Case No. A121651

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

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IFTIKHAR NAZIR,

Plaintiff and Appellant,

v.

UNITED AIR LINES, INC.
and BERNARD PETERSEN,

Defendants and Respondents.

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

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APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Opening with one of the most tediously unoriginal and oft misused quotes from Shakespeare, defendants characterize Nazir's opening brief as full of "sound and fury..." RB1[1]

The sound in Nazir's opening brief is the sound of United employees calling Nazir a "F*cking Muslim," "sand n*gger," "rag head," "camel jockey," and "terrorist," while United did nothing to stop it. AOB11-12, 14, 23.

The sound in Nazir's opening brief is also the sound of Nazir's boss Petersen tricking Nazir into eating pork ("I'm going to get you something you will like... [y]ou need to try it"), telling Nazir he "should try harder to make friends with the people who were responsible for harassing [Nazir]," and making a particularly disgusting racist statement quoted in the sealed portion of Nazir's opening brief. AA:V2:509:2-4 (cited at AOB76); AA:V13:3294:4-5 (cited at AOB67); AOB38.

The fury in Nazir's opening brief is the fury of defendants' escalating pretextual attacks on Nazir in response to Nazir's continued complaints about discrimination, culminating in Nazir's discharge.

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[1]More fully, Macbeth declaims "life's... a tale told by an idiot, full of sound and fury, signifying nothing." Macbeth's statement expresses an amoral view of life that in his case led him to murder his way to the throne.

Defendants' foray into Shakespeare continues by characterizing the "sound and fury" of Nazir's opening brief as "signifying nothing." RB1.

Defendants' brief tries to justify its weak rhetorical argument by ignoring almost all of the summary judgment evidence that was painstakingly reviewed in Nazir's opening brief.

Defendants' brief tries to justify its weak rhetorical argument by inaccurately claiming Nazir "repeatedly mischaracterizes what is found at the record citations he provides," RB10 n.4, but somehow doesn't bother to cite a string of important examples (or even one).

Defendants' brief tries to justify its weak rhetorical argument by ignoring controlling law, for example citing only cases from other jurisdictions for points on which the California Supreme Court ruled contrary.

Defendants' brief somehow fails to even once mention the California published decision most similar on its facts to the present case, Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95, even though plaintiff cited it ten times in his opening brief.

Defendants' brief ignores all this while at the same time abandoning a third of the arguments defendants advanced below.

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Defendants' brief makes hardly any mention of anything untoward happening in the 12 years during which Nazir was denied promotion.

Defendants' brief makes hardly any mention of the glaring fact that Nazir was the first and last person of color to supervise mechanics in Petersen's department.

Defendants' brief makes hardly any mention of defendants' failure to even investigate Nazir's complaints of discrimination.

Indeed, defendants' brief makes hardly any mention of any evidence favorable to Nazir, perhaps on the assumption that if they ignore it, it will go away. That, however, is not the standard for reviewing summary judgment on appeal.

II. PROCEDURAL ISSUES

A. Separate Statements of Fact

1. Summary Judgment Was Not Granted Based on Alleged Procedural Deficiencies

Defendants suggest summary judgment was granted based on "The trial court's alternative ground for granting summary judgment, that it could properly strike or disregard Nazir's summary judgment opposition in its entirety due to Nazir's willful failure to conform to the requirements of C.C.P §437c(b)(3)..." RB12.

The order granting summary judgment itself stated only "the Court would be at liberty to strike or disregard Plaintiff's opposition in its entirety." AA:V22:5474.

The trial court's statement simply reiterates the rule that courts have discretion ("liberty") to strike a summary judgment opposition if its separate statement is willfully and sufficiently defective. It was analogous to the trial court's statement in Collins v. Hertz Corp. (2006) 144 Cal.App.3d 64, 73 that it "could have easily grant[ed] [the motion for summary judgment] based on [appellants'] rule violations" although it did not.

