Case No. A121651

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

IFTIKHAR NAZIR,

Plaintiff and Appellant,

v.

UNITED AIR LINES, INC.
and BERNARD PETERSEN,

Defendants and Respondents.

Appeal from the Superior Court for San Mateo County
Case No. CIV 458060
Marie S. Weiner, Judge

APPELLANT'S OPENING BRIEF

REDACTED VERSION

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I. INTRODUCTION

This employment case is for egregious harassment, discriminatory and retaliatory discharge, and related claims. Defendants were erroneously granted summary adjudication of every cause of action, and thereby granted summary judgment. All but one of 811 evidentiary objections were decided in defendants' favor and almost all plaintiff's evidence excluded. AA:V22:5468-5475. Plaintiff's new trial motion was denied. AA:V25:6244-6246. This appeal follows.

Plaintiff Itikhar Nazir is a civil rights pioneer. Nazir complained and fought his way for years through the muck of slurs, harassment and discrimination to become in 2001 the first (and last) person of color to ever be a mechanic supervisor in United Air Lines' SFO Facilities Maintenance Department. AA:V13:3268:21-24, AA:V26:6400:13-6401:12, AA:V17:4203:18-25.

Nazir is Muslim. He has dark skin, is of Kuwaiti and Pakistani national origin and is of Pakistani ancestry. AA:V13:3245:26-27. Nazir worked for defendant United for 16 years, from April 1989 to May 2005. AA:V13:3245:23-25. During all but the first two years, defendant Bernard Petersen headed the Facilities Maintenance Department. AA:V15:3640:3-24.

Nazir's job performance was recognized by many commendations and awards. AA:V13:3246:5-15,

AA:V13:3306-3328. As a supervisor, Nazir's "achieved expectations" performance was reflected in written performance evaluations. AA:V15:3646:10-3650:20, AA:V15:3653:6-15, AA:V15:3660:20-3661:10, AA:V15:3774-3784.

Disgusting slurs such as "sand n*gger," "f*cking Muslim," "sand flea," "rag head," and "camel jockey" polluted Nazir's employment at United. Coworkers derided Nazir claiming he smelled. One co-worker told Nazir "I do not like the camel meat in your food." AA:V13:3248:1-23.

Following September 11, 2001, Nazir was called a "terrorist" to his face. AA:V2:0365:17-0366:18, AA:V2:0368:20-0369:22. Petersen's Director, Doyle, ordered Nazir reported to the FBI as a suspected terrorist in 2003 without a scintilla of factual justification. AA:V16:4048:5-21, AA:V16:4046:13-4047:23, AA:V16:4047:14-23, AA:V16:3954:4-15. The FBI investigated. AA:V16:4037:16-18. Nazir felt coworkers looking at him as if he were a terrorist. AA:V13:3255:25-3256:14, AA:V14:3393-3394.

The harassment against Nazir included not only repeated slurs, but being tricked into eating pork in violation of his religion, being shunned, refusals from coworkers to cooperate with Nazir, intense scrutiny, hypercritical investigation of every rumored flaw in Nazir's performance or conduct, reprimand and discipline for things

other employees were allowed to do, violence against Nazir's property and things entrusted to him (door, computer, car, tool box), and creating a paper trail of documented discipline to ultimately support discharge. (Please see Sections IV.A and VI.)

Nazir complained repeatedly. No effective remedial action was taken, so harassment continued unabated. Petersen admitted he never disciplined anyone for anything they did regarding Nazir. AA:V15:3724:15-24.

Towards the end, unrelenting harassment wore Nazir down so much he had to take a medical leave of absence beginning September 2004. AA:V13:3292:10-13, AA:V14:3560:5-17, AA:V13:3292:20-3293:6. During Nazir’s leave, Petersen suggested Nazir take a demotion to mechanic. AA:V13:3293:1-4. Nazir returned to work in January 2005 and was promptly given an unfavorable performance review. AA:V13:3246:22-3247:6, AA:V13:3344-3347.

Nazir was fired on a pretext four months after medical leave and a month after complaining to HR that Petersen was discriminating against him and tolerating discrimination. AA:V16:3966:10-24; AA:V16:3967:21-3968:2.

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The rich irony and gruesome horror was that the pretext defendants spun was an accusation that Nazir engaged in gender harassment, albeit nonsexual. AA:V3:0538:17-0540:9, AA:V3:0557.

United followed in the footsteps of other disingenuous employers who used trumped up charges of harassment, discrimination or misconduct as pretexts to fire employees who had themselves been discriminated against and complained. E.g. Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95; Collarossi v. Coty USA, Inc. (2002) 97 Cal.App.4th 1142, 1155; Metoyer v. Chassman (9th Cir. 2007) 504 F.3d 919, 937; Campbell v. Wal-Mart Stores, Inc. (N.D.Okla. 2003) 272 F.Supp.2d 1276.

Defendants claimed they fired Nazir for supposedly engaging in gender harassment against Iris Avellan, a janitorial supervisor working for independent contractor Scientific Concepts. AA:V2:0407, AA:V3:0538:17-0539:16.

Petersen headed the "investigation," though Nazir complained days earlier about Petersen discriminating and Petersen knew it. AA:V16:3966:10-24, AA:V16:3967:21-3968:18. Defendants knew Avellan and her employer had motives to get Nazir fired but ignored them. AA:V17:4093:25-4094:8, AA:V2:0340:1-22, AA:V17:4128:5-16.

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Defendants claim they concluded Nazir "slammed Iris Avellan's arm to the tabletop." AA:V3:0538:17-0539:16. However, Nazir explained the two were arm wrestling while Avellan smiled and giggled. AA:V15:3754:5-3755:1, AA:V2:00345, AA:V14:3581, AA:V14:3473:5-16.

Avellan herself simulated arm wrestling when she told Petersen and Rich what happened. AA:V17:4100:19-4101:10.

Eyewitness Coleman described the physical interaction between Nazir and Avellan as "like arm wrestling." AA:V17:4110:15-23, AA:V16:3946:2-9, AA:V17:4165. Coleman told United he took it as joking. AA:V15:3761:9-3762:20, AA:V15:3805, AA:V17:4109:5-10, AA:V17:4142.

Defendants admit no one said anything inconsistent with both Nazir's elbow and Avellan's elbow being on the table during their physical interaction. AA:V16:4061:11-18, AA:V16:4065:9-4066:12.

If Avellan was not trying to arm wrestle with Nazir, how on Earth did her elbow end up on the table with her hand in Nazir's hand while Nazir moved her hand to the table?

In the face of this clear evidence of arm wrestling, Petersen disingenuously claimed he had no information whether Nazir moved Avellan's hand more than three feet vertically, a distance inconsistent with arm wrestling. Petersen AA:V15:3733:16-21.

Another claimed reason for discharge is that Nazir discussed Avellan's personal life with her. AA:V3:0538:17-0539:18. However, defendants did not ask Avellan what was said or do anything to find out whether it was offensive. AA:V16:4069:22-4070:13, AA:V16:4079:7-4081:22.

Tellingly, given defendants' claim they fired Nazir for gender harassment, Avellan never said to anyone that Nazir discriminated against her and does not believe Nazir discriminated against her. AA:V16:4077:16-4078:7, AA:V15:3828:25-3829:2, AA:V15:3829:17-22, AA:V15:3830:3-10, AA:V15:3831:9-15, AA:V15:3839:1-5.

II. STATEMENT OF CONTENTIONS

A. Summary Judgment

Summary adjudication was granted erroneously as to every claim but one. Plaintiff does not appeal summary adjudication of the second cause of action.

1. Harassment

Defendants did not meet their burden of showing the harassment was not severe or pervasive. Nazir submitted ample evidence it was. Plaintiff adequately and timely exhausted DFEH administrative remedies.

2. Failure to Prevent Discrimination and Harassment

Because defendants' sole ground for summary adjudication of this claim was that Nazir's discrimination

and harassment claims were allegedly meritless, reversal of summary adjudication of those claims mandates reversal on this claim.

3. Discriminatory Discharge

Plaintiff presented ample direct and circumstantial evidence that Nazir's discharge was pretextual and discriminatory.

4. Retaliation

Nazir presented sufficient circumstantial evidence of retaliatory intent and adequately exhausted administrative remedies.

5. Fraud and Battery

Defendants offered no evidence or allegedly undisputed facts supporting their arguments. Plaintiff nonetheless presented evidence demonstrating triable issues. Summary adjudication based on issues not raised by defendants was error.

6. Intentional Infliction of Emotional Distress

This claim is not preempted by workers compensation because the acts alleged violate public policy, including FEHA. Defendants failed to establish that timely conduct was not sufficiently extreme or outrageous. Plaintiff's evidence established it was.

B. Evidentiary Objections

Most evidentiary rulings were erroneous.

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C. New Trial Motion

Plaintiff's new trial motion was erroneously denied. There was good reason why plaintiff did not file the additional evidence earlier. Further, a new trial was warranted because granting summary judgment was legal error.

D. Expert Witness Fees

Failure to reduce CCP §998 expert witness fees in light of plaintiff's financial condition was erroneous.

III. PROCEDURAL HISTORY, APPEALABILITY AND STANDARD OF REVIEW

A. Nature of Case

This is an employment case. It includes claims for harassment, discriminatory discharge, retaliation, fraud, battery and intentional infliction of emotional distress.

B. Relief Sought in Trial Court

The relief sought in the trial court included lost wages, emotional distress damages, punitive damages, attorneys' fees, and costs.

C. Summary Judgment Procedural Issues

Defendants argued summary judgment should be granted because Nazir's separate statement was defective, which it was not. If Nazir's separate statement were defective, leave should have been granted to correct any deficiencies. Collins v. Hertz Corp. (2006) 144 Cal.App.4th 64.

Hundreds of "facts" in defendants' separate statement should be stricken (as Nazir requested in responding to them) because they improperly stated witness perceptions as facts, something for which defendants' counsel Pritikin was previously admonished in Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95, 105-106.

D. Identification of Judgments and Orders Appealed From

Plaintiff appeals from the following judgments or orders:

The judgment entered, AA:V22:5476-5477, following the order granting summary judgment, AA:V22:5467-5475.

Most rulings on evidentiary objections. AA:V22:5467-5475.

The order denying Nazir's new trial motion. AA:V25:6244-6246.

The order, AA:V25:6247-6249, and amended order, AA:V25:6250-6252, on Nazir's motion to tax expert witness costs.

The second judgment. AA:V25:6262-6265.

E. Appealability

The judgments are appealable. CCP §§904.1(a)(1) and 437c(m)(1).

The rulings on evidentiary objections and the new trial motion are reviewable on appeal from the underlying

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judgment. CCP §906; Walker v. Countrywide Home Loans, Inc. (2002) 98 Cal.App.4th 1158, 1169.

The Court's orders on Nazir's motion to tax costs are appealable. CCP §904.1(a)(2); Norman I. Krug Real Estate Investments, Inc. v. Praszker (1990) 220 Cal.App.3d 35, 45-46.

F. Standard of Review

"We review the trial court's decision granting summary judgment de novo." Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.App.4th 1028, 1037.

Denial of a new trial motion following granting of summary judgment is reviewed de novo. Aguilar v. Atlantic Richfield Co. (2001) Cal.4th 826, 860.

The evidentiary rulings should be reviewed de novo because even if normally examined for abuse of discretion, "any determination underlying any [summary judgment] order is scrutinized under the [de novo] test appropriate to such determination." Id. at 859-860; contra Walker v. Countrywide Home Loans, Inc. (2002) 98 Cal.App.4th 1158, 1169.

Even if the evidentiary rulings were reviewed for "abuse of discretion," in practice this amounts to "plenary appellate scrutiny" because these are purely legal questions not involving "the trial court's opportunities for observation or other policy reasons." California Practice Guide: Civil
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Appeals and Writs §8:91; Hurtado v. Statewide Home Loan Co. (1985) 167 Cal.App.3d 1019, 1022, 1025-1027.

The order on expert witness costs is reviewed for abuse of discretion. Jones v. Dumrichob (1998) 63 Cal.App.4th 1258, 1262.

IV. HARASSMENT

A. Nazir Was Harassed Throughout Employment

1. Pervasive Slurs Against Nazir

Nazir was subjected to repeated slurs throughout his employment, including "sand n*gger," "sand flea," "rag head," and "camel jockey." Coworkers derided Nazir that he smelled. One coworker told Nazir, "I do not like the camel meat in your food." AA:V13:3248:1-23, AA:V13:3251:24-25.

