Filed 2/26/18 Sanders v. County of Los Angeles CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DEBORAH SANDERS, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B267619 (Los Angeles County Super. Ct. No. BC514539)

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor Chavez, Judge. Affirmed.

Law Offices of Helena Sunny Wise and Helena Sunny Wise for Plaintiff and Appellant.

Law Offices of David J. Weiss, David J. Weiss and Jaime E. Verducci for Defendants and Respondents.

Appellant Deborah Sanders was employed as a relief nurse at Los Angeles County, University of Southern California Medical Center ("LAC+USC"). Following her discharge, Sanders filed this action against her former employer, respondent County of Los Angeles ("County"), and her former supervisors, respondents Sheila Mallett and Sunday Okundolor (collectively "Respondents"). Sanders alleged she was subjected to unlawful discrimination and harassment based on her race and national origin, and was discharged in retaliation for engaging in legally protected activity. Following a trial, the jury found in favor of Respondents on all claims, and the trial court denied Sanders's motion for a new trial. On appeal, Sanders asserts the judgment should be reversed and a new trial should be granted based on alleged newly discovered evidence, instructional error, and insufficient evidence to support the jury's verdict. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Complaint

On July 9, 2013, Sanders filed this civil action, naming the County, Mallett, and Okundolor as defendants. The complaint alleged claims against the County for race or national origin discrimination in violation of the California Fair Employment and Housing Act, Gov. Code § 12900 et seq. (FEHA), retaliation in violation of FEHA, and retaliation in violation of Labor Code section 1102.5. The complaint also alleged a claim against each of Respondents for race or national origin harassment in violation of FEHA. The case was tried to a jury over a three-week period in June 2015.

II. The Evidence At Trial

A. Sanders's Employment with the County

Sanders, who is African-American, was hired as a Relief Nurse at LAC+USC in November 1992. She was terminated from her employment on October 29, 2012. There are three categories of nursing employees at LAC+USC: (1) Regular full-time employees; (2) Relief employees; and (3) Registry employees. Only regular full-time employees have civil service appeal rights, which entitle them to notice and an opportunity to contest a disciplinary action before it is imposed. Relief and registry employees, on the other hand, are employed on a temporary basis and can be disciplined or discharged at any time in the discretion of management.

Throughout her employment at LAC+USC, Sanders held the temporary position of a Relief Nurse. In this position, Sanders could be assigned to any unit in the medical center that had a staffing need for nursing assistance. Sanders primarily was assigned to work in the Psychiatric Emergency Room, a unit commonly referred to as the "Psych ER." The Psych ER is a locked facility in LAC+USC where psychiatric patients are treated on an emergency basis and may be subject to a 5150[1] involuntary hold for up to 72 hours. When assigned to that unit, Sanders's direct supervisor was Okundolor, the Nurse Manager of the Psych ER. Okundolor in turn reported to Mallett, the Nursing Director of Emergency Services.

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1 Welfare and Institutions Code section 5150.

B. Sanders's Alleged Workplace Complaints

Sanders testified that, prior to her October 2012 discharge, she frequently complained to her supervisors about breaches in patient and staff safety and violations of patient privacy. Among her complaints, Sanders reported that, in late 2011, the Psych ER had an influx of more aggressive, hyper-sexual patients, but management failed to provide adequate staffing or training to treat these patients. Sanders also raised concerns about the Psych ER's practice of placing male and female patients across from one another in the same open area rather than segregating the patients by gender into separate rooms for their safety. In addition, Sanders complained that the nursing staff was allowed to access the electronic medical records of patients in the Psych ER in a manner that she believed violated patient privacy laws. Sanders testified that she primarily raised these complaints at monthly staff meetings held by Okundolor, but also discussed her concerns on an individual basis with Okundolor and Mallett.

Sanders also testified that, in March 2012, she complained about patient care issues when she was interviewed as part of a personnel investigation conducted by the County into a claim made by another employee, Obidi Obienu. That investigation arose when Obienu complained about alleged discriminatory treatment by Okundolor, and identified Sanders as a potential witness in his claim. During her interview, Sanders told the investigator she believed there was a cultural or tribal conflict between Obienu and Okundolor, who are both Nigerian, rather than any discrimination. Sanders also reported that the regular staff would complain about how Okundolor assigned overtime work, but she was not aware of any employees receiving special treatment. According to the County's investigator, Sanders never

indicated in her interview that she had been subjected to any discrimination, harassment, or retaliation. At the conclusion of the investigation, the County determined that there had been no discrimination by Okundolor.