The order granting summary judgment did not order Nazir's separate statement, much less his entire opposition, stricken. AA:V22:5467-5474.

The summary judgment order did not disregard Nazir's opposition. To the contrary, it analyzed Nazir's opposition in depth. AA:V22:5467-5474.

At oral argument, the trial judge confirmed that the Court had considered the separate statement. RT2:9 ("Well, we plowed through this [lengthy separate statement].")

Defendants themselves concede that "It's obvious from the tentative ruling that the papers were reviewed in depth." RT34:23-25.

2. Nazir's Separate Statement Was Proper

The separate statements of material fact in this case are indeed lengthy. Defendants' separate statement is 192 pages long, not including its 4 page "table of contents"

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listing 44 issues which defendants sought to have adjudicated. AA:V1:0080-AA:V2:0276.

California Rule of Court 3.1350(f) required Nazir to copy every word contained in those 192 pages onto the left side of his separate statement. Doing this results in an opposing separate statement nearly 400 pages long even before Nazir inserted a single word to respond.

Nazir's responsive separate statement would have been 188 pages long (AA:V5:1140-1529) if he had incorporated his responses to defendants' first 146 alleged material facts by reference as his response to the remaining alleged material facts, each of which was identical to one of defendants' first 146 alleged material facts.

It is ironic, given defendants' arguments about the length of Nazir's separate statement, that they filed an unauthorized "reply separate statement" that was 296 pages long, AA:V18:4512-AA:V19:4808, and an unauthorized "response" to Nazir's separate statement of additional disputed facts that was 185 pages long, AA:V18:4326-4511. Separate statements are not allowed to be filed with reply papers. San Diego Watercrafts v. Wells Fargo Bank (2002) 102 Cal.App.4th 308, 316.

Defects in defendants' separate statement increased the length of plaintiff's statement. Defendants admittedly included in their separate statement facts that were not material. AA:V1:0085.

3. Nazir Complied With CCP §437c(b)(3)

CCP §437c(b)(3) imposes only three requirements on the opposing party's response to the moving party's separate statement of material facts. Nazir complied with all three requirements.

"The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed." This Nazir did.

The separate statement must indicate "whether the opposing party agrees or disagrees that those facts are undisputed." This Nazir did.

"Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence." This Nazir did, except for a few facts as to which Nazir properly relied entirely on defendants' failure to present admissible evidence.

Nowhere in the nine pages defendants' brief devoted to discussing Nazir's separate statement do defendants claim that Nazir's separate statement failed to comply with any of these three statutory requirements. RB1, 3, 12-20. Instead, defendants summarily claim Nazir's separate statement did not comply with CCP §437c(b)(3) without ever once saying how.

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The trial court likewise did not identify what specific requirements of CCP §437c(b)(3) with which Nazir did not in its view comply.

4. Nazir's Separate Statement Complied with California Rules of Court 3.1350(f) and (h)

Nowhere in the nine pages of defendants' brief devoted to Nazir's separate statement do defendants identify in what way they claim Nazir's separate statement violated California Rules of Court 3.1350(f) or (h). RB1, 3, 12-20.

The trial court likewise did not identify what requirements of CRC 3.1350(f) or (h) it believed Nazir violated.

5. Nazir's Separate Statement Was Not a Second Memorandum

The statement in Nazir's brief below inviting the trial court's attention to his separate statements of fact and to Nazir's declaration for more details about the facts, AA:V6:1322:10-13, does not make the separate statements additional memoranda of points and authorities, any more than it makes Nazir's declaration an additional memorandum of points and authorities.

Citation of legal authority in plaintiff's separate statement to support plaintiff's objections to defendants' purported material facts or evidence was proper, and was no more frequent than citation of legal authority in defendants' unauthorized reply separate statements.

Nazir's separate statement was not designed to make it difficult to ascertain which facts were disputed, nor would this have been in Nazir's interest.

