plaintiff's case turns on whether Spar intended to discriminate or retaliate "when he acted on [plaintiff's] employment," appellant nonetheless also contends that plaintiff wanted to divert the jury's attention from that issue and plaintiff did so by "persuad[ing] the trial court to admit two irrelevant pieces of evidence that inappropriately turned the trial into a wide-ranging referendum on *UCLA*." Appellant asserts admission of the evidence was reversible error because it deprived appellant of a fair trial.

Appellant challenges admission into evidence of UCLA's statistics for the number of men and women on the "ladder faculty" in the Department of Psychiatry. Appellant's attorney stated the ladder positions are the "senior leadership in the department." Appellant argues the ladder faculty is (1) "the one faculty series that enjoys tenure," and (2) does not include assistant clinical professors, and thus, statistics

on the ladder faculty are not relevant to this case. The statistics show that there are six ladder faculty positions in the Department of Psychiatry and all were held by men.[26]

The other piece of evidence that appellant contends was erroneously admitted is testimony from plaintiff's human resources expert regarding the quality of UCLA's practices in preventing discrimination, harassment and retaliation, and in investigating charges of discrimination, harassment and retaliation.

b. *Admission of the Gender Statistics*

We need not decide whether there was error in the admission of the statistical evidence relating to gender because the jury's special verdict shows the jury found that plaintiff properly claimed relief under the Act both on gender discrimination *and retaliation* grounds. The jury found that plaintiff's gender was "a motivating reason for [appellant's] failure to promote, appoint, or discharge her." The jury *also found* that plaintiff's "protesting or complaining about sexual harassment or discrimination [was] a motivating reason for [appellant's] failure to promote, appoint, or discharge her." The instructions to the jury on the special verdict form make it clear that *either* finding would permit the jury to deliberate on the question of damages. Thus, had the jury found against plaintiff on her charge of gender discrimination but in favor of plaintiff on her charge of retaliation, the jury would have still deliberated on damages.

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[26] At the in limine hearing on whether the ladder faculty statistics should be admitted into evidence, appellant stated the statistics for the position plaintiff wanted – assistant clinical professor—show that over 40 percent of the assistant clinical professors are women and thus *that* is the relevant statistic. The jury was told of that statistic.

Therefore, assuming arguendo that letting the jury know that all six of the ladder faculty positions were held by men was error because it could have influenced the jury's determination on gender as a motivating reason for appellant's negative action against plaintiff, it was not *prejudicial* error since alternatively the jury determined that appellant acted in retaliation when it denied her the assistant clinical professor position and discharge her.

c. *Admission of Testimony from the Human Resources Expert*

Evidence Code section 801 provides that an expert witness may offer an opinion on matters "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." Appellant made a motion in limine to exclude testimony of a human resource expert that plaintiff wanted to present to the jury.

Appellant indicated to the trial court it had deposed the expert witness and determined the witness proposed to give three opinions at trial: (1) there was a failure to take reasonable action to *prevent* discrimination, harassment and retaliation; (2) there was a failure to take reasonable action to *correct* discrimination, harassment and retaliation in the work place; and (3) appellant *violated its own policies* in a manner that is egregious and significant. Plaintiff summarized that the expert would testify as to what appellant was supposed to do. Plaintiff indicated the expert would not give an opinion whether appellant discriminated against plaintiff, nor whether appellant

retaliated against plaintiff (since those are determinations for the trier of fact to make). The trial court allowed the expert, Donna Duffy, to testify.[27]

Citing *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, appellant argues there is no liability for an employer who fails to investigate FEHA

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[27] In *Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, the plaintiff sued under FEHA, charging her employer violated the antiretaliation provisions of that Act. The trial court ruled, at a hearing on the defendant's motion in limine, that the plaintiff's human resources management expert would not be permitted to testify whether the employer retaliated against the plaintiff employee. However, the court did permit the expert to state that certain facts introduced in evidence were indications of a retaliatory *motive* on the part of the plaintiff's employer. The *Kotla* court held such testimony by the expert was inadmissible under Evidence Code section 801 because it invaded the jury's right to draw conclusions from the evidence (*id*. at p. 291), and the testimony was prejudicial to the employer (*id.* at pp. 294-295).