C. June 2012 Patient Elopement

On June 22, 2012, shortly after midnight, a patient on a 5150 involuntary hold was able to escape from the Psych ER's locked facility. This type of escape by a patient is referred to as an elopement. At the time, Sanders was working in another unit of the hospital and went to the Psych ER at the end of her shift so that a supervisor could sign her assignment sheet. Sanders also wanted to drop off a snack for Charles Ansare, a Nursing Attendant in the Psych ER. Security video footage of the hospital showed that, shortly before the elopement, Sanders entered the back area of the Psych ER where patients were lying on gurneys, and then walked out of view toward the nursing station. Ansare, who had been monitoring the patients in the back area, followed Sanders out of the room, leaving the patients unattended. A minute later, Ansare returned to the back area, but immediately left again, exiting the Psych ER through a set of double doors that could only be accessed with an employee key card. Unbeknownst to Ansare, a male patient followed him through those doors, and once outside the locked facility, fled the hospital on foot. At some point after Ansare left, another Nursing Attendant went to the back area to monitor the patients, but did not notice that a patient was missing for several minutes. Once the nursing staff on duty in the Psych ER became aware of the missing patient, they began to look for him; however, they left the

other patients in the back area unattended for a period of time during the search.

D. August 2012 Sexual Assault

On August 4, 2012, shortly after 6:00 a.m., a male patient in the Psych ER sexually assaulted a female patient. The two patients had been placed in gurneys across from one another in the patient care area near the nursing station. Sanders had been assigned to monitor the female patient, and Kristine Sanz, a Registry Nurse, had been assigned to monitor the male patient. Sanders also was acting as the Charge Nurse in the Psych ER at the time. As the acting Charge Nurse, Sanders was responsible for overseeing the Nursing Attendants who were on duty in the Psych ER. Dike Ojigwe was the Nursing Attendant assigned to monitor the patient care area when the assault occurred.

Sanders testified that, at the time of the assault, she was sitting behind the nursing station preparing paperwork. From that vantage point, she did not have a clear view of the female patient under her care because a pillar partially obstructed her view. Upon hearing a loud scream, Sanders looked up and saw the male patient standing at the foot of the female patient's bed. She immediately yelled at him to get away, and he complied. Ojigwe and other staff members responded to the patient care area when the female patient screamed, and they then moved the male patient to a seclusion room. Sanders testified that she never saw the male patient make physical contact with the female patient at any time.

Immediately after the incident, the female patient was too distraught to speak, but she later disclosed that the male patient had sexually assaulted her. The police then conducted a criminal

investigation of the incident. The patients interviewed reported to the police that, at a time when no hospital staff was present in the area, the male patient climbed on top of the female patient as she was sleeping and attempted to orally copulate her. The nursing staff, on the other hand, made inconsistent statements to the police about where Ojigwe was when the incident occurred and whether anyone intervened before there was any physical contact between the patients. After confessing to the police, the male patient was charged with sexual assault.

E. Personnel Investigation of the June 2012 and August 2012 Incidents

The County initiated a personnel investigation of both the August 4, 2012 sexual assault and the June 22, 2012 patient elopement. The investigation was conducted by Goar Oganesyan and Minerva Edwards,[2] two investigators in the Performance Management unit, which is part of the Human Resources division in the County's Department of Health Services. Beginning in late August 2012, the investigators interviewed various staff members in the Psych ER and obtained their signed affidavits. During her interview about the assault, Sanders stated that she saw the male patient standing at the foot of the female patient's bed, but never saw him touch her. Based on Sanders's description of where she was at the time of the incident, the investigators concluded that the female patient would have been in Sanders's direct line of sight when the assault occurred, but

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[2] Edwards also investigated the March 2012 complaint by Obienu against Okundolor, and interviewed Sanders as part of that earlier investigation.

Sanders was being inattentive to her patient. The investigators also concluded that Sanders had been derelict in her duties as the acting Charge Nurse by failing to ensure that the patients were being properly monitored by the nursing staff.

F. Sanders's Termination of Employment

In mid-September 2012, Mallett and Okundolor decided not to schedule Sanders for any more shifts in the Psych ER while the personnel investigation was pending. On October 2, 2012, Mallett, Oganesyan, and other members of nursing and human resources management met to discuss the results of the investigation and the Performance Management team's recommendation regarding Sanders's employment. The participants unanimously agreed Sanders should be discharged based on her poor job performance, and particularly, on her conduct in connection with the August 2012 sexual assault. Sanders's employment with the County was terminated effective October 29, 2012.

In January 2013, about three months after her discharge, Sanders sent an anonymous complaint to Isabel Milan, the Chief Nursing Officer at LAC+USC. Among other allegations, Sanders claimed that Okundolor treated the Nigerian employees in the Psych ER more favorably than the non-Nigerian employees. At Milan's request, Mallett investigated the allegations in the anonymous complaint and concluded that they lacked merit.