Nazir found pictures of turbans on his tool cart. AA:V13:3251:26. Nazir was mocked by being asked to point out his homeland on a piece of sandpaper. AA:V13:3251:21-23.

Supervisor Whitehouse told Nazir "We have you to do the dirty work" while discussing immigrants. AA:V13:3258:24-3259:2. Petersen told Nazir he had a "sewer pit" job for Nazir and laughed. AA:V13:3259:3-4.

As an immigrant, Nazir was accused of being lazy, sneaky, untrustworthy and a back stabber. AA:V13:3250:26-3251:3.

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Garvin told Nazir, "You f*cking Muslims are all the same and Bernie Petersen is right about you people." AA:V13:3249:1-3. Nazir promptly complained to his supervisor and Petersen, but United did not even investigate. AA:V13:3249:4-14.

Nazir's car was vandalized in United's employee parking lot; all four tire valves were removed leaving the tires flat. AA:V13:3251:4-10, AA:V14:3387. Flyers posted on employee bulletin boards with valves attached read "Wade 1" "Pak Man 0." "Pak Man" referred to Nazir's Pakistani national origin. AA:V13:3251:11-16. There was no investigation. AA:V13:3251:17-20.

Criswell twice called Nazir a "Paki." Nazir complained to Petersen each time. There was no investigation. AA:V13:3250:2-6, AA:V15:3724:15-24.

Months later, Criswell told Nazir "You need to be sent back to that camel where you came from." Nazir complained. There was no investigation. AA:V13:3250:7-19. Criswell continued to snub and belittle Nazir. AA:V13:3304:1-8.

Beginning September 11, 2001, employees "joked" that Nazir "looked like a terrorist," and asked "Do you have a plan set up to do something?" AA:V2:0365:17-0366:18, AA:V2:0368:20-0369:22.

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2. Harassment Between December 2002 Bankruptcy Bar Date and October 3, 2004

a. Discriminatory Flyers

Discriminatory flyers were slipped under Nazir's office door in 2003. One showed Saddam Hussein with an arrow in his forehead. Another obscenely depicted a "Suckometer." Nazir perceived a threat of physical violence. AA:V13:3252:1-13, AA:V14:3389-3391. Nazir complained to Petersen. There was no investigation. AA:V13:3252:14-17.

b. Nazir Only Employee Reprimanded For Bringing Child to Work

Petersen singled out his only mechanic supervisor of color, Nazir, for reprimand for bringing his daughter to work although white employee Davis also brought children to work (and had coworkers babysit). AA:V2:0352:22-25, AA:V2:0412, AA:V13:3269:6-11, AA:V15:3642:4-9, AA:V15:3742:16-3750:7, AA:V17:4215:26-4216:7.

Petersen's reprimand claimed children "cannot be in the workplace." AA:V3:0632:13-0633:1, AA:V3:0635. In deposition, Petersen admitted this statement was false. AA:V3:0633:6-23.

Petersen admitted he saw Davis' children at work, AA:V15:3742:16-3743:7, but never reprimanded her. AA:V15:3751:23-3752:3.

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c. United Reported Nazir to FBI as Possible Terrorist

Petersen's boss Doyle was Director and Managing Director from 2003 to 2006. AA:V16:3954:4-15. Doyle ordered Nazir reported to the FBI as a possible terrorist without a scintilla of evidence.

A voicemail message for Nazir in Urdu and English invited him to eat at a restaurant. White supervisor McKim heard it. AA:V14:3496:9-3498:3, AA:V14:3499:20-3500:23.

All McKim remembered about the message was it concerned a meeting. Nobody claimed to McKim the message involved terrorism. Despite this, McKim called security and saw Doyle immediately. AA:V16:4046:13-4047:23. Doyle told McKim to report the innocuous voicemail to the FBI. AA:V16:4048:5-21.

McKim told Security Supervisor Knight to expect an FBI call about Nazir because of concern the voicemail related to terrorism. AA:V16:4036:3-12. The FBI contacted Knight about Nazir. AA:V16:4037:16-18.

Nazir complained to HR that "the message has gone to the floor," people are "looking at me like I was some kind of a terrorist" and that this was discrimination. AA:V13:3255:25-3256:14, AA:V14:3393-3394.

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d. Nazir Only Supervisor Disciplined For Leaving Workplace

Nazir sometimes left the workplace during his shift for work errands and for rest and meal breaks. AA:V13:3302:11-16.

Petersen gave Nazir a final written warning in 2003 for leaving the workplace. Petersen had set Nazir up by telling Nazir when he became a supervisor that Nazir needn't keep track of his time anymore. AA:V13:3269:11-15, AA:V13:3349, AA:V2:0413, AA:V3:0540:2-9, AA:V3:0557, AA:V14:3549:19-25.

Petersen later vigorously analyzed Nazir's working hours going back a year, admitting he may have spent more than 40 hours reviewing Nazir's arrival and departure times. AA:V13:3269:19-23, AA:V15:3696:14-3697:4, AA:V15:3697:25-3698:6.

Petersen admitted his calculations of the times Nazir was away were inaccurate, AA:V15:3699:17-3701:16, and that he also didn't know if the underlying records were inaccurate, AA:V15:3694:15-3695:5.

Nazir was the only supervisor reporting to Petersen ever disciplined for being off premises during work hours. AA:V15:3679:23-3680:5.

In contrast, Nazir's white replacement Mullarkey was allowed to leave the premises freely, with no known time limits for meals, without telling anyone even if gone more

than an hour. AA:V17:4199:10-4201:3, AA:V17:4202:5-8; cf. AA:V13:3269:24-3270:2 (white predecessor same).

The notice could be removed after a year. Petersen refused. AA:V13:3270:3-11. The next year, Petersen relied on the pretextual notice to fire Nazir. AA:V15:3673:2-15.

e. Nazir's Training Requests Denied

Petersen repeatedly denied Nazir's requests for training for Nazir and his crew, even when the same training was approved for others. Once Petersen claimed a written policy prohibited certain training but when challenged could not produce it. AA:V13:3273:9-3274:1; cf. AA:V13:3282:19-27 (another training request intercepted).

f. Petersen Condoned Coworkers' Mistreatment of Nazir

Petersen failed to discipline white employee Kibbee for a rude insubordinate e-mail copied to Petersen. Nazir and crew were often unfairly blamed by another shift for problems including work backlogs. AA:V13:3286:10-19. When Nazir complained to Petersen about Kibbee blowing up at Nazir, Petersen laughed. AA:V14:3580:7-23.

Petersen didn't investigate Nazir's complaint that certain white employees would not cooperate and impeded Nazir's work. AA:V13:3283:10-16.

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Petersen encouraged white supervisors' rudeness to Nazir in meetings, for example laughing at it. AA:V13:3282:11-17.

In contrast, Mullarkey, Nazir's white replacement, was treated courteously and respectfully. AA:V17:4198:3-21, AA:V17:4199:10-4201:3, AA:V17:4202:5-8, AA:V17:4203:18-25.

Petersen refused to discipline white employees who were rudely insubordinate to Nazir. E.g., AA:V13:3287:10-13, AA:V14:3398, AA:V15:3724:15-24 (subordinate ignores Nazir's request then tells Nazir to go away), AA:V13:3279:2-25, AA:V15:3724:15-24 (subordinate refuses direct order to train Nazir's crew, disqualifying them certain work).

White employee Randolph refused in 2004 to enter data for Nazir, while continuing to enter it for white supervisors, because Nazir questioned whether Randolph discriminated against Nazir. Nazir had to begin entering the data himself. Randolph also refused to ever converse with Nazir again. Randolph's e-mail copied to Petersen admitted all this. AA:V13:3291:4-9, AA:V14:3423. Nazir complained to Petersen, who did nothing to stop this unlawful retaliation. AA:V13:3291:23-26, AA:V15:3724:15-24, AA:V15:3726:16-20, AA:V15:3799.

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g. Petersen Condoned Supervisors Unilaterally Transferring Nazir's Crew

In May through August 2004, Nazir complained to Petersen about white supervisors unilaterally transferring employees to and from Nazir's crew without even informing Nazir. Petersen admitted white supervisors treated Nazir differently and disrespectfully, but did nothing. When discussed in a supervisors' meeting, Petersen allowed a white supervisor to explode at then refuse to talk with Nazir. AA:V13:3277:2-3278:9, AA:V15:3724:15-24.

In contrast, no one was ever transferred to or from Nazir's white replacement's crew without his prior approval. AA:V17:4198:3-21.

h. Nazir Denied Weekend Overtime

Nazir was discriminated against in the assignment of desirable weekend work at time-and-a-half. AA:V13:3279:26-3280:12, AA:V17:4217:23-4218:12.

i. Nazir Denied Overtime For Crew

Petersen often refused Nazir's overtime requests for his crew while typically allowing white supervisors' requests. AA:V13:3274:8-20, AA:V17:4215:5-9.

j. Petersen Tricked Nazir Into Eating Pork

Petersen tricked Nazir into eating pork in violation of Nazir's Muslim religion in July 2004, as discussed in Section VIII.

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k. Company-Sponsored Pork Barbecues Excluded Nazir

In August 2004, United served only pork at a company barbecue, excluding Nazir because of his religion. AA:V13:3253:5-14, AA:V15:3711:22-3712:25.

3. Harassment After October 3, 2004

a. Criswell Harassed Nazir

After Nazir complained about Criswell's "Paki" and "camel" slurs, Criswell continued to harass Nazir by snubbing Nazir throughout the rest of Nazir's employment. When he did speak to Nazir, Criswell made belittling comments to Nazir, such as calling Nazir "incompetent" or saying "You don't belong here." AA:V13:3304:1-8.

Criswell's later conduct is sufficiently linked to his earlier slurs to make the earlier slurs timely under the continuing violations doctrine. Birchstein v. New United Motor Manufacturing, Inc. (2001) 92 Cal.App.4th 994 (later nonsexual staring similar enough to earlier sexual remarks); Dominguez v. Washington Mutual Bank (Cal.App. 11-21-08) 2008 DJDAR 17340 (throwing paper balls and stacking boxes to block path similar enough to earlier offensive comments about sexual orientation).

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b. Nazir Treated Differently From Other Supervisors

Differential treatment described in Sections IV.A.2.e-i continued.

Petersen refused Nazir a key to access personnel files (including of Nazir's crew) while white supervisors had keys. AA:V13:3274:2-7.

Petersen unfairly blamed Nazir for problems caused by white supervisors' crews, such as mixing spent with new lamps and turning barrels so labels couldn't be read. AA:V13:3275:16-3276:4.

Petersen never allowed Nazir to serve as temporary manager while Petersen was gone, though Petersen appointed employees who did not supervise mechanics, supervisors working less time in the department, and even a mechanic. AA:V13:3270:12-3271:8.

c. Petersen Tried to Get Nazir to Take Demotion

Petersen tried to convince Nazir to take a demotion to mechanic when Nazir returned from medical leave in January 2005. AA:V13:3293:1-4. Petersen knew Nazir's leave was for stress caused by continuing harassment. AA:V13:3292:10-13, AA:V14:3560:5-17, AA:V14:3538:4-3539:4.

Defendants tried to justify this by falsely claiming Nazir expressed interest in demotion. AA:V3:0681:3-12, AA:V13:3302:26-28, AA:V14:3538:4-16.

d. Another All-Pork Barbecue

Within a month of Nazir's return from leave, United sponsored another all-pork barbeque, again excluding Nazir because he was Muslim. AA:V13:3293:10-3295:2, AA:V13:3253:9-14. Petersen knew this was wrong. AA:V15:3711:22-3712:25.

e. Bad Performance Evaluation

Defendants gave Nazir a bad performance evaluation the second month after Nazir returned from medical leave. AA:V13:3246:22-3247:6, AA:V13:3344-3347. Petersen said it was Nazir's responsibility to befriend the employees harassing him. AA:V13:3294:3-6. Petersen took no steps to discipline Nazir's harassers. AA:V13:3294:7-8, AA:V15:3724:15-24.

f. Petersen Laughed at Nazir's Help Request

Petersen responded to Nazir's February 2005 request for more electricians by making fun of Nazir. Nazir complained to HR. Nothing was done. AA:V13:3293:18-24.

g. Nazir Denied Training

Petersen denied Nazir's April 2005 training request. Petersen first told Nazir that working four hours and training four hours the same day was "Not allowed." AA:V13:3294:9-12.