In a footnote, the *Kotla* court stated it was not "fashion[ing a] general rule [] precluding the use of human resources experts in employment cases. We are concerned solely with [the plaintiff's expert's] testimony that the facts in evidence were indicators of or had a tendency to show retaliation. Expert testimony on predicate issues within the expertise of a human resources expert is clearly permissible. For example, evidence showing (or negating) that an employee's discharge was grossly disproportionate to punishments meted out to similarly situated employees, or that the employer significantly deviated from its ordinary personnel procedures in the aggrieved employee's case, might well be relevant to support (or negate) an inference of retaliation. Opinion testimony on these subjects by a qualified expert on human resources management might well assist the jury in its fact finding." (*Id*. at p. 294, fn. 6.)

In arguing the in limine motion in the instant case, plaintiff asserted the expert's opinions would assist the jury and they are relevant to motive. However, plaintiff did not assert that she was entitled to have the expert give an opinion on appellant's motives in dealing with plaintiff's employment.

Regarding assisting the jury, plaintiff argued there was much activity by UCLA's human resources department regarding plaintiff, including that three people from human resources worked on plaintiff's matter and generated "5 books of exhibits of their e-mail transactions." Plaintiff added that the expert would be able to give testimony concerning academic settings. On appeal, plaintiff notes that her expert "served to illuminate matters beyond the common experience of laypersons—such as how human resources departments should properly discharge their duties to investigate allegations of retaliation or discrimination or take reasonable steps to prevent retaliation and discrimination from occurring.

claims or fails to adopt reasonable preventive measures, *unless the finder of fact determines that discrimination or retaliation have actually occurred*. Subdivision (k) of section 12940 of the Act makes it an unlawful employment practice for an employer to fail to take those measures. *Trujillo* held it is not a stand-alone subdivision. Appellant's argument has the effect of pointing up why it was *not* error to permit plaintiff's human resources expert to testify concerning UCLA's human resources policies and practices, and its investigative efforts concerning plaintiff's charges. Since plaintiff alleged that discrimination and/or retaliation did occur, and since plaintiff alleged that appellant failed to take the required measures regarding discrimination and retaliation, then evidence of a violation of subdivision (k) was clearly relevant to the issues in plaintiff's case.

Further, because Ms. Duffy's testimony *was relevant*, appellant's contention that her testimony had no bearing on Dr. Spar's motives when he dealt with plaintiff's employment and plaintiff's complaints against her fellow employees is itself irrelevant. Moreover, the contention is also incorrect because Duffy testified Spar should have removed all of the people from the search committee who had negative feelings about plaintiff, meaning Dr. Espinoza. Further, Duffy remarked that UCLA's diversity training courses were mandatory and when Spar was asked whether he had taken the training he remarked that he had not because he did not have any interest in the topic.

5. *We Find No Cause to Disturb the Trial Court's Award of Attorney's Fees*

a. *Introduction*

Based on provisions in section 12965, subdivision (b), which permit the trial court to award attorney's fees and costs to the prevailing party in a suit concerning violations of the FEHA, plaintiff filed a motion for attorney's fees as the prevailing party in this suit. A hearing was held on November 15, 2004. Using a multiplier of 2 on the lodestar amount determined by the court (discussed more fully, *infra*), the court awarded plaintiff fees in the amount of $515,450.

Section 12965 provides that awards of attorney's fees are in the court's discretion. It is the trial court that is in the best position to evaluate the legal services provided by attorneys, based on its own expertise, and expert testimony is not required. The court's determination of a proper award of fees will not be disturbed on appeal unless it clearly constitutes an abuse of discretion. (*PLCM Group, Inc. v. Drexler,* (2000) 22 Cal.4th 1084, 1096; *Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 522-524.) The burden is on the party challenging the award to show such abuse; the reviewing court will not divest the trial court of its discretionary power merely to substitute its own view as to what amount of fees should have been awarded. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

However, the correct application to a case of the statutory and case authority regarding awards of attorney's fees is not a matter for the trial court's discretion. Rather, it presents a question of law which we decide de novo,. (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1132-1133.)