G. Discipline Imposed on Other Employees

As a result of the personnel investigation conducted by the Performance Management team, the County imposed discipline on a number of nursing employees in the Psych ER. With respect

to the June 2012 elopement, Ansare, the Nursing Attendant who had left his assigned post when the patient eloped, was issued a notice of intent to discharge. As a regular County employee, Ansare had a right to contest the discharge decision through the civil service process, and he ultimately was issued a 30-day suspension without pay. Ansare's national origin is Ghanaian. No other employees were disciplined or discharged as a result of the elopement investigation.

With respect to the investigation of the August 2012 sexual assault, a total of seven nursing employees, including Sanders, were subject to discipline. In addition to discharging Sanders, the County terminated the employment of Ojigwe, the Registry Nursing Attendant who had been assigned to monitor the patient care area, and Sanz, the Registry Nurse who had been assigned to monitor the male patient. Like Sanders, both Ojigwe and Sanz were employed on a temporary basis and did not have civil service appeal rights. Ojigwe is Nigerian and Sanz is Caucasian-American. The four other employees who were disciplined as a result of the sexual assault investigation were issued suspensions without pay that varied in length from five to 20 days. Unlike Sanders, Ojigwe, and Sanz, each of those four employees was a regular County employee with civil service appeal rights. Of those employees, three are Nigerian and one is Asian-American.

III. The Special Verdict and Judgment

At the conclusion of the trial, the jury returned a special verdict in favor of Respondents on all claims. On the claim for retaliation in violation of Labor Code section 1102.5, the jury found that Sanders had disclosed information to a government agency about acts that she reasonably believed violated state or

federal law regarding patient care, patient safety, and/or patient privacy rights. The jury found, however, that the disclosure was not a motivating reason for Sanders's termination of employment. On the claims for race or national origin harassment in violation of FEHA, the jury found that Sanders had not proven that she was subjected to unwanted harassing behavior based on her race or national origin. On the claim for race or national origin discrimination in violation of FEHA, the jury found that Sanders had not proven that her employment was terminated based on her race or national origin. On the claim for retaliation in violation of FEHA, the jury found that Sanders had not engaged in legally protected activity by complaining about discrimination or harassment.

Following the entry of judgment in favor of Respondents, Sanders filed a motion for a new trial on various grounds, including newly discovered evidence and alleged legal error. The trial court denied the motion in its entirety. Sanders then filed an appeal from the judgment and the order denying her new trial motion.

DISCUSSION

On appeal, Sanders argues the judgment entered in favor of Respondents should be reversed and a new trial should be granted. In particular, Sanders asserts the trial court erred in denying her new trial motion based on newly discovered evidence that was produced by Respondents shortly before trial. Sanders also contends the court erred in refusing to give her requested jury instructions and in responding to questions posed by the jury during its deliberations. In addition, Sanders raises issues about the sufficiency of the evidence supporting the jury's verdict.

I. Alleged Error Based on Newly Discovered Evidence

Sanders argues the trial court erred in denying her motion for a new trial based on newly discovered evidence. That evidence consisted of a hand-drawn map of the Psych ER, which was part of the Performance Management team's notes of its personnel interview with Sanders about the August 2012 sexual assault, and included the handwritten initials "DS" to show where Sanders allegedly was seated at the time of the assault. Respondents offered the map as an exhibit at trial; the court admitted it into evidence without an objection from Sanders. Sanders nevertheless asserts that a new trial should have been granted because Respondents did not produce the map until after the close of discovery, and did not reveal what the map purported to show until their witnesses testified about its contents at trial.

A. Relevant Law

Code of Civil Procedure section 657 authorizes the trial court to grant a new trial on grounds that include "[n]ewly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." (Code Civ. Proc., § 657, subd. (4).) "Generally, a party seeking a new trial on this basis must show that '(1) the evidence is newly discovered; (2) he or she exercised reasonable diligence in discovering and producing it; and (3) it is material to the … party's case.' [Citation.]" (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1192.) "In the context of a motion for a new trial, 'material' means likely to produce a different result. [Citation.]" (*Wood v. Jamison* (2008) 167 Cal.App.4th 156, 161.)

We review the ruling on a motion for a new trial based on this ground for an abuse of discretion. (*Hall v. Goodwill Industries of Southern California* (2011) 193 Cal.App.4th 718, 730.)

B. The Trial Court Did Not Abuse Its Discretion in Denying Sanders's Motion for a New Trial Based on Newly Discovered Evidence

In this case, it is undisputed the alleged newly discovered evidence was produced by Respondents prior to trial, and was admitted as an exhibit at trial without objection. The record reflects that the County produced the map in May 2015 in response to a pre-trial discovery request made by Sanders, and identified the document in the final joint exhibit list that was filed on the first day of trial in June 2015. Accordingly, Sanders had reason to know of the map's existence and contents at the time the trial began.