6. If Nazir's Separate Statement Were Deficient, Leave Would Have Been Required to Allow Correction of Any Deficiencies

When the separate statement of a party opposing summary judgment is deficient, "an immediate grant of summary judgment is, in most instances, too harsh a consequence." Collins v. Hertz Corp. (2006) 144 Cal.App.4th 64, 74.

"[T]he proper response, in most instances, if the trial court is not prepared to address the merits of the motion in light of the deficient separate statement, is to give the opposing party an opportunity to file a proper separate statement...." Parkview Villas Association, Inc. v. State Farm Fire and Casualty Company (2005) 133 Cal.App.4th 1197, 1211.

In applying the abuse of discretion standard of review for an order resolving a lawsuit without trial, the trial court order must be carefully examined and all inferences and presumptions drawn against it. Parkview at 1208-1209. A trial court's exercise of CCP §437c discretion to deny a motion is "more readily affirmed than a decision to grant the motion based on a curable procedural defect." Parkview at 1213, citing Shamblin v. Brattain (1988) 44 Cal.3d 474.

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Even failure to file any separate statement at all usually results in continuance of the motion to permit one to be filed, United Community Church v. Garcin (1991) 231 Cal.App.3d 327, 335, even in a complex summary judgment motion, Security Pacific National Bank v. Bradley (1992) 4 Cal.App.4th 89, 94-95. Both of these cases were cited with approval in Parkview at 1211.

The only case cited by defendants in which summary judgment was affirmed is distinguishable. In Oldcastle Precast, Inc. v. Lumbermen's Mutual Casualty Co. (2009) 170 Cal.App.4th 554, the plaintiff moved for summary adjudication. Id. at 560. Defendants' separate statement did not even bother responding to 42 of plaintiff's 46 material facts. Defendants did not propose any additional material facts. Id. at 560.

Oldcastle Precast identified seven facts that distinguished it from Parkview Villas: (1) the responsive separate statement did not mention any of the three affirmative defenses upon which defendants relied, (2) the separate statement did not propose any material facts supporting defendants' defenses, (3) defendants' only two pieces of evidence were inadmissible, (4) the separate statement did not refer to one of the three causes of action as to which summary adjudication was sought, (5) the separate statement did not respond to any material facts regarding one cause of action, (6) the separate statement

did not refer to one of the two inadmissible pieces of evidence, and (7) defendants did not submit a transcript of the testimony on which they relied. Id. at 575.

More substantively, the only evidence submitted by defendants was deposition testimony by one witness about that defendant's general practices that did not even mention what happened in this particular case, Id. at 569-570, and a lawyer's declaration purporting to describe sworn testimony as to which no transcript was filed, Id. at 572. In short, defendants not only submitted a wholly deficient separate statement, but submitted no admissible evidence to demonstrate a triable issue of fact.

Defendants also misconstrue Security Pacific National Bank v. Bradley (1992) 4 Cal.App.4th 89, 94 by claiming it stated that a trial court could grant a motion for summary judgment" because the opposing party fails to file a proper responsive separate statement." RB 17.

Actually, at the very page cited by defendants, the Court held that a trial court "can grant the motion for summary judgment based on the absence of the separate statement." The responding party filed no separate statement at all in Security Pacific. Even on those facts, Security Pacific reversed the trial court's grant of summary judgment for failure to submit any separate statement at all as an abuse of discretion.

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"[P]ublic policy favors disposition of cases on their merits; any doubts must be resolved in favor of the party seeking relief from its procedural default." Parkview at 1213, summarizing the holding of Rappleyea v. Campbell (1994) 8 Cal.4th 975, 980.

7. Granting Summary Judgment Because of Separate Statement Deficiencies Is Improper If the Trial Court Was Prepared to and Addressed the Merits of the Motion

In the present case, the trial court was prepared to and did address the merits of the motion, as discussed above. Granting summary judgment because of separate statement deficiencies is improper if the trial court is prepared to and does address the motion's merits. Parkview at 121.