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When Nazir protested that this training was a goal Petersen set, Petersen changed his story. Petersen told Nazir half-day training was allowed. Petersen then said he'd approve Nazir's request only if Nazir contacted every other supervisor about the training, something not required of white supervisors. AA:V13:3294:13-18.

h. Petersen Laughed About Sabotage Against Nazir

Nazir's office door was glued shut and his computer sabotaged in April 2005. When told, Petersen laughed and did not investigate. AA:V14:3557:6-3559:18, AA:V13:3252:18-25. Computer vandalization by unknown perpetrators is evidence inferring retaliation. Marra v. Philadelphia Housing Authority (3d Cir. 2007) 497 F.3d 286, 303.

i. Nazir Complained of Harassment Month Before Termination

Nazir complained of continuing daily harassment to HR one month before termination. AA:V13:3294:20-23.

j. Harassment After Discharge

Harassment against Nazir continued even after discharge: United stole Nazir's tools or allowed their theft. AA:V13:3303:12-16.

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4. Defendants Did Nothing to Stop Harassment

Despite Nazir's many complaints to Petersen of harassment, Petersen did nothing to stop it, as discussed in Section VI.K.

Nothing was done by Human Resources either, despite Nazir's many discrimination complaints to HR, as discussed in Section VI.E. See also AA:V13:3281:1-4, AA:V13:3288:17-3289:14, AA:V15:3816:3-24, AA:V15:3818:7-22, AA:V17:4217:23-4218:12, AA:V13:3255:25-3256:19, AA:V14:3393-3394, AA:V13:3290:18-3291:3. If United had investigated, Nazir would have known, as discussed in Section X.B.8.

Nothing was done by United's Office of Business Conduct either, although Nazir twice reported unlawful employment discrimination to it. AA:V13:3289:15-3290:6, AA:V14:3401 (Question 5), AA:V14:3412 (Question 5).

"Inaction constitutes a ratification of past harassment." McGinest v. GTE Service Corp. (9th Cir. 2004) 360 F.3d 1103, 1120. Remedial actions must stop both identified harassers and potential harassers. Id. at 1121. United ratified Nazir's harassment by doing nothing to stop it.

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B. Harassment Was Severe or Pervasive

Defendants argued the harassment was not severe or pervasive. Summary adjudication on this ground should have been denied both because defendants failed to meet their burden and because plaintiff presented ample evidence.

1. Defendants Failed to Meet Burden Because They Presented No Evidence or Argument

A party seeking summary judgment must "present evidence, and not simply point out, [fn] that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 854-855.

"There is no obligation on the opposing party... to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing every element... necessary to sustain a judgment in his favor." Consumer Cause, Inc. v. SmileCare (2001) 91 Cal.App.4th 454, 468.

Denial of summary adjudication of this issue was mandated because defendants presented no evidence, alleged no undisputed facts, and made no arguments in their brief.

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2. There is Ample Evidence of Severe or Pervasive Harassment

The harassment of Nazir discussed in Section IV.A was pervasive. It lasted many years. It infected every aspect of Nazir's work environment. It was severe. The evidence Nazir presented was more than sufficient. Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028; cf. EEOC v. Sunbelt Rentals (4th Cir. 2008) 521 F.3d 306 (Muslim called "Taliban," "towel head;" Muslims stereotyped as terrorists).

Harassment of Nazir in the year before his October 2005 DFEH charge was worse than the harassment in the year before the DFEH charges in Birchstein v. New United Motor Manufacturing, Inc. (2001) 92 Cal.App.4th 994 (nonsexual staring) and Dominguez v. Washington Mutual Bank (Cal.App. 11-21-08) 2008 DJDAR 17340 (throwing paper balls, stacking boxes to block path, turning in mail late). Cf. Fielder v. UAL Corp. (9th Cir. 2000) 218 F.3d 973.

C. Harassment Allegations Are Timely

1. Introduction

Defendants argue Nazir's harassment claims were untimely because the harassment occurred more than a year before May 2006, when Nazir's second and third DFEH complaints were filed. Defendants' argument is mistaken for two reasons.

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First, Nazir's initial October 3, 2005 DFEH complaint made timely claims beginning October 3, 2004.

Second, the continuing violation doctrine makes Nazir's claims for earlier harassment also timely.

Nazir's claims before December 9, 2002 are barred by United's bankruptcy. See attached orders.

2. October 2005 DFEH Complaint Makes Claims Beginning October 2004 Timely

There are three reasons why Nazir's October 2005 DFEH complaint makes timely harassment claims beginning October 2004, despite the DFEH's error of not including harassment in the complaint it prepared after Nazir wrote the DFEH extensively about harassment.

First, such DFEH errors do not bar employee claims for failure to timely exhaust administrative remedies. Second, DFEH failure to check a complaint's "harassment" box is an inconsequential technical error. Finally, discrimination claims the DFEH explicitly included in the October 2005 complaint were similar enough to Nazir's harassment claims to exhaust administrative remedies regarding harassment.

a. Nazir Complained of Harassment in Pre-Complaint Questionnaires

Nazir explicitly and extensively complained of harassment in two Pre-Complaint Questionnaires he gave the DFEH in July and September 2005.

Three times Nazir wrote "1991-2005" after the word "Harassed" when asked "[c]ircle the discriminatory

treatment and indicate the date occurred." AA:V14:3591, AA:V14:3493:13-21, AA:V14:3595, AA:V14:3508:22-3509:21, AA:V14:3604, AA:V14:3520:19-3521:11.

Twice Nazir wrote the DFEH that harassment had "been non stop since 1991." AA:V14:3592, AA:V14:3596; cf. AA:V14:3594.

Perpetrators of harassment Nazir identified to the DFEH included Petersen, Doyle, McKim, Cahill, Whitehouse, and Lewis. AA:V14:3591-3597, AA:V14:3604-3606. Nazir named more favorably treated white employees. AA:V14:3605.

Nazir listed for the DFEH dozens of witnesses to such things as "the hostile environment," "my treatment," and "how I was disrespected." AA:V14:3609-3612.

Nazir complained to the DFEH he was "labeled as a 'terrorist'." AA:V14:3592. Nazir also complained about "a long sick leave for the stress I had been put under over the years," Petersen's demotion suggestion, and "relentless unfair and prejudicial treatment for years." AA:V14:3606.

b. DFEH Failure to Check "Harassment" Box Inconsequential Error

Defendants complained the "harassment" box was not checked on the October 2005 complaint. Failure to check the right boxes is a technical defect disregarded in determining whether administrative remedies were exhausted. Sandhu v. Lockheed Missiles and Space Co.

(1994) 26 Cal.App.4th 846, 858-859; cf. Sanchez v. Standard Brands, Inc. (5th Cir. 1970) 431 F.2d 455, 462.

c. DFEH's Negligent Omission of Harassment Allegations Cannot Bar Nazir's Claims

Negligent DFEH omission of harassment allegations from Nazir's DFEH complaint cannot bar Nazir's claims, given Nazir complained clearly about harassment to the DFEH. Denney v. Universal City Studios (1992) 10 Cal.App.4th 1226, 1233-34; EEOC v. Farmer Bros. Co. (9th Cir. 1994) 31 F.3d 891, 899; B.K.B. v. Maui Police Department (9th Cir. 2002) 276 F.3d 1091, 1101-1102; cf. Richards v. CH2M Hill, Inc. (2001) 26 Cal.4th 798, 819 (FEHA statute of limitations liberally construed).

Pre-Complaint Questionnaires must be considered in determining whether administrative remedies were exhausted. B.K.B. v. Maui Police Department, supra at 1101-1102; Cheek v. W.&S. Life Insurance Co. (7th Cir. 1994) 31 F.3d 497, 502; Anthony v. County of Sacramento (E.D.Cal. 1995) 898 F.Supp. 1435, 1443 n.5, citing EEOC v. Farmer Bros. Co., supra.

Indeed, the United States Supreme Court held an EEOC intake questionnaire sufficed as a discrimination complaint, although no formal complaint was filed and the EEOC took no action. Federal Express Corp. v. Holowecki (2008) 128 S.Ct. 1147. *A fortiori*, an employee who files an
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administrative complaint from which the agency omits some allegations is not barred from court.

d. Administrative Remedies Were Exhausted Because Harassment Claims Are Reasonably Like Included Claims

Nazir's October 2005 DFEH complaint exhausted administrative remedies for harassment because it alleged similar enough claims. Baker v. Children's Hospital Medical Center (1989) 209 Cal.App.3d 1057, 1065 (harassment and discrimination reasonably like retaliation); Oubichon v. North American Rockwell Corporation (9th Cir. 1973) 482 F.2d 569, 571 (same); Okoli v. Lockheed Technical Operations, Co. (1995) 36 Cal.App.4th 1607, 1615.

If reasonable investigation would reveal conduct not listed in a complaint, administrative remedies are deemed exhausted for the unlisted conduct. Baker; Oubichon; Okoli.

Whether the agency actually investigated reasonably like claims is irrelevant. B.K.B. v. Maui Police Department (9th Cir. 2002) 276 F.3d 1091, 1099; Yamaguchi v. United States Dept. of the Air Force (9th Cir. 1997) 109 F.3d 1475, 1480; Martin v. Nannie & the Newborns, Inc. (10th Cir. 1993) 3 F.3d 1410, 1413, 1416 fn.7.

A DFEH complaint's purpose is to "provide the basis for the DFEH to investigate the aggrieved employee's claims of discrimination. It is not intended as a limiting device."

Watson v. Department of Rehabilitation (1989) 212 Cal.App.3d 1271, 1288.

3. Continuing Violation Doctrine Makes Earlier Claims Timely

The continuing violation doctrine makes Nazir's claims before October 2004 also timely. Under this doctrine, defendants are liable for any earlier harassment sufficiently linked to harassment within the limitations period. Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1056-1058; Richards v. CH2M Hill, Inc. (2001) 26 Cal.4th 798, 812.

Later harassment need not be outwardly similar to be sufficiently linked to earlier harassment. Birchstein v. New United Motor Manufacturing, Inc. (2001) 92 Cal.App.4th 994; Dominguez v. Washington Mutual Bank (Cal.App. 11-21-08) 2008 DJDAR 17340.

The most egregious harassment need not occur within the limitations period. Porter v. California Department of Corrections (9th Cir. 2005) 419 F.3d 885, 894, citing National Railroad Passenger Corp. v. Morgan (2002) 536 U.S. 101, 117.

Actions not severe enough individually are still actionable if severe enough when considered collectively. Yanowitz, supra, 36 Cal.4th at 1058. "Actions that threaten to derail an employee's career are objectively adverse." Id. at 1060.

The continuing violation doctrine applies because evidence discussed in Section IV.A demonstrates a continuous chain of sufficiently linked severe or pervasive harassment.

D. Nazir Exhausted Administrative Remedies

Defendants claim Nazir cannot sue United for harassment by United employees unless each employee was named in Nazir's DFEH complaint.

The single published case defendants cite, Medix Ambulance Service, Inc. v. Superior Court (2002) 97 Cal.App.4th 109, 118, does not support defendants' argument. Medix holds only that individuals must be named in an administrative complaint before they can be sued personally. The plaintiff in Medix was allowed to sue her employer for harassment by two individuals dismissed as defendants because not named in the administrative complaint.

Two additional cases hold employers can be sued for harassment by individuals dismissed as defendants because not named in the administrative complaint. Saaveda v. Orange County Transportation Service Agency (1992) 11 Cal.App.4th 824, 828-829; Valdez v. City of Los Angeles (1991) 231 Cal.App.3d 1043, 1061.

Cf. Cole v. Antelope Valley Union High School District (1996) 47 Cal.App.4th 1505, 1515 (defendants must be

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named in administrative complaint); Martin v. Fisher (1992) 11 Cal.App.4th 118 (same).

V. FAILURE TO PREVENT DISCRIMINATION AND HARASSMENT

Because the defendants' sole ground for summary adjudication of this claim was that Nazir's discrimination and harassment claims were allegedly meritless, reversal of summary adjudication of those claims mandates reversal on this claim.

Summary adjudication is also precluded because defendants failed to take all reasonable steps to prevent discrimination and harassment, as discussed in Sections IV.A.4 and VI.K.