While Sanders attempts to characterize the map as newly discovered evidence, she does not dispute that the document was admitted as an exhibit at trial, and that she had an opportunity to examine the percipient witnesses about its contents. At trial, Minerva Edwards and Goar Oganesyan, the two Performance Management employees who conducted the investigation of the August 2012 sexual assault, each testified that they showed the map to Sanders during their interview with her, and that Sanders wrote her initials on the map to identify where she was when the incident occurred. Sanders, on the other hand, testified that she never placed her initials on the map, nor was she shown any map during her interview with the investigators. On appeal, Sanders appears to contend that a new trial should have been granted because she did not know prior to trial that these witnesses would testify that she wrote the initials "DS" on the

map, and thus, contradict her trial testimony. However, the mere fact that Sanders may have been surprised by the witnesses' testimony about certain aspects of the map does not demonstrate that the map itself constituted newly discovered evidence that warranted a new trial.

Sanders also asserts the trial court abused its discretion when it refused to permit a forensic handwriting examination of the map at trial and instead elected to have the jury resolve the issue of who wrote the initials "DS" on the document. Sanders does not, however, cite to any portion of the record which shows that she requested an opportunity to have a forensic examination during the trial, or sought to call a handwriting expert to testify about the initials on the map. Instead, Sanders cites to Minerva Edward's testimony, and specifically, to the part of the testimony in which Sanders's counsel asked Edwards to compare the initials on the map with Sanders's handwriting on another document. In sustaining a defense objection to such question, the trial court correctly observed that, unless the witness was an expert in handwriting, "it's a matter of fact that's up to the jury to decide." Contrary to Sanders's claim on appeal, there is no indication in the record that the court refused to allow her to call a proper handwriting expert. On this record, the trial court did not abuse its discretion in denying the motion for a new trial based on alleged newly discovered evidence.[3]

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[3] In her opening brief, Sanders also makes vague references to other "questionable" or "doctored" records that were offered at trial, and asserts that these documents further support her claim that she was entitled to a new trial based on newly discovered evidence. Sanders does not, however, identify what new evidence she discovered that would prove these records were doctored, nor

II. Alleged Error in Instructing the Jury

Sanders contends the trial court committed prejudicial error in refusing to give three CACI instructions and seven special instructions that she requested at trial. Sanders also claims the trial court erred in responding to the jury's questions about her retaliation claims.

A. Relevant Law

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him [or her] which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) A court may refuse a proposed instruction that incorrectly states the law or is argumentative, misleading, or incomplete. (*Shaw v. Pacific Greyhound Lines* (1958) 50 Cal.2d 153, 158; *Harris v. Oaks Shopping Center* (1999) 70 Cal.App.4th 206, 209.) A court also may refuse an instruction requested by a party when the legal point is adequately covered by other instructions given. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1189, fn. 11.)

When the claim on appeal is that the trial court failed to give a requested instruction, we review the record in the light most favorable to the party proposing the instruction to determine whether it was warranted by substantial evidence. (*Ayala v. Arroyo Vista Family Health Center* (2008) 160 Cal.App.4th 1350, 1358.) However, "[a] judgment may not be reversed for instructional error in a civil case 'unless, after an

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does she explain why she could not have, with reasonable diligence, presented such evidence at trial.

examination of the entire cause, including the evidence, the [reviewing] court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' [Citation.]" (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 580.) "A 'miscarriage of justice' exists when, after examining all the evidence, we conclude ""it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."" [Citation.]" (*Weaver v. Chavez* (2005) 133 Cal.App.4th 1350, 1356.)

B. The Trial Court Did Not Err in Refusing to Give Sanders's Requested CACI Instructions

Sanders argues the trial court erred when it refused to give three of her requested CACI instructions: (1) CACI No. 204 regarding the willful suppression of evidence, (2) CACI No. 201 regarding clear and convincing proof; and (3) Former CACI No. 214 regarding admissions by silence. We find no error, however, in the trial court's rulings.

1. CACI No. 204

CACI No. 204 states: "You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party."

Sanders asserts the trial court erred in refusing to give this instruction because Respondents admitted to withholding video evidence related to the June 2012 patient elopement and August 2012 sexual assault. While Sanders cites to the trial testimony of Mallett, Okundolor, and Oganesyan to support her argument, a review of these citations shows that the witnesses made no such admissions. Rather, the witnesses testified they were not certain

if video footage existed that captured other angles of the Psych ER during the elopement or assault, but they could not recall seeing any such additional footage. Mallett further testified that only on-site law enforcement had access to the security footage for the hallways and other non-patient care areas of the hospital, and that a third-party vendor maintained the footage for the locked patient care facility in the Psych ER. Given the lack of any evidence of willful suppression by Respondents, the trial court did not err in refusing to instruct the jury with CACI No. 204. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1434 [CACI No. 204 may be given only "if there is evidence of willful suppression, that is, evidence that a party destroyed evidence with the intention of preventing its use in litigation"].)