No published California case of which plaintiff is aware upheld the grant of summary judgment based on an allegedly defective separate statement, without giving the opposing party the opportunity to correct any defects, where the trial court was prepared to and did address the merits of the motion.

8. Any Deficiencies Were Not Willful

The fact that failure to comply with all of the requirements of CCP§437c(b)(3) makes "the task of the trial court more difficult" does not make the deficiencies willful. Parkview at 1211. Any deficiencies were not willful.

9. Nazir Did Not Waive Argument on The Propriety of His Separate Statement

Nazir's opening brief appropriately addressed the propriety of his separate statement, especially in light of the fact that the trial court did not grant summary judgment on that ground. AOB8. Indeed, defendants' briefs below did not even mention the issue. AA:V5:1117-1139, AA:V17:4312-4325.

B. Motion for New Trial

Defendants inaccurately claim that Nazir "presents no actual legal argument concerning the new trial motion...." RB54.

First, Nazir argued denial of his new trial motion was error "because granting summary judgment was legal error." AOB8. That legal error is discussed throughout the AOB, with over a hundred cases cited and hundreds of citations to the record. AOB1-85.

Second, Nazir argued there "was good reason why plaintiff did not file the additional [new trial] evidence earlier." AOB8. Nazir devoted over three pages to discussing the new evidence, why it was relevant (citing six cases), why it was not presented earlier, and why it should have been considered (citing three cases) and a new trial granted. AOB38-39, 64-66.

Defendants argue a new trial motion could not be granted based on Shields' deposition testimony because

Nazir did not request the summary judgment hearing be continued. RB54-55. However, all three cases defendants cite concern new trial evidence submitted after live trials, which consume far more judicial resources.

Nazir's AOB argued "'[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." AOB39. Defendants cite nothing contrary.

Doe v. United Airlines also explained that new trial motions should be denied because of delay submitting new evidence when the party "knew, or should have known, about the pertinent evidence before trial, but did not exercise due diligence in producing it [emphasis added]..." Id.

Here, Nazir presented admissible evidence of his due diligence in obtaining Shields' deposition. AOB39. Defendants cite not a single fact suggesting lack of due diligence.

Even more fundamentally, defendants did not dispute Nazir's AOB argument that defendants are estopped from complaining about when Shields' testimony was presented because defendants "improperly expurgated Shields' address from documents," "defeated plaintiff's motion to obtain addresses of employees including Shields," and

"obtained Shields' agreement not to discuss United." AOB39, citing Puerto v. Superior Court (2008) 158 Cal.App.4th 1242.

See also Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal.App.4th 1152, 1162 (defendants' concealment of probative documents entitled plaintiff to new trial once plaintiff uncovered them).

Nazir's opening brief also demonstrated that the substance of the new evidence warranted a new trial. Nazir's opening brief showed that evidence a decisionmaker discriminated against one minority group shows discrimination against a plaintiff of another minority group. AOB38 (citing three cases). Defendants do not argue otherwise. Nazir's opening brief also showed that evidence of a common pretextual scheme for discriminatory discharge shows pretext. AOB64-65 (citing three cases). Defendants do not argue otherwise.

III. HARASSMENT

A. Introduction

Throughout 16 years of employment with United, Nazir was inflicted with daily discrimination and harassment because of his religion, color, national origin and ancestry. The continuing chain of egregious discrimination and harassment was severe and pervasive, creating a rabidly hostile environment. AOB11-23.

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Harassment included repeated slurs (e.g. "sand n*gger," "f*cking Muslim," "rag head," "camel jockey"), AOB11-13, attacks on Nazir's religious beliefs, AOB11-13, 19, 21, 72-73), reporting Nazir to the FBI as a possible terrorist, AOB14, and shunning Nazir, AOB17, 19.