VI. DISCRIMINATORY DISCHARGE

A. Proving Discriminatory Discharge: Overview

Summary adjudication is "drastic and should be used with caution." Mann v. Cracchiolo (1985) 38 Cal.3d 18, 35-36. It may be granted in employment discrimination cases only if "the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 361.

Employment discrimination may be proved by either direct or circumstantial evidence. Morgan v. Regents of the University of California (2000) 88 Cal.App.4th 52, 67.

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"Circumstantial evidence is often needed in employment discrimination cases because employers usually conceal their improper motive." Spitzer v. Good Guys, Inc. (2000) 80 Cal.App.4th 1376, 1386.

Discriminatory discharge can be proved by circumstantial evidence alone, which can be "more certain, satisfying and persuasive than direct evidence." Desert Palace, Inc. v. Costa (2003) 539 U.S. 90, 100.

Even a little evidence of discriminatory animus is enough to require summary adjudication be denied, even without any showing the employer's stated reasons for discharge are untrue. Cordova v. State Farm Ins. Co. (9th Cir. 1997) 124 F.3d 1145, 1148.

An employee "'need produce very little evidence of discriminatory motive to raise a genuine issue of fact' as to pretext." Warren v. City of Carlsbad (9th Cir.1995) 58 F.3d 439, 443; Morgan v. Regents of the University of California (2000) 88 Cal.App.4th 52, 69; Godwin v. Hunt Wesson, Inc. (9th Cir. 1998) 150 F.3d 1217, 1221.

B. Direct Evidence of Discriminatory Animus of Petersen and Petersen's Director

1. Introduction

Petersen was the person who decided to fire Nazir. AA:V15:3671:10-25, AA:V16:3967:16-20, AA:V16:4073:22-4074:4.

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There is direct evidence Petersen had discriminatory animus against both Muslims and people of color, including Petersen's slurs against people of color and his effective admission he made an anti-Muslim slur.

This evidence, even alone, demonstrates triable issues whether Nazir's discharge was discriminatory, precluding summary adjudication.

Discriminatory comments needn't be made "in the direct context" of an adverse employment decision to be direct evidence of discriminatory animus. Reeves v. Sanderson Plumbing Products, Inc. (2000) 530 U.S. 133, 152; Lam v. University of Hawaii (9th Cir. 1999) 164 F.3d 1186; Cordova v. State Farm Insurance Cos. (9th Cir. 1997) 124 F.3d 1145, 1149.

Oblique comments can be direct evidence of discriminatory animus. Dee v. Vintage Petroleum, Inc. (2003) 106 Cal.App.4th 30, 32-33, 35-37 ("Well, it is your Filipino understanding versus mine"); Kelly v. Stamps.com, Inc. (2005) 135 Cal.App.4th 1088, 1101 (remark pregnant employee had "checked out")

"A single discriminatory comment by a plaintiff's supervisor or decisionmaker is sufficient to preclude summary judgment for the employer." Dominguez-Curry v. Nevada Transportation (9th Cir. 2005) 424 F.3d 1027, 1039 (citing authority).

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Direct evidence of discriminatory animus precludes summary judgment even if directed at someone other than plaintiff, Cordova v. State Farm Ins. Cos. (9th Cir. 1997) 124 F.3d 1145, 1149, or if several years old, Mustafa v. Clark County School District (9th Cir. 1998) 157 F.3d 1169, 1179-80.

Summary judgment must be denied, even if there is strong or even undisputed evidence of apparent good cause for termination, if there is sufficient direct evidence of discriminatory animus. Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95, 102-103, 113 (plaintiff shoved crew manager, eyewitness corroborated, and plaintiff admitted calling manager a "f*cking waste of air"); Metoyer v. Chassman (9th Cir. 2007) 504 F.3d 919 (employee transferred $30,000 elsewhere, disbursed to husband's company and others, and forged invoices to conceal who got funds); Campbell v. Wal-Mart Stores, Inc. (N.D.Okla. 2003) 272 F.Supp.2d 1276 (plaintiff admitted pushing coworker after warned for prior workplace violence).

2. By Silence and Concealment, Petersen Admitted Making Anti-Muslim Slur

Nazir's coworker, Garvin, told Nazir "You f*cking Muslims are all the same and Bernie Petersen is right about you people." Nazir complained to Petersen. Petersen said nothing to deny the statement attributed to him. AA:V13:3249:1-14.

The statement by Nazir to Petersen would normally call for a response because, if true, it meant Petersen was at most one step away from discharge under United's "zero tolerance" policy, AA:V15:3857:7-25, AA:V16:3873, AA:V1:0066:26-28, and risked personal liability under FEHA.

Petersen's failure to deny making the statement was admission by silence. When a statement is made "under circumstances that would normally call for a response if the statement were untrue," then "silence, evasion or equivocation may be considered as a tacit admission." In re Estate of Neilson (1962) 57 Cal.2d 733, 746; cf. People v. Riel (2000) 22 Cal.4th 1153, 1189.

"For the adoptive admission to apply . . . a direct accusation in so many words is not essential." People v. Fauber (1992) 2 Cal.4th 792, 852. Cf. People v. Roldan (2005) 35 Cal.4th 646, 710-711 ("defendant heard the comments"); In re Amos L. (1981) 124 Cal.App.3d 1031 (mother's silence when boyfriend told social worker he burned baby while "high" admission because implied she negligently left baby with "high" boyfriend); Keller v. Key System Transit Lines (1954) 129 Cal.App.2d 593, 596 (train operator referred questioner to employer when asked where he first saw woman struck by train).

Petersen claimed to Nazir the slur could not be investigated because too much time (two weeks) had

passed. AA:V13:3249:1-14. In contrast, Petersen investigated (and discharged) Nazir for alleged conduct first reported a month later. AA:V3:0626:12-22, AA:V3:0642:5-10.

Petersen's claim it was too late to investigate was an adoptive admission because it was an evasion to avoid investigation about what Petersen told Garvin. Cf. Cornwell v. Electra Central Credit Union (9th Cir. 2006) 439 F.3d 1018, 1033 (failure to investigate evidenced attempt to conceal supervisor's illegitimate motives).

Petersen's adoptive admission he made an anti-Muslim slur about Nazir by itself requires summary judgment be denied.

3. Petersen Tricked Nazir Into Eating Pork

Petersen tricked Nazir into eating pork, knowing this violated Nazir's Muslim religion, just a year before Petersen fired Nazir. There is evidence Petersen lied under oath to cover up what he did. The evidence is discussed in Section VIII.

This disgusting attack by Petersen on Nazir's religion is direct evidence of Petersen's discriminatory animus. Cf. AA:V13:3255:2-7 (Petersen taunted Nazir that donuts Nazir ate supposedly cooked in pork lard).

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4. Management Condoned Harassment

As discussed in Sections IV.A and VI.K, Petersen, HR, and other management tolerated harassment against Nazir including repulsive slurs; such tolerance is evidence of discriminatory animus.

5. Petersen Made Racist Comments About People of Color

Evidence of a decisionmaker's discrimination against one minority group is admissible evidence of discrimination against a plaintiff of another minority group. Lam v. University of Hawaii (9th Cir. 1998) 164 F.3d 1186, 1188; Schwapp v. Town of Avon (2d Cir. 1997) 118 F.3d 106, 112; cf. McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 804-805 (employer's "general policy and practice with regard to minority employment" evidence of pretext).

Evidence of Petersen's racist comments was submitted with plaintiff's new trial motion because plaintiff could not locate Shields earlier.

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Plaintiff could not locate Shields earlier because defendants improperly expurgated Shields' address from documents, defendants defeated plaintiff's motion to obtain addresses of employees including Shields who complained of race discrimination, Shields had moved out of state, Shields was using a different surname, and United obtained Shields' agreement not to discuss United. AA:V22:5507:21-5512:4, AA:V22:5521:12-5522:9, AA:V22:5523:6-12, AA:V26:6372:1-11, AA:V25:6306-6308 (narrowing discovery to discrimination because of "Muslim faith or Middle Eastern national origin").

Defendants' conduct estops them from complaining about when Shields' testimony was submitted. Puerto v. Superior Court (2008) 158 Cal.App.4th 1242 (interest in locating witness outweighs address privacy).

"[A] party claiming the discovery of new evidence following summary judgment is held to a less demanding standard of reasonable diligence than a party asserting this claim after trial." Doe v. United Airlines, Inc. (2008) 160 Cal.App.4th 1500, 1509, citing with approval Scott v. Farrar (1983) 139 Cal.App.3d 462, 467-469 (reasonable diligence although witness deposed after summary judgment hearing).

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6. Petersen's Director Ordered Nazir Reported as Possible Terrorist

Petersen's Director ordered Nazir reported to the FBI as a possible terrorist without a scintilla of evidence, as discussed in Section IV.A.2.c.

Doyle's conduct is exactly the sort of anti-Muslim stereotyping held sufficient direct evidence of discriminatory animus to preclude summary judgment. Raad v. Fairbanks North Star Borough School District (9th Cir. 2003) 323 F.3d 1185, 1195-6 (Muslim woman who said she was angry and did not want to "blow up" suspended for terrorist threat).

Stereotyping someone Muslim as "terrorist" is unlawful discrimination. EEOC Compliance Manual §12.II.C; cf. §12.III.A.2.a (www.eeoc.gov/policy/docs/religion.html). See also www.eeoc.gov/facts/backlash-employer.html.

C. Statistical Evidence Shows Discrimination

"Statistical evidence may support a plaintiff's showing of pretext in a disparate treatment claim." Noyes v. Kelly Services (9th Cir. 2007) 488 F.3d 1163; cf. Diaz v. AT&T (9th Cir. 1985) 752 F.2d 1356, 1362-63.

"Statistics showing racial or ethnic imbalance are probative... because such imbalance is often a telltale sign of purposeful discrimination." Teamsters v. United States

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(1977) 431 U.S. 324, 339-40, fn.20. An inference of discrimination can be drawn from an "inexorable zero" of people of color without statistical analysis. Id. at fn. 23.

Nazir's department completely excluded people of color from positions supervising mechanics, with the temporary exception of Nazir. Petersen headed the department since 1991. AA:V15:3640:3-24.

Until 2001, no person of color ever held a position in Petersen's department devoted to supervising mechanics. This was despite the fact that about 30% of the mechanics were people of color. AA:V13:3268:21-24, AA:V26:6400:13-6402:3.

Since Petersen fired Nazir, all permanent mechanic supervisors in Petersen's department have again been white. AA:V17:4203:18-25.

Absence of supervisors from a protected group is circumstantial evidence of pretext. Davis v. Team Electric Co. (9th Cir. 2008) 520 F.3d 1080; Bergene v. Salt River Project Agricultural Improvement & Power District (9th Cir. 2001) 272 F.3d 1136, 1143; cf. Surrell v. California Water Service Co. (9th Cir. 2008) 518 F.3d 1097, 1107 (plaintiff's personal knowledge proves absence).

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D. No Same Actor Inference Applies

1. Evidence Same Decisionmaker Promoted and Fired Given No Special Weight

In granting summary judgment, the trial court erroneously accepted defendants' argument that the "same actor inference" created a presumption Petersen didn't discriminate. AA:V22:5472.

Defendants supported their argument by claiming "Petersen promoted Nazir to supervisor, gave him three positive performance reviews, and offered to become Nazir's mentor..." AA:V1:0069:1-7.

Evidence the same actor hired or promoted an employee before firing them is simply one piece of evidence creating no presumption. Waldron v. SL Industries, Inc. (3d Cir. 1995) 56 F.3d 491, 496, fn.6; Williams v. Vitro Services Corp. (11th Cir. 1998) 144 F.3d 1438, 1443; Haun v. Ideal Industries, Inc. (5th Cir. 1996) 81 F.3d 541, 546.

The "same actor inference" issue will be decided by the California Supreme Court in Harvey v. Sybase, Inc.

2. No Same Actor Inference Applies Because Petersen Didn't Make Promotion Decision

For years, Petersen rejected Nazir for temporary supervisor positions, which groomed mechanics to become permanent supervisors. Petersen instead selected at least seven white mechanics, some with only two years experience, prompting Nazir to ask why only whites were

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chosen. AA:V13:3263:8-21, AA:V13:3261:6-14, AA:V13:3263:8-16, AA:V17:4213:15-19.