2. CACI No. 201

CACI No. 201 provides: "Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true. I will tell you specifically which facts must be proved by clear and convincing evidence."

Sanders argues this instruction was warranted because it set forth the burden of proof for her claim of retaliation under Labor Code section 1102.5. The record reflects that, while both parties initially requested that the jury be instructed with CACI No. 201, the trial court never ruled on the issue because the request was withdrawn. Sanders thus cannot show that the court improperly denied her request. (*Swails v. General Elec. Co.* (1968) 264 Cal.App.2d 82, 85 ["[a] party who has agreed at the trial that an instruction proposed by him shall be deemed withdrawn cannot contend on appeal that the instruction should

have been given"].) Even if the issue were not forfeited, Sanders has not demonstrated any prejudicial error in the failure to instruct the jury with CACI No. 201. The clear-and-convincing standard only applies to a Labor Code section 1102.5 claim once the employee has proven that retaliation was a contributing factor in the adverse action, and the employer asserts it would have made the same decision in the absence of retaliation.[4] Here, the jury found that Sanders's protected activity was not a motivating reason for her discharge. Therefore, the burden never shifted to the County to prove a same-decision defense by clear and convincing evidence.

3. Former CACI No. 214

Sanders requested the trial court instruct the jury with CACI No. 214 as follows: "You have heard evidence that Deborah Sanders made statements in the presence of Sunday Okundolor and Sheila Mallett relative to patient care and staffing violations which threatened the safety and well[-]being of patients and staff alike. You have also heard that Sunday Okundolor and Sheila Mallett did not deny the statements. You may treat the silence of Sunday Okundolor and Sheila Mallett as an admission that

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[4] Section 1102.6 of the Labor Code sets forth the clear-and-convincing standard for a civil action brought pursuant to section 1102.5, and states as follows: "Once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5."

the statement was true only if you believe all of the following conditions are true: 1. Sunday Okundolor and Sheila Mallett were aware of and understood the statements; 2. That these individuals, by either words or actions, could have denied the statement but they did not; and 3. That they would have denied the statement if they thought it was false."

This instruction was argumentative, misleading, and not supported by the evidence.[5] Sanders testified that she frequently complained about patient and staffing issues to Okundolor and Mallett, and that, instead of addressing these issues, they responded in ways that were dismissive of her complaints. Okundolor and Mallett, on the other hand, testified that they did not recall Sanders ever making any such complaints to them during her employment in the Psych ER. There was no evidence, however, that either supervisor was silent when faced with a complaint that a reasonable person would have denied if it were untrue. Sanders's proposed version of former CACI No. 214 was not appropriate, and the trial court properly refused to give it.

C. The Trial Court Did Not Err in Refusing to Give Sanders's Proposed Special Instructions

Sanders also contends the trial court erred in refusing to give seven special instructions that she requested to aid the jury on the law governing her claims. We conclude the trial court properly denied Sanders's request for these instructions.

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[5] We note that CACI No. 214 was revoked by the Judicial Council of California in 2012, and thus, it was no longer in effect when the case was tried.

1. Special Instructions Nos. 1, 2, 3

Sanders proposed the following three special instructions regarding proof in a discrimination or retaliation claim:

Special Instruction No. 1: "Proximity in time between one's complaints and adverse action can alone prove retaliation."

Special Instruction No. 2: "With respect to Deborah Sanders's claim of retaliation for raising issues about patient care, patient-staff ratios, HIP[P]A violations, failure to protect patient privacy, and patient-staff safety, if the County has offered some legitimate, nondiscriminatory reasons for its actions, you must decide whether based upon the evidence presented by Deborah Sanders, the reasons given by the County were not the true reasons for the employment decisions causing Plaintiff's adverse employment actions. [¶] Deborah Sanders may persuade you that either a retaliatory reason more likely motivated the employer or that the County's proffered explanation for its actions is unworthy of credence and simply not believable. Deborah Sanders must then persuade you, by a preponderance of the evidence, that the reason given by the Defendant was a mere 'pretext' or 'cover-up' for what was really a discriminatory or retaliatory purpose."

Special Instruction No. 3: "The easiest way to prove a case of discrimination is to show that the Employer's reasons are false. Evidence suggesting that a defendant accused of illegal retaliation has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation."

The principal flaw with these instructions is that they sought to have the jury apply the burden-shifting framework in *McDonnell Douglas Corp. v Green* (1973) 411 U.S. 792

(*McDonnell Douglas*). The *McDonnell Douglas* test is used "for trying claims of discrimination . . . based on a theory of disparate treatment." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.) Under this three-part test, the plaintiff has the initial burden of establishing a prima face case of discrimination by providing evidence that "(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action . . ., and 4) some other circumstance suggests discriminatory motive." (*Id.* at p. 355.) If the plaintiff establishes a prima facie case, "a presumption of discrimination arises." (*Ibid.*) At this stage, "the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[ ] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason.' [Citations.]" (*Id.* at pp. 355-356.) "If the employer sustains this burden, the presumption of discrimination disappears. [Citations.] The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. [Citations.]" (*Id.* at p. 356; see also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 [applying *McDonnell Douglas* test to a FEHA retaliation claim].)