Harassment included tricking Nazir into eating pork, AOB72-73, an embargo on cooperating with Nazir designed to sabotage Nazir's performance, AOB16-18, 21-22, and hypercritical investigation of every rumored flaw in Nazir's job performance or conduct, AOB13, 15-16, 20, 46-49.

Harassment included reprimanding and disciplining Nazir for things others were allowed to do, AOB13, 15-16, violence against Nazir's property and things entrusted to him, AOB12, 22, and creating a paper trail of documented discipline to ultimately support discharge, AOB13, 15-16, 46-64.

Defendants demanded summary adjudication of Nazir's FEHA harassment claim based on 17 separately itemized issues. AA:V1:AA0048:12-00051:12. These issues fall into three categories, which are addressed in three separate sections below. None of these issues rightfully supported summary adjudication.

B. Harassment Was Severe or Pervasive

Defendants moved for summary adjudication of Nazir's harassment claim on the ground the harassment was supposedly not severe or pervasive enough.

AA:V1:AA0048:25-00049:17 (Issues 8, 10, 11); AA:V5:1133:3-1134:14. Defendants' argument fails for two reasons.

First, defendants didn't meet their initial summary judgment burden, as Nazir demonstrated in his opening brief. AOB24. Defendants do not now argue otherwise.

Second, Nazir presented ample evidence of severe and pervasive harassment, as shown in Nazir's opening brief. AOB25. Defendants do not now argue otherwise.

C. DFEH Complaints Need Name Only Defendants

Defendants moved for summary adjudication by claiming Nazir couldn't sue United for harassment by United employees unless each employee was named in Nazir's DFEH complaint. AA:V1:AA0049:18-00051:12 (Issues 12-21); AA:V5:1131:15-1133:2.

As Nazir established in his opening brief, the only individuals who need be named in a DFEH charge are those who will be sued in court as defendants. Employers may be sued for harassment without naming individual harassers in a DFEH charge. AOB31-32. Defendants do not now argue otherwise.

D. Harassment Allegations Were Timely Exhausted

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. AA:V1:AA0048:12-00049:7 (Issues 5-7, 9); AA:V5:1131:15-1133:2. 1134:15-1135:17. Defendants' argument is mistaken for two reasons.

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.

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. AOB26-27.

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

Defendants complained below the "harassment" box was not checked on the October 2005 complaint. Defendants now concede failure to check the right boxes is a technical defect disregarded in determining whether administrative remedies were exhausted. RB23.

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

(1) Introduction

As Nazir's opening brief discussed, negligent DFEH omission of harassment allegations from Nazir's formal verified DFEH administrative 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).

Defendants' brief makes various contrary arguments. They are discussed in separate sections below.

(2) Verification of Allegations is Not Required to Exhaust Administrative Remedies

The allegations in Nazir's two 2005 pre-complaint questionnaires would have sufficed as discrimination

complaints even if Nazir had never filed a formal verified administrative complaint. This was the holding of last year's United States Supreme Court decision, Federal Express Corp. v. Holowecki (2008) 128 S.Ct. 1147. *A fortiori*, an employee who files a varied administrative complaint from which the agency omits some of the pre-complaint allegations is not barred from court.

The FEHC likewise held: "the requirement that a complaint be verified – is not an absolute jurisdictional prerequisite to proceeding on a complaint, and thus that failure to comply, in a proper case, should not prevent us from reaching the merits. [Citation.]" DFEH v. Louis Cairo, Billie Jean Baker, and Clyde Baker, dba Louis Cairo's Restaurant (1984) FEHC Decision No. 84-04, 1984 WL 54284 *8. FEHC decisions are entitled to deference by courts. Rodriguez v. Airborne Express (9th Cir. 2001) 265 F.3d 890, 898.