In the instant case, appellant contends the trial court abused its discretion when it applied what is known as a multiplier or fee enhancer, to arrive at the amount of attorney's fees to award plaintiff. Appellant contends that in FEHA cases against public entities, fee enhancers should only be used in extraordinary cases and the instant case is not extraordinary. However, appellant's position is not supported by the law governing fee multipliers.

b. *Lodestars and Multipliers*

Fundamental to a determination of an attorney's fee award, both in FEHA cases and other cases where awards of attorney's fees are permitted, is a computation whereby the number of hours reasonably expended for legal services on behalf of the prevailing party is multiplied by a reasonable hourly rate. The product of that computation is the "lodestar." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 584; *PLCM Group*, *supra*, 22 Cal.4th at p. 1095.) "The reasonable hourly rate is that prevailing in the community for similar work." (*PLCM Group*, *Inc. v. Drexler, supra*, 22 Cal.4th at p. 1095.) It is the "hourly rate for a fee-bearing case" rather than a case taken on contingency. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138.) In determining the lodestar, the trial court need not " ' "become enmeshed in a meticulous analysis of every detailed facet of the professional representation." ' " (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1098.) Moreover, "California case law permits fee awards in the absence of detailed time sheets. [Citations.]" (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 255.) Nevertheless, the trial court is not bound by the evidence submitted by an

attorney in support of a motion for fees. (*Vella v. Hudgins, supra,* 151 Cal.App.3d at p. 524.)

After the lodestar amount is arrived at, the trial court then determines whether that amount, considering the circumstances of the case, should be adjusted upwards or downwards so as to "fix the fee at the fair market value for the legal services provided." (*PLCM Group Inc. v. Drexler, supra,* 22 Cal.4th at p. 1095.) In general, the court looks at " 'the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case' " (*Id*. at p. 1096.) Whether the case was taken on a contingency basis is one of the "other circumstances" to be considered by the trial court.

c. *Purpose of Section 12965's Fee Shifting Provisions*

Whereas litigants are generally expected to pay their own attorney's fees, section 12965 shifts that requirement. "[T]he aim of fee-shifting statutes is 'to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific . . . laws. Hence, if plaintiffs . . . find it possible to engage a lawyer based on the statutory assurance that he will be paid a "reasonable fee," the purpose behind the fee shifting statute has been satisfied.' [Citation.]." (*Flannery v. Prentice, supra,* 26 Cal.4th at p. 583.)

"There is no doubt that ' "privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions" ' [citation] and ' "[w]ithout some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical

matter frequently be infeasible." ' [Citation.]" (*Flannery v. Prentice*, *supra*, 26 Cal.4th at p. 583, fn. omitted.)

Regarding such fundamental public policies, "[t]he basic, underlying purpose of FEHA is to safeguard the right of Californians to seek, obtain, and hold employment without experiencing discrimination on account of race, religious creed, color, national origin, ancestry, physical disability, medical disability, medical condition, marital status, sex, age, or sexual orientation. (Gov. Code, § 12920; [citation].)" (*Flannery v. Prentice*, *supra*, 26 Cal.4th at pp. 582-583.) Moreover, this fundamental policy that people be able to seek and hold employment free from prejudice recognizes that " '[j]ob discrimination "foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." ' " (*Id*. at p. 584.)

"It has long been recognized . . . that the contingent and deferred nature of the fee award in a civil rights or other case with statutory attorney fees *requires* that the fee be adjusted in some manner to reflect the fact that the fair market value of legal services provided on that basis is greater than the equivalent noncontingent hourly rate. [Citation.]" (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 394-395, italics added.) Although the *Horsford* court, citing *Ketchum v. Moses* (2001) 24 Cal.4th 1122, stated a contingent fee case "requires" an adjustment of the lodestar when the case involves statutory attorney's fees, the *Ketchum* court actually stated the adjustment is not required. (*Ketchum v. Moses*, *supra*,

24 Cal.4th at p. 1138). Rather, the *Ketchum* court explained in detail why the enhancement for contingent cases is a reasonable concept. (*Id*. at pp. 1132-1133.) "The purpose of a fee enhancement, or so-called multiplier, for a contingent risk is to bring the financial incentives for attorneys enforcing important constitutional rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-service basis." (*Id*. at p. 1132.) The *Ketchum* court noted that contingency fee work is a loan of the attorney's services and the interest rate on that loan must be higher than on a conventional loan since a loss of the case will cancel the client's debt to the attorney. (*Id*. at pp. 1132-1133.) " 'A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.' " (At p. 1133.)