The *McDonnell Douglas* test "reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 354.) The test is not properly used, however, in the jury instruction context. As one appellate court explained, "the construct of the shifting

burdens of proof enunciated in *McDonnell Douglas* is an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the factfinding process." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 202.) "By the time that the case is submitted to the jury, . . . the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision, leaving only the issue of the employer's discriminatory intent for resolution by the trier of fact." (*Id.* at p. 204.) Therefore, "when the case is submitted to the jury, the construct of the shifting burdens 'drops from the case,' and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's [non-discriminatory] reasons for the employment decision." (*Ibid.*; see *Heard v. Lockheed Missiles & Space Co., Inc.* (1996) 44 Cal.App.4th 1735, 1739 ["*McDonnell Douglas* framework is a burden-shifting tool—not a subject on which the jury should be instructed"]; *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 375 ["[o]nce the case is submitted to the jury," the *McDonnell Douglass* framework "drop[s] from the picture"].) Because Special Instructions Nos. 1-3 sought to have the jury apply the *McDonnell Douglas* test to Sanders's discrimination and retaliation claims, the trial court did not err in refusing to give those instructions.

Sanders's proposed instructions had other defects as well. Special Instruction No. 1 on temporal proximity in a retaliation claim was argumentative and did not accurately state the law. While proximity in time between an employee's protected activity and the employer's adverse action can be evidence of a causal

link between the two (*McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 388), such evidence does not "alone prove retaliation," as set forth in the instruction. Rather, to prevail on a retaliation claim, the plaintiff must prove by a preponderance of the evidence that the protected activity was a substantial motivating reason for the adverse decision. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 226; *Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 470.)

Special Instruction No. 3 on the inference to be drawn from evidence of pretext was likewise argumentative and misleading. Although a jury rationally may infer that an employer's false explanation for an adverse action is masking its actual motivation, it would be improper to instruct the jury that such an inference must be drawn, or that this is the "easiest way" to prove discrimination, as stated in the instruction. As our Supreme Court explained, "[p]roof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there must be evidence supporting a rational inference that intentional discrimination, on grounds prohibited by the statute, was the true cause of the employer's actions. [Citation.]" (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 361.) The trial court properly refused Special Instructions Nos. 1-3.

2. Special Instructions Nos. 4, 7, 8

Sanders requested the following three special instructions regarding her race or national origin harassment claim:

Special Instruction No. 4: "When harassment is perpetrated by a supervisor, the employer is vicariously liable,

regardless of whether the employer was aware, or should have been aware of it. A single offensive act by a co-employee is not enough to establish employer liability for a hostile work environment. But where that act is committed by a supervisor, the result may be different."

Special Instruction No. 7: "Whether harassment is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment, an assessment must be made from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff, and not the race of the individually named Defendants."

Special Instruction No. 8: "Some official employment actions done in furtherance of a supervisor's managerial role can also have a secondary effect of communicating a hostile message. This may include shunning of plaintiff during staff meetings, belittling of plaintiff's job, and reprimands of plaintiff in front of plaintiff's co-workers."

Sanders based these proposed instructions on select quotes from appellate opinions addressing harassment claims outside the jury instruction context. As courts have recognized, "[t]he mere fact that language in a proposed jury instruction comes from case authority does not qualify it as a proper instruction. 'The admonition has been frequently stated that it is dangerous to frame an instruction upon isolated extracts from the opinions of the court.' [Citation.] . . . [Citation.]" (*Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 526; see *Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 487 [extracting jury instructions from appellate opinions "tends to produce instructions which are repetitive, misleading and inaccurate statements of the law as to the particular case"],

overruled on other grounds in *Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 574.)

Special Instruction No. 4 regarding an employer's liability for a single offensive act was based on dicta in *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30. The court in that case noted there may be circumstances where "a single racial slur by a supervisor" is sufficient to create a triable issue of fact in a hostile work environment claim. (*Id.* at p. 36.) The instruction offered by Sanders, on the other hand, incorrectly implied that any single offensive act by a supervisor, regardless of its severity, can be enough to establish liability for harassment. The jury was instructed on the correct statement of the law with (1) CACI No. 2521, which defined the elements of a hostile work environment claim against an employer; (2) CACI No. 2523, which defined "harassing conduct" as including "verbal harassment such as obscene language, demeaning comments, slurs or threats;" and (3) CACI No. 2524, which defined the element of "severe or pervasive" conduct and the factors that may be considered in deciding whether the conduct at issue created a hostile or abusive work environment.