Petersen and others also rejected Nazir for many permanent supervisory openings for which Nazir applied, despite Nazir's complaints, and often without even interviewing him. AA:V13:3260:18-3265:19.

Instead, a white supervisor proclaimed Nazir would be promoted over his dead body. AA:V17:4213:19-22, AA:V13:3265:7-9. Instead, Nazir was told he was “lazy and no good.” AA:V13:3262:8-28.

No person of color had ever been a mechanic supervisor in Petersen’s department. AA:V13:3268:21-24, AA:V26:6400:13-6401:12. That fact resulted in written complaint to HR in March 2001. AA:V26:6399:2-13, AA:V26:6418.

Nazir became temporary supervisor in May 2001 only after that decision was removed from Petersen. AA:V17:4213:9-28, AA:V13:3263:25-28.

In July 2001, Nazir got promoted to permanent mechanic supervisor after involving HR, upon hearing Petersen improperly offered a white mechanic the position before interviews. AA:V13:3266:5-3267:2.

Petersen’s boss Wysong then told Petersen it would be good to select Nazir because there were so many white supervisors. AA:V15:3681:11-22, AA:V15:3682:22-25.

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Petersen admitted in deposition that Wysong was "the tie breaker" in choosing Nazir. AA:V15:3683:25-3684:5.

Petersen's declaration to the contrary, that Petersen decided, must be disregarded because it contradicts Petersen's deposition admission. D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 22.

After Nazir was selected for promotion, Petersen demonstrated hostility to Nazir's selection, prompting Nazir to again complain to HR. AA:V13:3266:27-3268:20.

No same actor inference may be invoked when there is a triable factual issue whether the termination decisionmaker selected the employee for hiring or promotion. Horn v. Cushman & Wakefield Western, Inc. (1999) 72 Cal.App.4th 798, 809; Zambetti v. Cuyahoga Community College (6th Cir. 2002) 314 F.3d 249, 252, 261; Juell v. Forest Pharmaceuticals, Inc. (E.D.Cal. 2006) 456 F.Supp.2d 1141, 1154-1155.

The same actor inference may also not be invoked when the termination decisionmaker did not make the hiring or promotion decision freely and alone, without pressure or influence by others. Zambetti v. Cuyahoga Community College, supra at 252, 261 (hired employee to please other manager); Fernandes v. Costa Brothers Masonry (1st Cir. 1999) 199 F.3d 572, 588 ("only hired a few minorities because of local pressure"); Matthews v. Euronet Worldwide, Inc. (D.Kan. 2007) 505 F.Supp.2d 850 (felt

obliged to hire because of HR advice); cf. Bennett v. Emerson Elec. Co. (D.Kan. 2001) 160 F.Supp.2d 1244, 1249; Sciola v. Quattro Piu, Inc. (E.D.N.Y. 2005) 361 F.Supp.2d 61, 66; Abdulnour v. Campbell Soup Supply Co., L.L.C. (N.D.Ohio 2006) 464 F.Supp.2d 711, 717, fn.3.

3. No Same Actor Inference Applies For Four Additional Factual Reasons

Petersen did not know Nazir was Muslim or Pakistani when Nazir was promoted to supervisor. AA:V15:3643:5-11. No same actor inference applies unless the decisionmaker knew the employee's protected class when hiring or promoting. Czekakski v. Peters (D.C. Cir. 2007) 475 F.3d 360, 368.

Second, no California (and perhaps no published) case applied a same actor inference to a satisfactory performance review, much less an "offer" to become a "mentor."

Third, the four-year gap between Nazir's promotion and termination dispelled any same actor inference. No same actor inference applies unless the hiring (or promotion) occurs "within a short period of time" before discharge. Horn v. Cushman & Wakefield Western, Inc. (1999) 72 Cal.App.4th 798, 809.

No published California or Ninth Circuit case identified by plaintiff ever found an inference when the gap was more than three years. Some cases hold a gap of more than two

years destroys any inference. Thomas v. Istar Financial Inc. (S.D.N.Y. 2006) 438 F.Supp.2d 348, 361-362; Campbell v. Alliance Nat'l Inc. (S.D.N.Y.2000) 107 F.Supp.2d 234, 248; cf. Buhrmaster v. Overnite Transportation Co. (6th Cir. 1995) 61 F.3d 461, 464 (gap weakens inference); Heinemann v. Howe & Rusling (W.D.N.Y. 2008) 529 F.Supp.2d 396, 412 (same).

Fourth, intervening circumstances, including Nazir's persistent complaints of discrimination and his medical leave, dispel any same actor inference. Feingold v. New York (2d Cir. 2004) 366 F.3d 138, 155 (intervening discrimination complaints dispelled inference); cf. Tellepsen Pipeline Services Co. v. NLRB (5th Cir. 2003) 320 F.3d 554, 569; Sutherland v. SOS Intern., Ltd. (E.D.Vir. 2008) 541 F.Supp.2d 787.

E. If Nazir Were Treated Like White Employees, He Wouldn't Have Been Investigated

Petersen had a pattern of searching for pretextual reasons for disciplining Nazir, as discussed in Sections IV.A.2.b and IV.A.2.d.

Petersen's hairtrigger decision to formally investigate Nazir's interactions with Avellan as discrimination contrasts markedly with United's failure to investigate Nazir's discrimination complaints. If the same standards had been used, Nazir would never have been even investigated, much less fired.

Petersen investigated Nazir for alleged conduct first reported four weeks later. AA:V2:0626:12-22, AA:V2:0642:5-10. In contrast, Petersen claimed he could not investigate Nazir's complaint of an anti-Muslim slur reported two weeks later (after an even earlier report) because too much time had elapsed. AA:V13:3249:1-14.

If Petersen had used the same standard, Nazir would not have been investigated at all.

Defendants also used a double standard about how explicitly discrimination must be alleged to trigger a discrimination investigation.

Defendants investigated Nazir for alleged discrimination against Avellan even though she did not claim (or believe) Nazir discriminated. AA:V15:3828:25-3829:2, AA:V15:3829:17-3830:10, AA:V15:3831:9-15.

In contrast, defendants claimed they did not investigate complaints by Nazir as discrimination because Nazir did not allege discrimination explicitly enough.

HR representative Asfaha claimed she did not investigate as discrimination Nazir's complaint he was "the only minority" supervisor and treated "without support or respect," because Nazir did not separately explicitly allege he was mistreated because he was a minority. AA:V15:3816:3-24, AA:V15:3818:7-20.

Asfaha claimed she also did not investigate as discrimination Nazir's later complaint of specific

mistreatment because Nazir did not allege discrimination. AA:V20:4943:24-4944:3, AA:V15:3818:7-20, AA:V15:3823:8-18, AA:V13:3289:5-12. However, Asfaha's written notes of Nazir's complaint begin: "Obstacles for success in the job? Racism." They continue: "Do think it's a race issue with Al." AA:V20:4941:19-22, AA:V20:4945-4948.

Nazir complained to Petersen that maintenance specialists mistreated him. AA:V15:3714:2-17, AA:V15:3715:8-3716:7, AA:V15:3716:22-3717:1. Petersen admitted "I felt the entire conversation was in regard to I.N. [Nazir's] race." Petersen's notes documented his response: "I told him you can't make people like us." AA:V15:3714:2-17, AA:V15:3797.

The month before United fired Nazir, Nazir complained to HR representative Keliihoomalu over several days about daily harassment. AA:V13:3294:20-23. Keliihoomalu claimed Nazir's statement "race was still an issue" was not a discrimination complaint. AA:V16:3968:7-3969:2.

Treating an employee less favorably in events leading to adverse employment action than employees outside the protected class evidences pretext. Bodett v. Coxcom, Inc. (9th Cir. 2004) 366 F.3d 736, 744.

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F. Petersen Characterized Nazir's Alleged Conduct in Worst Light

Characterizing allegations against an employee in the worst possible light is evidence of pretext. Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95, 117-118; Shager v. Upjohn Co. (7th Cir. 1990) 913 F. 2d 398, 405.

As discussed above, Petersen decided to investigate Nazir for gender discrimination even though Avellan did not claim (or believe) Nazir discriminated.

Petersen also checked the national origin discrimination box on United's complaint form, although he admittedly never had any facts even suggesting national origin discrimination. AA:V22:5591:21-5592:4, AA:V23:5598:21-28, AA:V23:5605.

G. United's Assignment of Biased Investigators Including Petersen Evidences Pretext

1. Introduction

Assignment of someone biased to investigate, or someone beholden to them, evidences pretext. California Fair Employment and Housing Commission v. Gemini Aluminum Corp. (2004) 122 Cal.App.4th 1004, 1022; cf. Bierbower v. FHP, Inc. (1999) 70 Cal.App.4th 1, 7; Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95, 120 (biased supervisor "exploiting a disciplinary process predisposed to confirm all charges").

Assignment of biased investigators also evidences pretext because it violated United's policies, forbidding

investigation by anyone if "there is any reason you would not be perceived as an unbiased investigator." ¶10 of AA:V16:3877, AA:V15:3857:7-25, AA:V16:3868-3925.

An employer's violation of its own policies, procedures or practices evidences pretext. Kotla v. Regents of the University of California (2004) 115 Cal.App.4th 283, 294 fn.6; Erickson v. Farmland Industries, Inc. (8th Cir. 2001) 271 F.3d 718, 727; cf. Village of Arlington Heights v. Metropolitan Housing Development Corp. (1977) 429 U.S. 252, 267.

2. Petersen Was Biased

Petersen was selected to investigate Nazir even though Nazir complained days earlier about Petersen discriminating and Petersen knew it. AA:V16:3966:10-24, AA:V16:3967:21-3968:18.

Petersen also knew of Nazir's earlier complaint that Petersen tolerated discrimination against Nazir. AA:V15:3719:20-3720:15, AA:V15:3721:17-23, AA:V15:3798.

A supervisor in Petersen's department had also told HR and EEO that Petersen tolerated discrimination in his department, including against Nazir. AA:V17:4217:12-4218:5.

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3. Rich Was Biased

Rich was assigned to assist Petersen's "investigation" of Nazir. AA:V16:3966:10-24.

Rich attended most of Petersen's staff meetings and talked with Petersen often by phone. AA:V16:4058:12-20. Rich was Petersen's primary labor relations advisor. Rich considered Petersen to be his internal customer who he served. AA:V16:4059:9-19.

Rich's role in the investigation was biased like that of the investigator in Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95, 121.

H. Biased Investigation and Policy Violations Evidence Pretext

1. Introduction

A biased investigation evidences pretext. Tesh v. U.S. Postal Service (10th Cir. 2003) 349 F.3d 1270, 1274; Metoyer v. Chassman (9th Cir. 2007) 504 F.3d 919.

Although not controlling in discrimination cases, the contractual good cause standard tellingly requires "an appropriate investigation." Cotran v. Rollins Hudig Hall International, Inc. (1998) 17 Cal.4th 93, 107.

An employer's violation of its policies or procedures also evidences discriminatory pretext, as discussed in Section VI.G.1.

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2. <u>United Ambushed Nazir By Not Giving Nazir Avellan's Statements</u>

United's policy required it give an alleged harasser a detailed form completed by complainant. AA:V16:3882 ¶8, AA:V15:3857:7-3858:14. This was also United's normal practice. AA:V16:4060:6-22.

United did not ask Avellan to complete the form its policy mandated, AA:V16:3882 ¶8, AA:V16:3891-3895, or otherwise answer those questions in writing. Mandatory questions included the type of discrimination alleged, AA:V16:3891, why the complainant believed the conduct was motivated by discrimination, AA:V16:3891, what "exact words" were objectionable, AA:V16:3892, what "exact conduct" was objectionable, AA:V16:3892, "exactly how you were touched," AA:V16:3892, "[e]xactly what did you say or do" to object, AA:V16:3894, and who was told about the incident, AA:V16:3895.

Indeed, United never got even verbal answers from Avellan to these mandated (and logically necessary) questions, as discussed in Sections VI.H.6, VI.H.8, VI.I.2, VI.I.3 and VI.E.

United ambushed Nazir. United suddenly announced charges against Nazir. United immediately ordered Nazir while in shock to write all he recalled about his conversation with Avellan a month earlier. AA:V2:0333:5-16,

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AA:V2:0334:13-25, AA:V2:0335:16-25, AA:V2:0336:23-0337:6, AA:V2:0345-0347.