"The contingency adjustment may be made at the lodestar phase of the court's calculation or by applying a multiplier to the noncontingency lodestar calculation (but not both)." (*Horsford v. Board of Trustees of California State University*, *supra*, 132 Cal.App.4th at p. 395.) Because the multiplier is used to promote public policy and interest, it does not have the function of punitive damages, which by statute (Gov. Code, § 818) cannot be awarded against a public entity.

Absent contract provisions permitting it, the plaintiff's attorney is not permitted to take the whole of the contingency fee and the fees awarded under section 12965. When there is no contract between the attorney and the client designating who will own the section 12965 fees awarded by a court, the proceeds of the fee award that exceed the

fees the client has already paid belong "to the attorneys for whose work they are awarded." (*Flannery v. Prentice*, *supra*, 26 Cal.4th at p. 577.) Thus, when "the contingency fee is larger than the statutory fee award, counsel is permitted to accept that fee, with a setoff for statutory fees received. If the contingency fee is smaller than the statutory fee, counsel must reimburse the plaintiff from the statutory award for any amounts already paid by the client pursuant to the contingency contract. [Citations.]" (*Horsford v. Board of Trustees of California State University*, *supra*,. 132 Cal.App.4th at p. 401, italics omitted.)

The *Horsford* court also observed that while the interest of the taxpayers of California is impacted by multipliers when the defendant is a public entity, that fact has less importance "where the public entity intentionally engages in discrimination and chooses to defend its conduct through lengthy and complex litigation." (*Horsford v. Board of Trustees of California State University*, *supra*, 132 Cal.App.4th at pp. 400-401.) The court stated that in neither of those instances (which are *both* present in this case), is the trial court permitted to use the public entity status of a defendant "to wholly negate the enhancement of a lodestar that otherwise would be appropriate after consideration of the contingency and delay factors." (*Id*. at p. 401.)

Cases relied on by amici curiae to support the notion that the trial court's application of a multiplier was error miss the mark. Besides not involving the highly important fundamental public policy that FEHA is designed to further, the court in *State of California v. Meyer* (1985) 174 Cal.App.3d 1061, 1073-1074. (eminent domain proceeding) clearly stated it was not holding that multipliers would not be appropriate in

an eminent domain proceeding where the public entity would be paying an attorney's fee award. And in *San Diego Police Officers Assn. v. San Diego Police Department* (1999) 76 Cal.App.4th 19, 24, (determination that Penal Code section 148.6 only requires an advisory warning to persons making complaints against peace officers when the complainant is a citizen complaining of police misconduct during performance of the officer's duties), the court applied a negative multiplier of .20 to the lodestar because it determined the plaintiff achieved "very limited success," the case "did not involve complex issues of law" and the plaintiff's attorneys were thus not precluded from working on other matters, there was no contingency fee, and the fee award would ultimately be paid for by the taxpayers. Thus, consideration of who would pay the award was just one of the reasons for reducing the lodestar.

Nor are we impressed with amici's argument that public employees have greater job security than private sector employees (amici mention due process rights, civil service merit systems, administrative proceedings, and unions and union contracts), and therefore use of multipliers would provide public employees little benefit. Assuming arguendo the validity of this claim, we are dealing only with the case before us and amici does not explain how these job protections fit into this case. Equally unimpressive is their argument that multipliers are not necessary in FEHA cases brought against public entities because "the size of public entity budgets and the fact that payment of any award of fees and damages is guaranteed by taxpayer dollars [makes] litigants view public entities as the ultimate 'deep pocket' [and] there is no evidence of

a shortage of attorneys willing to bring FEHA cases against public entities." Amici are shooting from the hip with that argument and they offer nothing concrete to back it up.

The same can be said for amici's assertion that "[p]ublic entities employ hundreds of thousands of individuals throughout the state and face a heavy stream of FEHA litigation brought by current and former employees. For example, the City and County of San Francisco employs in excess of 20,000 employees and has approximately 20-25 active FEHA cases in a given year. Most of these cases are garden-variety claims that have no impact beyond the resolution of the plaintiff's personal rights and economic interests. Awarding fee multipliers on a regular basis in such cases would only encourage meritless litigation and make it more difficult and expensive for public entities to settle. FEHA litigation would become more contentious, more expansive, and more expensive. The result would be a devastating drain on the increasingly strained coffers of public entities and the diversion of public funds from vital public services like FEHA enforcement into the pockets of plaintiffs' attorneys. Thus, awarding fee multipliers in routine FEHA cases will likely harm the very people that FEHA is supposed to protect. And ultimately the public will suffer."