Special Instruction No. 7, stating that whether a work environment is abusive must be assessed from the perspective of a reasonable person in the plaintiff's racial or ethnic group, was taken from a quote in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 264. While the quoted language was an accurate statement of the law, the issue was adequately covered in CACI No. 2521 on employer liability for harassment and CACI No. 2522 on individual liability for harassment. Those CACI instructions provided that one of the elements required to prove a hostile work environment harassment claim was that "a

reasonable person in Deborah Sanders' circumstances would have considered the work environment to be hostile or abusive." No further instruction on this issue was necessary.

Special Instruction No. 8 regarding official employment actions done in furtherance of a supervisor's managerial role was extracted from dicta in *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686 (*Roby*). In that case, the Supreme Court concluded that some discriminatory personnel management actions can also be evidence of harassment when the actions have the "effect of communicating a hostile message" and "establish a widespread pattern of bias." (*Id.* at 709.) The instruction proposed by Sanders quoted part of this language, but it was confusing and incomplete. The instruction also took the specific personnel actions at issue in *Roby*, such as shunning the plaintiff during staff meetings and belittling her work, and improperly suggested there was evidence of these actions in Sanders's case. The trial court did not err in refusing to give this instruction.

3. Special Instruction No. 5

Sanders proposed Special Instruction No. 5 as follows: "You must decide whether the County reached its decision to fire Sanders in good faith, honestly and after an investigation that was appropriate under the circumstances, and not for reasons that are arbitrary or pretextual. The Employer must have acted in good faith and had good cause for the actions taken against the Plaintiff, based upon fair and honest reasons that are neither trivial, arbitrary or capricious, or pretextual."

The proposed instruction was not appropriate in this case. It was based on the holding in *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93 (*Cotran*). That case, however, concerned an action for breach of an implied employment contract

not to discharge except for good cause, and held that the jury's role in evaluating such a contract claim is to decide whether "the employer acted with "'a fair and honest cause or reason, regulated by good faith'"" in discharging the employee. (*Id*. at p. 96.) In this case, Sanders did not allege a claim for breach of contract, express or implied. Rather, it was undisputed Sanders was an at-will employee and could be discharged any time in the discretion of management. The jury accordingly was instructed with CACI No. 2513, which stated that at-will employment means "an employer may discharge an employee for no reason, or for a good, bad, mistaken, unwise, or even unfair reason, as long as its action is not for a discriminatory reason." The good cause standard set forth in *Cotran* was inapplicable to Sanders's claims.

D. The Trial Court Did Not Err in Responding to the Jury's Questions

Sanders asserts the trial court also erred in responding to certain questions raised by the jury during deliberations. She specifically argues the court's responses did not correctly state the law regarding legally protected activity in a FEHA or Labor Code section 1102.5 retaliation claim. We see no prejudicial error in the responses given by the trial court.

1. Question on "Legally Protected Activity"

During deliberations, the jury asked the following question about Sanders's claim for retaliation under FEHA: "We would like clarification of 'engage in legally protected activity' . . . . Also what is FEHA?" After an in-chambers conference with counsel, the trial court provided the following response: "The protected activity element may be established by evidence that the plaintiff

threatened to file a discrimination charge, by a showing that the plaintiff mistakenly, but reasonably and sincerely believed she was opposing discrimination, or by evidence an employer believed the plaintiff was a potential witness in another employee's FEHA action. Complaints about personal grievances that may be vague or conclusory that do not put an employer on notice of conduct it should investigate is not a 'legally protected activity.'" The court also defined FEHA as the "Fair Employment and Housing Act."

Sanders contends the trial court's response misstated the law by suggesting that Sanders only engaged in legally protected activity if she was a potential witness in another employee's "FEHA action," as opposed to a potential witness in an internal investigation of another employee's discrimination complaint. Sanders also claims this error was prejudicial because the evidence showed that she was a witness in the County's internal investigation of a March 2012 complaint made by Obidi Obienu against Okundolor. Sanders's argument, however, lacks merit.

First, the trial court's response was an accurate statement of the law as set forth in *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 652, superseded by statute on another ground, and *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1046. Indeed, these cases are cited as sources and authority in CACI No. 2505 defining the elements of a FEHA retaliation claim. Second, Sanders is incorrect that participation in an employer's internal personnel investigation constitutes protected activity as a matter of law. Rather, FEHA prohibits retaliation against an employee who has "assisted in any proceeding under this part" (Gov. Code, § 12940), which the California Code of Regulations define as "an investigation, proceeding, or hearing conducted by the [Fair

Employment and Housing] Council or Department [of Fair Employment and Housing] or its staff" (Cal. Code Regs., tit. 2, § 11021, subd. (a)). An internal investigation conducted by an employer is not a "proceeding under [FEHA]," and thus, merely participating as a witness in such an investigation does not constitute legally protected activity. (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1527-1528.)