United gave Nazir neither the detailed form United was supposed to have Avellan complete, nor the two less specific statements Avellan did provide, so Nazir could fairly respond. AA:V13:3296:1-3, AA:V17:4138:8-4139:4.

Defendants' ambush of Nazir was like facts found to show pretext in Adams v. Sewell (11th Cir. 1991) 946 F.2d 757 (plaintiff did not know subject of interview beforehand and not shown documentation until after discharge).

3. Defendants Ignored Avellan's Motives to Get Nazir Fired

Although Rich saw an Avellan statement saying, "Carlos told me that Iftikhar [Nazir] had been calling him at home complaining about me," Rich unbelievably claimed he didn't even consider whether Avellan had a motive to get Nazir fired. AA:V17:4093:25-4094:8.

Considering "Did the person have a reason to lie?" is "critical in determining whether the alleged harassment in fact occurred." EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors §VC1e(ii).

United's own policies direct investigators to consider, "Who has a motive to lie?" AA:V16:3916 ¶7, AA:V15:3857:7-3858:14.

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4. Defendants Ignored Avellan's Employer's Motives to Get Nazir Fired

Nazir told Petersen and Rich that Avellan's boss at Scientific Concepts, Flanigan, wanted Nazir fired because Nazir complained about Scientific Concepts. AA:V13:3295:9-15.

Petersen was there when Flanigan "came yelling at me [Nazir]: Who the hell are you to complain about my people." "[Nazir] had to go around Petersen to avoid confrontation with the man." AA:V2:0340:1-22.

Rich implausibly claimed Flanigan's denial of his dispute with Nazir did not make Rich even question Flanigan's honesty. AA:V17:4126:23-4127:17.

Avellan was never interviewed alone without another Scientific Concepts employee present, AA:V17:4107:4-12, even though Nazir asked this be done, AA:V14:3484:5-19, AA:V15:3757:4-16, AA:V17:4135:21-25. Defendants claim they wanted to interview Avellan alone and didn't because they lacked Avellan's home contact information, AA:V17:4120:19-25, but they didn't even try to get it, AA:V17:4133:20-4134:15.

Rich also improbably claims he didn't consider whether Scientific Concepts employees Palacios, Flanigan and Avellan orchestrated their written statements, even though all three statements claimed Nazir treated janitors like "servants." AA:V17:4129:23-4130:19.

5. Avellan's Questionable Statements Credited Without Further Investigation

Avellan's statements were questionable.

The first two pages were handwritten by United Security Supervisor Knight instead of Avellan. AA:V15:3845:13-18, AA:V15:3848:20-22, AA:V15:3849-3850, AA:V16:4034:5-4035:10, AA:V16:4038:12-23, AA:V16:4039-4040, AA:V17:4105:23-4107:12.

Defendants never asked Knight what Avellan told him about her interactions with Nazir, even though Knight discussed them with Avellan, wrote most of Avellan's statement, and was Avellan's boyfriend. AA4075:10-24, AA:V17:4087:13-4088:1.

United's failure to interview Knight was contrary to its normal procedures. AA:V15:3768:3-10, AA:V17:4091:21-4092:19.

Avellan also did not compose "her" statement's third, final, page. AA:V15:3845:24-3846:21, AA:V15:3851. Petersen knew this, but never tried to interview the person who did compose it. AA:V15:3766:9-3767:13. This was contrary to United's normal procedure. AA:V15:3768:3-10.

Rich improbably claimed he did not think it better to interview Avellan with open-ended questions, even though Avellan's written statements were by others and she was never interviewed alone. AA:V17:4105:24-4106:11, AA:V17:4107:4-12.

Lack of thoroughness in investigating potentially exculpatory information evidences pretext. Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95, 120-121.

6. No Investigation of Contradictory Avellan Statements

Petersen and Rich didn't ask Avellan who she talked with about her interaction with Nazir. Normal United practice was to ask this question then interview those people. AA:V15:3768:3-22. This was also United's written policy. AA:V16:3886, AA:V16:3891, AA:V16:3895, AA:V16:3908 ¶3, AA:V16:3916 ¶2.

Defendants did not interview people they knew Avellan talked with about her interaction with Nazir, including Knight, AA:V17:4087:7-4088:1.

United also avoided asking Wing more about what Avellan told Wing, AA:V17:4120:12-4121:2, after learning Avellan contradicted herself to Wing on a key point.

Avellan told Petersen and Rich she did not know what arm wrestling was. AA:V17:4121:25-4122:2. Rich testified it was this that ruled out the possibility Avellan and Nazir had been arm wrestling. AA:V20:4903:16-25.

United then received Wing's statement that Avellan told him Nazir "arm wrestled her." AA:V15:3756:4-12, AA:V15:3811. Rich implausibly testified Wing's statement did not make him even question Avellan's credibility. AA:V17:4121:25-4122:18.

Indeed, Rich testified that he would not even have doubted Avellan's credibility if she had also told a second person that Nazir "arm wrestled her." AA:V17:4123:1-9.

An employer's failure to interview witnesses for potentially exculpatory information evidences pretext. Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95, 120-121; Greene v. Coach, Inc. (S.D.N.Y. 2002) 218 F. Supp.2d 404, 410; Probst v. Reno (N.D.Ill. 1995) 917 F.Supp. 554, 561.

7. United Didn't Ask Eyewitness Coleman Necessary Questions

United policy required investigators to ask eyewitnesses "What exact conduct occurred?" and for an exact description of "how the complainant was touched." AA:V16:3912, AA:V15:3857:7-25.

Neither Rich nor Petersen asked Coleman whether Nazir's elbow was touching the table while he moved Avellan's hand to touch the table (a hallmark of arm wrestling). AA:V16:4065:21-4066:5.

Neither Petersen nor Rich asked Coleman to reenact the touching. AA:V16:3943:12-3944:12. If they had, Coleman would have demonstrated arm wrestling. Please see one-minute Coleman deposition video on DVD. AA:V17:4165, AA:V16:3943:12-3944:12.

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8. "Investigation" Into Nazir's Discussion About Avellan's Personal Life Lacking

One claimed reason for firing Nazir is Nazir supposedly had an inappropriate discussion with Avellan about her personal life. AA:V3:0538:17-0539:18.

However, defendants did not ask Avellan what was discussed or do anything to determine if it would offend a reasonable person. AA:V16:4069:22-4070:13, AA:V16:4079:7-4081:22. Defendants knew nothing about whether Avellan previously mentioned these things to Nazir. AA:V16:4069:22-4070:13.

Defendants' failure to ask these questions violated United policy to ask "What specific words are alleged to have been said?" AA:V16:3884, AA:V15:3857:7-25; cf. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors §VC1ei.

9. United Denied Nazir Appeal Hearing to Which Policy Entitled Him

Nazir timely requested a discharge appeal hearing using company procedure. AA:V2:0351:18-23, AA:V2:0408-0411. Nazir followed up with scheduling requests on May 31, 2005, February 26, 2006, and March 14, 2006. United received them, but never scheduled Nazir's appeal. AA:V13:3299:16-3300:3, AA:V14:3439-3447.

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By violating its appeal policy, United pretextually refused to consider Nazir's evidence, including evidence mentioned in Nazir's appeal that Avellan not Nazir brought up Avellan's personal life. AA:V2:0408-0409.

I. Weaknesses and Implausibilities in Claimed Discharge Reasons Show Pretext

1. Introduction

Summary judgment must be denied when there are sufficient "weaknesses, implausibilities, inconsistencies, or contradictions" in claimed discharge reasons that a "reasonable fact finder could rationally find them 'unworthy of credence.'" Hersant v. California Department of Social Services (1997) 57 Cal.App.4th 997, 1003; cf. Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 356; California Fair Employment & Housing Commission v. Gemini Aluminum Corp. (2004) 122 Cal.App.4th 1004, 1023 ("proffered reason was insufficient to motivate discharge"); Reeves v. Sanderson Plumbing Products, Inc. (2000) 530 U.S. 133, 147-48; Fuentes v. Perskie (3d Cir. 1994) 32 F.3d 759, 765 & fn.8 ("decision foolish, imprudent, or incompetent by comparison to the employer's usual mode of operation").

Defendants' claimed reasons for firing Nazir, AA:V3:0538:17-0539:16, cf. AA:V3:0539:17-0540:9, AA:V3:0557, appear solid at first cursory glance.

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Examination of what defendants were actually told about what happened between Nazir and Avellan shows otherwise.

2. Arm Wrestling

United had overwhelming evidence Nazir and Avellan were arm wrestling, as discussed in Sections I and VI.H.6. Reasonable factfinders could conclude United knew they were arm wrestling.

Even if Avellan somehow did not intend to arm wrestle, United had ample evidence Nazir reasonably believed she did.

Rich admitted Nazir could reasonably have believed Avellan invited arm wrestling if she extended her hand to Nazir's while both their elbows touched the table. AA:V17:4117:6-4118:7.

Rich also admitted that nothing Avellan said ruled out Avellan moving her arm upward while her elbow remained on the table. AA:V16:4063:4-4064:22.

Avellan admitted Nazir said something about arm wrestling to her, claiming she didn't understand. AA:V15:3836:23-3837:16, AA:V15:3833:5-10, AA:V15:3834:2-10, AA:V15:3835:3-10.

United policy requires investigators to consider whether an issue resulted from misunderstanding. AA:V15:3857:7-25, AA:V16:3902.

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The facts resemble those in Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95, 121 where a "minor" incident "was amplified into a 'solid case' of 'workplace violence.'" Reeves reversed summary judgment.

3. Nazir's Statements About Avellan's Personal Life

Defendants had no evidence Nazir said anything inappropriate about Avellan's personal life, much less enough to justify discharge.

Nazir and Avellan talked more than half an hour. Nothing said about Avellan's personal life struck eyewitness Coleman as memorable. AA:V16:3937:20-24, AA:V16:3938:15-3939:7, AA:V16:3947:8-19.

All defendants were told Nazir said about Avellan's personal life was advising her to accept an engagement ring from her boyfriend, United Security Supervisor Knight. AA:V16:4080:17-4081:11. That is hardly offensive.

Defendants didn't know if the personal matters discussed were things Avellan previously told Nazir. AA:V16:4069:22-4070:4. They did nothing to find out. AA:V16:4080:17-4081:11.

Knight's romantic relationship with Avellan was not news. Rich already knew about it. AA:V17:4087:7-4088:1. Avellan often discussed it with Nazir. Avellan asked Nazir to discuss her personal issues on the day in question. AA:V19:4828:18-23, AA:V20:4850-4851.

Nazir did call Avellan tough and manipulative regarding Avellan telling Nazir she had her husband jailed by falsely accusing him of stabbing her. AA:V14:3476:18-25.

Rich admitted he could not rule out that Avellan told Nazir something about her personal life proving her tough and manipulative. AA:V16:4070:5-13.

Nazir explained to United that after arm wrestling and calling Avellan tough, "we laughed and talked." AA:V14:3473:5-16, AA:V14:3582. Avellan also told United she was laughing during discussion of her personal life. AA:V17:4108:6-18.

4. Video

Avellan said Nazir told her she should "watch a video about how women are treated in the Middle East," "then you would know how good you have it." AA:V3:0651:3-0652:4, AA:V3:0657-0659. Neither Petersen nor Rich asked Avellan the context. AA:V16:4071:18-4072:24. Nazir's comment was inoffensive, not meriting discipline much less discharge.

5. Nothing Said About Who Should Clean Office Merited Discharge

Defendants also relied on Nazir telling Avellan he wanted one of the lady janitors to clean his office because they did a better job than Gerwin, the man newly assigned to clean it. AA:V14:3466:11-18, AA:V16:4067:17-25.

Coleman confirmed Gerwin was the only man who cleaned Nazir's office, and that others who cleaned it were all women. AA:V16:3930:9-20, AA:V16:3931:22-3932:5.

Nazir's request a "lady" clean his office was simply another way of asking for another janitor, who were all women. Defendants did nothing to find out if they cleaned better than Gerwin. AA:V17:4131:18-4132:18.

Coleman admitted Gerwin's main job was cleaning the cafeteria and Nazir's office was the only office Gerwin cleaned. AA:V16:3934:8-16, AA:V16:3935:3-6. Coleman never checked Nazir's office after Gerwin cleaned it. AA:V16:3933:15-3935:2.

Rich admitted it would not be gender discrimination for Nazir to ask for women who cleaned his office better to clean it instead of a man who did not clean it as well. AA:V17:4103:10-20.