If this "sky is falling" argument is meant to be applied to the instant case, then what amici is effectively arguing is that in this case, where the jury and the trial court found liability so clear, plaintiff was the victim of UCLA's routine manner of handling in-house claims of discrimination and retaliation and handling FEHA cases. That manner can reasonably be described as stonewalling. Moreover, amici do not explain whether San Francisco has 20-25 *new* cases every year, and do not explain why they

believe use of a multiplier in the instant case is the equivalent of using it "on a regular basis," unless, again, stonewalling is something that UCLA does on a regular basis. Further, the argument paints the FEHA plaintiff's bar with a wide, disrespectful brush.

We quite agree with plaintiff's assertion that if the Legislature believed that use of a multiplier in FEHA cases involving public entities was to be avoided, it could have added such a provision to section 12965's attorney's fee provision. Plaintiff notes that Code of Civil Procedure section 1021.5's fee provisions for public interest cases includes a provision prohibiting the use of a multiplier "based on extrinsic circumstances" to increase or decrease an award of fees in favor of a public entity.

d. *Application of Lodestar and Fee Enhancement Case Law to the Instant Case*

In the instant case, plaintiff claimed a lodestar of $411,530, which the trial court reduced to $257, 725. The court then applied a multiplier of 2 and awarded fees of $515,450. The court did not elaborate as to what factors it considered when it determined that a multiplier of two was appropriate in this case. As noted above, it is this use of a multiplier that appellant challenges in its appeal from the order awarding attorney's fees. Appellant asserts that the trial court abused its discretion when it applied the multiplier.

In reviewing appellant's claim of abuse of discretion, we observe the case involves both a contingency case and a delay in bringing it to a close. It has been over three years since plaintiff's attorneys took this case (the suit filed in June 2003) and thus the attorneys' compensation has not only been delayed, it has been delayed for a lengthy

time and during that time, the demands of this case have precluded the attorneys, to a greater or lesser extent, from taking other work, and thus required them to use savings or incur debt to finance their offices and family responsibilities. (*Horsford v. Board of Trustees of California State University*, *supra*, 132 Cal.App.4th at pp. 399-400.) The *Horsford* court noted that "a failure to fully compensate [attorneys] for the enormous risk in bringing even a wholly meritorious case would effectively immunize large or politically powerful defendants from being held to answer for constitutional deprivations, resulting in harm to the public." (*Id*. at p. 400.)

In addition to the two factors of contingent payment and delay, the trial court was entitled, in its discretion, to enhance the attorney's fees based on other matters specific to this case. Plaintiff's attorneys noted in her motion for attorney's fees that suing UCLA posed a risk because of the deference given by the public to educational institutions. Moreover, nearly all of the pertinent witnesses were still employees of UCLA and presumably would be reluctant to testify against appellant. Despite these hurdles, plaintiff prevailed in the case and was awarded a substantial sum of damages. Indeed, plaintiff's attorneys presented her case so well that the trial court, in deciding appellant's motion for new trial, stated that after weighing the evidence, it was "convinced . . . that the jury could not have reached a different verdict."

Based on these matters, we cannot say there was an abuse of discretion in applying a multiplier of two to the lodestar. Moreover, the arguments which appellant and amici curiae present against application of a multiplier ignore the body of law which we have set out above regarding contingency cases, delays in bringing a case to a

close, and the right of litigants in FEHA cases to obtain a multiplier even though the losing party is a public entity. Further, although appellant asserts that use of the multiplier provides plaintiff with a double counting of enhancement factors because the enhancement factors were already included in the lodestar figure, appellant does not provide evidence in the record to support that assertion. Given that the trial court made its decision on the record at the fee hearing, an inquiry to the trial court by appellant at the attorney's fees hearing would have resolved the question.

DISPOSITION

The judgment and order from which appellant has appealed are affirmed. Costs on appeal to plaintiff.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P.J.

ALDRICH, J.