2. Question on Disclosures in Staff Meetings

During deliberations, the jury also asked the following question about Sanders's claim for retaliation under Labor Code section 1102.5: "Is raising an issue at a staff meeting [a] disclosure to a government agency?" Over the objection of Sanders's counsel, the trial court responded: "This is a factual decision for you to decide."

Sanders argues the trial court's response was erroneous because the jury should have been told Sanders had "engaged in protected Whistle-blowing . . . activities" by raising patient care and safety issues at staff meetings. The question of whether Sanders engaged in protected activity, however, was an ultimate issue of fact for the jury. One of the elements Sanders had to prove to establish a Labor Code section 1102.5 claim was that she disclosed to a government agency information about acts that she reasonably believed were violations of state or federal laws, rules, or regulations. (Lab. Code, § 1102.5, subd. (b); CACI No. 4603.) The court had instructed the jury that LAC+USC was a government agency, and thus, the jury's question was directed at whether Sanders's complaints in staff meetings constituted protected activity. Resolving that question required the jury to determine as the trier-of-fact whether Sanders had a reasonably

based suspicion of illegal activity when she raised patient issues at staff meetings. The trial court correctly responded that the question was a factual one for the jury to decide.

In any event, Sanders cannot show that she was prejudiced by the court's response. In its special verdict, the jury resolved the disclosure issue in Sanders's favor by finding that she had disclosed information to a government agency about acts that she reasonably believed were violations of state or federal law. The jury then turned to the second question on the verdict form, which asked whether Sanders's disclosures were a motivating reason for the County's decision to discharge her. Because the jury found the disclosures were not a motivating reason for the discharge, it returned a special verdict in favor of the County on the Labor Code section 1102.5 claim.

III. Sufficiency of the Evidence Supporting the Verdict

Throughout her opening brief, Sanders details the evidence presented at trial, and broadly asserts that the weight of the evidence supported a verdict in her favor. Sanders does not, however, clearly articulate whether she is challenging the sufficiency of the evidence supporting the jury's verdict, nor does she provide a reasoned discussion of the issue supported by reasoned argument. It is "well established that a reviewing court must presume that the record contains evidence to support every finding of fact, and an appellant who contends that some particular finding is not supported is required to set forth in his brief a summary of the material evidence upon that issue. Unless this is done, the error assigned is deemed to be waived. [Citation.]'" (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887; see also *Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 80

["appellant challenging a factual finding . . . must summarize the evidence supporting the judgment and explain why such evidence is insufficient"]; *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 484 ["[i]t is the appellant's burden, not the court's, to identify and establish deficiencies in the evidence"].) Because Sanders does not provide a proper argument about the sufficiency of the evidence, she has forfeited that issue on appeal.

Even if Sanders had not forfeited the issue, however, her challenge to the sufficiency of the evidence would fail. Where, as here, "'the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, "'it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. . . . [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838 (*Dreyer's*); accord, *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) '"'All conflicts, therefore, must be resolved in favor of the respondent." [Citation.]' [Citation.]" (*Dreyer's*, *supra*, at p. 838.)

To prevail on her discrimination or retaliation claims, Sanders had the burden of proving by a preponderance of the evidence that her race, national origin, and/or protected activity was a substantial motivating reason for the County's decision to discharge her. To prevail on her harassment claim, Sanders had

the burden of proving by a preponderance of the evidence that she was subjected to unwanted harassing conduct based on her race or national origin. The jury found in favor of Respondents on each of the claims, thus concluding that Sanders had not met her burden of proof. Sanders cannot show the evidence at trial compelled a contrary finding as a matter of law. The decision-makers in Sanders's discharge testified that they did not take any action regarding Sanders's employment based on her race or national origin. They also testified that they had no knowledge of any prior complaints of discrimination or harassment that had been made by Sanders at the time they decided to discharge her, and that they did not base the discharge decision on any alleged protected activity. The decision-makers further testified that Sanders's discharge was based solely on her poor job performance, and particularly, on her dereliction of duties during the August 2012 sexual assault.

At trial, Sanders presented evidence that other employees committed more serious misconduct in connection with the June 2012 patient elopement and the August 2012 sexual assault, but the County imposed lesser or no discipline on those employees. Sanders also contended that the witnesses testifying on behalf of the County were biased against her and should not be believed. However, """"it is the exclusive province of the [jury] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."""" (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) It is not the role of the appellate court to reweigh the evidence or to reevaluate the credibility of witnesses. (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 877; *Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1377.) Based on

the totality of the record in this case, we conclude the evidence did not compel a finding in favor of Sanders as a matter of law. (*Dreyer's*, *supra*, 218 Cal.App.4th at p. 838.)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.