Verification is a technical rather than a substantive requirement. See Edelman v. Lynchburg College (2002) 535 U.S. 106, 116 (EEOC verification); Philbin v. General Elec. Credit Auto Lease, Inc. (7th Cir. 1991) 929 F.2d 321, 324.

Despite this clear authority, defendants argue unverified allegations cannot be considered in deciding whether administrative remedies have been exhausted, citing only three cases. RB21-22.

One case is an unpublished Ninth Circuit decision. Unpublished Ninth Circuit opinions may not be cited in federal court. In state court, they have at most minimal precedential value.

The second case defendants cite, Rodriguez v. Airborne Express (9th Cir. 2001) 265 F.3d 890, ultimately considered unverified statements in holding the plaintiff exhausted administrative remedies.

The third and final case defendants cite is Cole v. Antelope Valley Union High School Dist. (1996) 47 Cal.App.4th 1505. Cole holds only that an individual defendant may not be sued in court unless first named in an administrative complaint (which are normally verified). Id. at 1511.

As discussed in Nazir's opening brief, the rationale behind this rule is to provide advance notice to the individual of the pending lawsuit. AOB31-32 (citing five cases). Here, defendants United and Petersen received advance notice of the pending lawsuit.

(3) Defendants Mistakenly Claim Pre-Complaint Questionnaires Cannot Be Considered

Defendants' brief argues pre-complaint questionnaires cannot be considered in deciding whether DFEH administrative remedies were exhausted. RB20-22. Defendants cite no cases to support their argument, other

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than cases regarding whether allegations must be verified, which are discussed in §III.D.2.c(2).

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. (9th Cir. 1994) 31 F.3d 891, 899.

(4) Defendants' Erroneous Argument That Pre-Complaint Questionnaire Allegations Not Specific Enough

Defendants erroneously argued that allegations in Nazir's pre-complaint questionnaires were not specific enough. RB24-25. Defendants' argument is mistaken.

An administrative complaint with only a bare allegation of harassment, but no specific examples, sufficiently exhausts administrative remedies for harassment. B.K.B. v. Maui Police Dept. (9th Cir. 2002) 276 F.3d 1091, 1102-1103.

An administrative complaint containing only a bare allegation of race discrimination exhausted administrative remedies for racial harassment and retaliation. Baker v. Children's Hospital Medical Center (1989) 209 Cal.App.3d 1057, 1065.

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An administrative complaint alleging incidents of sexual harassment exhausted administrative remedies for other incidents of sex discrimination the complaint never mentioned. Yamaguchi v. U.S. Dept. of the Air Force (9th Cir. 1997) 109 F.3d 1475, 1480.

An administrative complaint containing specific examples of race discrimination exhausted administrative remedies as to other specific incidents of race discrimination the administrative charge never mentioned. Lyons v. England (9th Cir. 2002) 307 F.3d 1092, 1104-1105.

An administrative charge alleging specific incidents of harassment, discrimination and retaliation is sufficient to exhaust administrative remedies for other incidents never mentioned in the charge. Sosa v. Hiraoka (9th Cir. 1990) 920 F.2d 1451, 1457-58.

An administrative complaint listing specific incidents of retaliation exhausted administrative remedies for other retaliation incidents never mentioned in the administrative complaint. Soldinger v. Northwest Airlines (1997) 51 Cal.App.4th 345, 382-83.

As discussed in the next section, Nazir's pre-complaint questionnaires presented much more information than the information these cases held exhausted administrative remedies.

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(5) Nazir Demonstrated the DFEH Negligently Omitted Harassment Allegations

Defendants' brief argues that Nazir did not demonstrate the DFEH negligently omitted harassment allegations. Defendants' argument is mistaken.