Nazir wrote United, "I do not recall saying that Irwin [Gerwin] smells and has short hair and does not wear high heels." AA:V14:3473:5-16, AA:V14:3581. Avellan admitted to United she took that alleged statement as a joke. AA:V17:4104:13-25.

Nazir told United he left when janitors cleaned his office so they could do their job. AA:V14:3473:5-16, AA:V14:3581. Rich admitted there was not the slightest suspicion Nazir sexually harassed janitors. AA:V17:4095:8-4096:14.

6. Pretextual Warning For Leaving Workplace

As discussed in Section IV.A.2.d, the written warning given Nazir for leaving work was pretextual.

7. Defendants' False Implication Patel Incident a Reason For Discharge

Defendants falsely implied the Patel incident, involving returning photos to her, was a reason for Nazir's discharge. It was not.

Defendants admitted the Patel incident played no role in the termination decision. All three people who participated in firing Nazir admitted the only things considered were the warning for leaving work and the Avellan incident. AA:V15:3672:13-3673:19, AA:V3:0557, AA:V17:4137:15-21, AA:V17:4140:9-15, AA:V17:4141:1-7, AA:V16:3972:2-10; cf. AA:V15:3867:4-19, AA:V15:3677:9-25, AA:V13:3301:16-19.

J. Common Pretextual Scheme For Discriminatory Discharge

Another employee of color who complained of discrimination was also pretextually discharged for supposedly violating United's "zero tolerance" discrimination policy.

Common pretextual schemes evidence pretext. Goldsmith v. Bagby Elevator Company Inc. (11th Cir. 2008) 513 F.3d 1261; Morris v. Washington Metropolitan Area Transit Authority (D.C. Cir. 1983) 702 F.2d 1037, 1046; cf.

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McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 804-805.

K. Tolerance of Discrimination Evidences Discriminatory Animus

Tolerating discrimination demonstrates discriminatory animus, evidencing pretext. Glass v. Philadelphia Elec. Co. (3rd Cir. 1994) 34 F.3d 188, 194-5; Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1103 (8th Cir.1988); Hunter v. Allis-Chalmers Corp. (7th Cir.1986) 797 F.2d 1417, 1421; Hawkins v. Hennepin Technical Center (8th Cir.1990) 900 F.2d 153, 155.

As discussed in Sections IV.A.1, IV.A.2.a and IV.A.3.h, Petersen tolerated disgusting slurs against Nazir and vandalization of Nazir's car, office door and computer.

As discussed in Section IV.A.2.f, Petersen tolerated insubordination to Nazir, disrespect to Nazir, and refusal to work with Nazir.

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As discussed in Section IV.A.2.g, Petersen tolerated Nazir's peers transferring Nazir's crew without even telling Nazir, while in contrast Nazir's white replacement's consent was always obtained first.

Petersen tolerated rudeness to Nazir in supervisor meetings. AA:V13:3259:16-26, AA:V17:4214:4-20, AA:V13:3282:11-17, AA:V13:3291:27-3292:2, AA:V13:3277:10-28, AA:V15:3724:15-24.

Petersen tolerated verbal attacks against Nazir, a white employee's harassment of Nazir for properly using a company vehicle, and employees' refusal to cooperate with Nazir. AA:V13:3283:3-3285:19, AA:V17:4215:15-22, AA:V15:3724:15-24.

Nazir told Petersen other supervisors were discriminating against Nazir, AA:V15:3669:25-3670:3, and other employees shunned him. AA:V15:3687:3-7.

Petersen suggested Nazir's demotion instead of stopping the harassment. AA:V13:3292:8-3293:6, AA:V14:3560:5-17.

Petersen told Nazir it was Nazir's responsibility to befriend the harassers. AA:V13:3294:3-8, AA:V15:3724:15-24.

Petersen admitted he ignored employees' "disrespectful" comments about Nazir. AA:V13:3250:19-25.

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Petersen admitted he never disciplined anyone for anything they did regarding Nazir. AA:V15:3724:14-24.

As discussed in Sections IV.A.4 and VI.E, Human Resources and United's Office of Business Conduct also repeatedly tolerated discrimination against Nazir.

VII. RETALIATION

A. Introduction

The complaint alleges United fired Nazir in retaliation for Nazir's discrimination complaints, AA:V1:0018:8-0020:16, and for taking medical leave for disability caused by stress resulting from discrimination, AA:V1:0023:15-0026:8. Summary adjudication of each of these distinct claims was error.

Nazir took medical leave from September 2004 to January 2005, informing Petersen that workplace harassment caused his illness. AA:V13:3292:10-13, AA:V14:3560:5-17.

Petersen suggested Nazir be demoted, upon returning, from supervisor to mechanic. AA:V13:3292:20-3293:6.

Petersen wrote a performance review the month after Nazir's return downgrading Nazir to "needs improvement." AA:V14:3551:1-18.

United fired Nazir in May 2005, two months after the bad review and four months after Nazir's leave. As discussed in Section VI, the discharge was pretextual.

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Nazir was fired less than a month after complaining to HR that Petersen was discriminating against him and tolerating others' discrimination. AA:V16:3966:10-24, AA:V16:3967:21-3968:2. Petersen knew Nazir complained. AA:V16:3967:16-3968:18.

Nazir's increased opposition to discrimination over the years led to correspondingly escalating harassment and personnel actions, culminating in retaliatory discharge.

B. Temporal Proximity Evidences Retaliation

Temporal proximity, even alone, establishes a triable issue of retaliatory motive. Flait v. North American Watch Corp. (1992) 3 Cal.App.4th 467, 478; Fisher v. San Pedro Hosp. (1989) 214 Cal.App.3d 590, 615; Ray v. Henderson (9th Cir. 2000) 217 F.3d 1234, 1244; Jalil v. Avdel Corp. (3d Cir. 1989) 873 F.2d 701, 708; Donnellon v. Fruehauf Corp. (11th Cir. 1986) 794 F.2d 598, 601-602.

Four months between Nazir's leave and discharge is close enough, especially because of intervening adverse acts. Richards v. CH2M Hill, Inc. (2001) 26 Cal.4th 798, 823; Wysinger v. Automobile Club of Southern California (2007) 157 Cal.App.4th 413, 421 (exclusion from committees and being treated with "coldness" sufficient); Marx v. Schnook Markets, Inc. (10th Cir. 1996) 76 F.3d 324, 329 ("retaliatory conduct begins soon ... culminates later in a discharge").

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Defendants argue "intervening favorable treatment" precludes Nazir's retaliation claims. No case cited so holds.

Further, there was no favorable treatment after Nazir's medical leave ending January 2005 or his April 2005 HR complaint. Between Nazir's earlier complaints and discharge, intervening unfavorable treatment overwhelms any favorable treatment.

C. Pretextual Discharge Evidences Retaliation

Pretextual reasons for discharge evidence retaliation. Iwekaogwu v. City of Los Angeles (1999) 75 Cal.App.4th 803, 816. Nazir's discharge was pretextual, as discussed in Section VI.

D. Comparative Evidence Shows Retaliation

Comparative evidence can show retaliation. Id. The comparative evidence discussed in Section VI.E evidences retaliation.

E. Heightened Scrutiny and Procedural Violations Evidence Retaliation

United's heightened scrutiny of Nazir's alleged disciplinary infractions involving Avellan is discussed in Sections VI.E, VI.F, VI.H and VI.I. Heightened scrutiny evidences retaliation. Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1062; Marx v. Schnook Markets, Inc. (10th Cir. 1996) 76 F.3d 324, 329.

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United violated its policies in discharging Nazir, as discussed in Section VI.H. Violation of "protocol and procedures" is "evidence of retaliation." Marx at 329.

F. Tolerance of Earlier Discrimination Evidences Retaliation

United tolerated discrimination against Nazir, as discussed in Section VI.K. United tolerated admitted retaliation against Nazir for complaining of discrimination, as discussed in Section IV.A.2.f's last paragraph.

G. Administrative Remedies Were Timely Exhausted

Nazir's May 5, 2006 DFEH complaints alleged retaliation, AA:V14:3525:19-3526:2, AA:V15:3620-3621, making retaliation claims for his May 9, 2005 discharge timely.

Retaliation was not explicitly alleged in Nazir's October 2005 DFEH complaint, AA:V14:3598-3599, because of agency error. Nazir's Pre-Complaint Questionnaires clearly complained of retaliation. AA:V14:3493:13-21, AA:V14:3520:19-3521:11, AA:V14:3594 ("retaliated against" "fifteen years"), AA:V14:3604 (retaliation box checked), AA:V14:3605 ("retaliation" witnesses), AA:V14:3606 ("retaliate[d] against me because I used FMLA for my treatment"), AA:V14:3609 ("did not want me back [from medical leave] as a supervisor... This resulted in a very bad performance review and retaliatory attitude").

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Nazir's October 2005 DFEH complaint sufficiently exhausted administrative remedies for retaliation beginning October 2004 for reasons discussed in Section IV.C.2. The continuing violations doctrine makes earlier retaliation claims also timely, for reasons discussed in Section IV.C.3.

VIII. FRAUD AND BATTERY

A. Petersen Tricked Nazir Into Eating Pork

Petersen knew by 2004 that Nazir was Muslim and did not eat pork because it violated Nazir's religion. AA:V15:3644:23-3645:1, AA:V15:3643:12-13, AA:V13:3254:15-19.

In the wee hours of July 16, 2004, Petersen and Nazir were called into work for emergency response to an acid spill. AA:V13:3253:15-22. Hours later they had a working breakfast at Joe's Restaurant. They discussed getting employees to respond to emergency calls, getting Nazir a respirator, protective boots and gloves, and other work matters. AA:V13:3253:25-3254:14.

Petersen insisted on ordering a dish for Nazir. Petersen told Nazir he would like the dish and to try it. Nazir did not suspect it contained pork. AA:V13:3254:15-18, AA:V2:0509:1-0510:6.

When the food arrived, Nazir noticed brown chips he thought were fried onion. AA:V13:3254:20-21.

When Nazir began eating, he discovered the chips were pork because the taste was like the smoky smell of

bacon. AA:V2:0509:21-0510:6. While sitting with Petersen, Nazir asked the chef whether the chips were bacon. The chef said yes. Nazir told Petersen "[y]ou knew it, I don't eat pork. Why did you order this dish for me?" Petersen, caught, claimed "I'm sorry." AA:V2:0510:7-23.

Nazir felt physically ill. AA:V13:3254:24-25.

B. Petersen's Lies Demonstrate Guilt

Petersen's testimony is completely at odds. Petersen claimed he did not order the dish for Nazir nor even suggest it. AA:V15:3771:7-16, AA:V15:3772:20-3773:17. Petersen denied telling Nazir he would like it. AA:V15:3771:11-14. Petersen denied the chef said the dish contained pork and claimed a waitress told Nazir it didn't. AA:V15:3772:20-3773:14. Petersen claimed no knowledge "Nazir was served pork," thereby denying Nazir confronted Petersen and Petersen claimed he was "sorry." AA:V15:3771:17-22.

Factfinders could reasonably conclude Petersen lied under oath to cover up what he did, proving Petersen's intent to trick Nazir into eating pork. Perjured testimony is "affirmative evidence of guilt." Wright v. West (1992) 505 U.S. 277, 296, cited with approval regarding employment discrimination in Reeves v. Sanderson Plumbing Products, Inc. (2000) 530 U.S. 133, 147. Petersen's discriminatory animus, discussed in Section VI.B., provides further evidence.

C. Evidence Establishes Liability

These facts establish all elements of fraud. Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951, 974. Petersen's representation Nazir would like the dish was intentionally false given Petersen knew Nazir's religion forbids eating pork.

These facts also establish all elements of battery. Rains v. Superior Court (1984) 150 Cal.App.3d 933, 938. Petersen caused pork to touch Nazir's lips, mouth, throat, stomach, and intestines.

It matters not it was Nazir not Petersen who offensively touched Nazir with pork. "[I]f a defendant compels the victim to touch himself... defendant would be guilty of battery." People v. Thomas (2007) 146 Cal.App.4th 1278, 1293; cf. People v. Meacham (1984) 152 Cal.App.3d 142, 153.

Nazir's ostensible consent was invalid because obtained by fraud. Rains v. Superior Court (1984) 150 Cal.App.3d 933, 941; Barbara A. v. John G. (1983) 145 Cal.App.3d 369, 375.

D. Summary Adjudication Erroneously Granted

Defendants moved for summary adjudication of fraud and battery on two grounds only: respondeat superior and that plaintiff "cannot show that Petersen intended to cause Nazir to eat pork." AA:V1:0053-0054.

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1. Respondeat Superior

Defendants offered no evidence, no facts and no argument regarding respondeat superior, compelling denial of summary adjudication for reasons discussed in Section IV.B.1.

Further, evidence does establish respondeat superior. Employers are liable for employees' conduct within the scope of employment. Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal.3d 962, 967. The breakfast was a working meeting. AA:V13:3253:25-3254:14. Petersen only released Nazir to go home after that meeting. AA:V13:3254:26-3255:1.

2. Petersen Intentionally Caused Nazir to Eat Pork

Defendants submitted only two undisputed facts supporting summary adjudication of fraud and battery. AA:V2:0272:24-00274:23. They cited no evidence Petersen didn't intentionally cause Nazir to eat pork, or that plaintiff couldn't get necessary evidence. Defendants thereby failed to meet their burden, mandating summary adjudication be denied. United Community Church v. Garcin (1991) 231 Cal.App.3d 327, 337. Defendants also presented no evidence which, as discussed in Section IV.B.1, also mandates denial.

Additionally, plaintiff submitted enough evidence, discussed in Sections VIII.A and VIII.B.

3. Summary Adjudication Erroneously Granted on Three Unraised Grounds

Summary adjudication was granted not on any ground defendants raised, but on three factual issues not raised. AA:V22:5473, AA:V1:0053-0054, AA:V2:0272:24-00274:23. This was error because plaintiff was denied any opportunity to respond, Juge v. County of Sacramento (1993) 12 Cal.App.4th 59, 69-71, and because no undisputed facts precluded liability.

First, the court found "no evidence that Defendants made representations as to contents of the food." AA:V22:5473. Actually, Petersen told Nazir he would like the pork dish, AA:V13:3254:15-18, AA:V2:0509:1-0510:6, knowing Nazir's religion forbids eating pork, AA:V15:3644:23-3645:1, AA:V15:3643:12-13, AA:V13:3254:15-19, necessarily representing the dish didn't contain pork.

Second, the court found "no evidence... that Petersen knew it contained pork." AA:V22:5473. Actually, evidence discussed in Sections VIII.A and VIII.B demonstrated triable issues.

Third, the court found "the only evidence that it was pork is hearsay allegedly from the statement of an unidentified chef." Plaintiff had no burden to establish the dish contained pork, for reasons discussed in Section IV.B.1, because no evidence showed it didn't or that plaintiff

couldn't prove it did. Further, Nazir knew the chips were pork because the taste was like the smoky smell of bacon. AA:V2:0509:21-0510:6.

IX. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Defendants moved to summarily adjudicate Nazir's IIED claim on three grounds. AA:V1:0054:7-16.

First, defendants accurately noted this claim reaches only incidents after July 9, 2004 due to the statute of limitations.

Second, defendants mistakenly argued the Workers Compensation Act preempted this claim. It is not preempted because the acts alleged violated public policy, including FEHA. Gantt v. Sentry Insurance (1992) 1 Cal.4th 1083; Accardi v. Superior Court (1993) 17 Cal.App.4th 341; Flait v. North American Watch Corp. (1992) 3 Cal.App.4th 467.

Third, defendants claimed "timely [post-July 9, 2004] conduct alleged is not sufficiently extreme or outrageous." AA:V1:0054:10-13.

Defendants claimed only one supporting "fact," that the complaint alleged only three timely incidents: serving only pork at a party, a negative performance review and Nazir's door being glued shut and computer sabotaged. AA:V2:0275:17-23.

This purported fact is false, as plaintiff's response to defendants' separate statement noted. AA:V13:3236-3237.

The IIED claim incorporates dozens of paragraphs of outrageous conduct, AA:V1:0033:10-15, including §84, AA0302:26-0303:9, and including Petersen tricking Nazir into eating pork, AA:V1:0033:14, AA:V1:0029:19-0030:3.

Additional incorporated allegations include Nazir's discharge. AA:V1:0018:26-0019:9. More collectively outrageous conduct is discussed in Sections IV.A.2.k and IV.A.3.

The incorporated conduct was extreme or outrageous enough to support an IIED claim. Agarwal v. Johnson (1979) 25 Cal.3d 932, 946; Alcorn v. Anbro Engineering (1970) 2 Cal.3d 493, 498-499.

Defendants' brief also argued Nazir's IIED claim was barred because "there is no common law cause of action for harassment," citing only Medix Ambulance Service, Inc. v. Superior Court (2002) 97 Cal.App.4th 109, 118. AA:V1:0079:18-21.

Actually, Medix held an IIED claim for harassment is a valid separate claim not barred by failure to exhaust DFEH administrative remedies. Id. at 118.

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X. EVIDENTIARY RULINGS

A. Plaintiff's Evidentiary Objections

Plaintiff made 47 evidentiary objections. AA:V17:4280-4293. They were all overruled. AA:V22:5474. Plaintiff requests 23 rulings be reversed. Objections are identified as in the trial court, numbered separately by witness.

Avellan 1-2. Plaintiff objected to inaccurate evidence Avellan's hand was supposedly bandaged and later bled. This evidence is irrelevant because not told to defendants before they fired Nazir. Cotran v. Rollins Hudig Hall International (1998) 17 Cal.4th 93, 107. It is also inadmissible because the court held it irrelevant and denied plaintiff discovery about it. AA:V25:6328-6329.

Flanigan 1. Flanigan's testimony about what Nazir supposedly said outside Flanigan's presence is inadmissible hearsay. Evidence Code §§1200, et seq.

Nazir 1. Nazir's testimony that Avellan said she had one Middle-Eastern grandparent is inadmissible hearsay.

Nazir 2-4, & 11. The Patel incident played no role in defendants' decision to fire Nazir. AA:V15:3671:10-25, AA:V15:3672:13-18, AA:V15:3677:9-25, AA:V17:4152:9-4160:15. This makes it irrelevant. Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95, fn.13. Even if

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relevant, only evidence of what Patel told United before Nazir's discharge would be admissible. Id. at fn.8. There is none.

Nazir 10 & 12. Plaintiff's testimony is hearsay lacking foundation. Evidence Code §702.

Nazir 15. The tentative proposed DFEH finding is hearsay and improper opinion. Evidence Code §§702 & 800. AA:V2:0438.

Petersen 1. Petersen's testimony he selected Nazir as supervisor is inadmissible because contradicted by Petersen's deposition admissions. AA:V15:3641:12-19, AA:V15:3681:11-22, AA:V15:3682:22-25, AA:V15:3683:25-3684. D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 22.

Patel 1-9. This evidence is inadmissible for the same reasons as Nazir 2-4 & 11.

Stallard 1 and 2. Nazir's training records are not business records exempt from the hearsay rule absent testimony about how prepared based on personal knowledge. Evidence Code §§1271, 702; Snider v. Snider (1962) 200 Cal.App.2d 741, 754.

B. Defendants' Evidentiary Objections

1. Introduction

Defendants made 764 objections to plaintiff's evidence. AA:V20:4962-AA:V21:5286. All but one were sustained. AA:V22:5475.

Sustained objections erroneously excluded almost all evidence plaintiff submitted. "The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases. [Cite.]" Glass v. Philadelphia Electric Co. (3d Cir. 1994) 34 F.3d 188, 195.

Plaintiff requests all rulings on defendants' objections be reversed except: Objections 1, 2, 4, 6, 7, 8, 40, 43, 59-61, 68, 70-71, 80-81, 83-84, 110, 113-114, 117, 119-120, 149-151, 157, 163, 174-177, 181, 195, 225, 232, 236, 238, 241, 254, 268, 350-351, and 355-356.

2. Prima Facie Case

The court erroneously sustained Objections 366-367 to Nazir's sworn statement of his employment dates, religion, color, national origin and ancestry. AA:V21:5104.

The court erroneously sustained Objection 369 to Nazir's performance evaluations although they are admissions of a prima facie case element. AA:V21:5105, AA:V22:5475.

3. Deficient Mass Objections

The court erroneously sustained Objections 366-737, although defendants failed to quote the evidence, violating CRC §3.1354. The trial court erroneously sustained Objections 738-764, although these objections were to statements in plaintiff's brief not any identified evidence.

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4. Allegedly Time-Barred Conduct

Evidence of discrimination is admissible even if barred by statutes of limitation or failure to exhaust administrative remedies. National Railroad Passenger Corp. v. Morgan (2002) 536 U.S. 101, 102, 105; cf. Glass v. Philadelphia Elec. Co. (3d Cir. 1994) 34 F.3d 188, 195. Defendants' objections to the contrary are mistaken.

Admission of evidence of conduct before the December 9, 2002 bankruptcy bar date is not precluded by discharge in bankruptcy, as explicitly provided in the attached Bankruptcy Court orders.

5. Statistical Evidence

Evidence people of color were excluded from mechanic supervisor positions is admissible to prove discrimination, as discussed in Section VI.C. Objections 104, 133, 481, 516, 756.

6. Petersen's Anti-Muslim Slur

Objections 18-21 and 383-385 were to evidence of Petersen's anti-Muslim slur. This evidence is admissible for reasons discussed in Section VI.B.2.

7. Anonymous Vandalization

Objections 29-31, 37-38, and 396-398 were to evidence Nazir's car, office door and computer were anonymously vandalized. An unknown perpetrator's vandalization of a work computer is admissible to infer retaliation. Marra v. Philadelphia Housing Authority (3d Cir.

2007) 497 F.3d 286, 303. Other vandalization is likewise admissible.

8. Failure to Investigate Nazir's Complaints

Objections to Nazir's testimony that United did not investigate his complaints were erroneously sustained as lacking foundation or speculative.

Nazir knew whether his discrimination complaints were investigated because United's policy required complainants be given an information packet, interviewed, asked to write a statement, told what action resulted, and later contacted periodically. AA:V16:3876, AA:V16:3882, AA:V16:3917-3918, AA:V15:3857:7-25.

9. Arm Wrestling Evidence

Objections 751-753, among others, are to evidence of information defendants had showing Nazir and Avellan were arm wrestling, or would have had but for a pretextual investigation. Plaintiff's evidence is admissible.

10. Security Supervisor's Admissions

Objections 307-310 are to Security Supervisor Knight's admissions that Avellan's employer pressured Avellan to make statements as revenge against Nazir. These are United admissions given Knight's position supervising 43 security officers. AA:V16:4034:1-4035:14. They are also admissible evidence of United's knowledge.

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11. Slurs Not Hearsay

Evidence of slurs directed at Nazir is not hearsay because slurs are unlawful acts not offered for their truth. Objections 9-36, 51-58, 72-73, 374-403, 420-435, 449-450, 738-739. Nazir is certainly not offering Criswell's slur that Nazir came from a camel to prove Nazir's mother a camel. Objection 24.

12. Boilerplate Objections

Defendants erroneously objected to testimony describing what witnesses personally observed on grounds such as lacks foundation, opinion, argument, speculation, hearsay or legal conclusion.

Defendants' relevance objections to evidence this brief discusses are meritless because that evidence is circumstantial proof of discrimination, harassment or retaliation. Defendants' other challenged objections are likewise meritless.

XI. EXPERT WITNESS FEES

Summary judgment should assuredly be reversed. If it is not, plaintiff requests the $28,096.51 in CCP §998 expert witness fees be scaled down in light of Nazir's financial resources in accordance with Seever v. Copley Press, Inc. (2006) 141 Cal.App.4th 1550, 1561-1562.

Nazir's income and assets are small and his monthly expenses for himself, his wife and two children substantial. AA:V26:6521:19-6522:18. Costs awarded against plaintiff

other than expert witness fees were $51,020.59. AA:V25:6263:4.

Suggested expert fees are $3,500, corresponding to 10 billable hours of the examining psychiatrist for a 3.5 hour defense mental examination. AA:V23:5667:6-14.

XII. CONCLUSION

Plaintiff respectfully requests the Court reverse the contested evidentiary rulings, reverse summary adjudication and judgment, reverse denial of a new trial, reverse the judgments, and remand this case for trial.

Dated: January 12, 2009 Law Offices of Phil Horowitz

by ______________________
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