Nazir presented evidence that his pre-complaint questionnaires told the DFEH he was harassed (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); told the DFEH the period during which he was harassed (AA:V14:3592, AA:V14:3596; cf. AA:V14:3594); identified specific incidents of harassment (AA:V14:3609-3612) such as being reported to FBI as possible terrorist (AA:V14:3592); gave the DFEH more than 10 names of people who harassed him, gave the DFEH more than 40 names of people who knew about how he was treated differently (AA:V14:3591-3597, AA:V14:3601-3612) and gave the DFEH the names of more favorably treated white employees (AA:V14:3597). That is far more information than the amount of information held sufficient to exhaust administrative remedies in B.K.B. v. Maui Police Dept. (9th Cir. 2002) 276 F.3d 1091, 1102-1103; Baker v. Children's Hospital Medical Center (1989) 209 Cal.App.3d 1057, 1065; and Sosa v. Hiraoka (9th Cir. 1990) 920 F.2d 1451, 1457-58.

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Defendants themselves presented evidence the DFEH did not include these allegations in the formal administrative complaint it prepared in 2005. (AA:V1:0094-0095, Facts 79-81, 86-87). Although the plaintiff in Denney brought the DFEH's negligence to the DFEH's attention, Denney nowhere held this was required in order to prove DFEH negligence. Defendants cite no other authority for this proposition either.

(6) Equity Requires Nazir Be Deemed to Have Exhausted Administrative Remedies

The equities favor administrative exhaustion for a pro se plaintiff like Nazir who diligently pursued his claims with the agency. Denney v. Universal City Studios, Inc. (1992) 10 Cal.App.4th 1226, 1234.

Nazir filed not one, but at least two, pre-complaint questionnaires. (AA:V17:4167-4176). In the body of each pre-complaint questionnaire there is the statement, "I wish to complain against . . ." indicating Nazir's desire for agency action. Cf. Federal Express Corp. v. Holowecki (2008) 128 S.Ct. 1147 (unverified statement requesting action exhausts administrative remedies). During the agency's investigation into his claims, Nazir wrote a lengthy letter to the DFEH representative assigned to his case providing him with the names of more than 40 additional witnesses he could contact about Nazir's claims. (AA:V17:4178-4186).

Nazir had more contacts with the DFEH, provided more details about the specifics of his complaints and identified more witnesses than the plaintiffs in Denney v. Universal City Studios, Inc. (1992) 10 Cal.App.4th 1226, 1234; Holland v. Union Pacific Railroad Co. (2007) 154 Cal.App.4th 940, 947; and Rodriguez v. Airborne Express (9th Cir. 2001) 265 F.3d 890, all cases where the courts found the plaintiffs' efforts to notify the agency about the true nature of their claims warranted equitable exhaustion as to those claims.

Indeed, the DFEH's policy is to toll the statute of limitations as to any administrative complaints where the Department commits errors in processing the complaint. DFEH Enforcement Division Directive 227, www.dfeh.ca.gov/DFEH/Publications/dfehPolicies.aspx.

The appropriate standard of review for exhaustion of administrative remedies following the trial court's grant of summary judgment is de novo. Rodriguez v. Airborne Express (9th Cir. 2001) 265 F.3d 890, 896. Even if the abuse of discretion standard applied, it amounts to "plenary appellate scrutiny" for purely legal questions not involving "the trial court's opportunities for observation or other policy reasons." California Practice Guide: Civil Appeals and Writs §8:91; Hurtado v. Statewide Home Loan Co. (1985) 167 Cal.App.3d 1019, 1022, 1025-1027.

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

Nazir's opening brief established that an administrative complaint for one claim also exhausts administrative remedies for reasonably related claims. AOB29-30. Defendants do not argue otherwise, and cite no contrary authority. RB26-28.

Defendants instead argue discrimination and harassment are not reasonably related. Defendants cite only three California cases in alleged support of this argument. RB27-28. None support defendants' argument.

Melugin v. Zurich Canada (1996) 50 Cal.App.4th 658 is an insurance case that says nothing about whether harassment and discrimination are reasonably related.

Reno v. Baird (1998) 18 Cal.4th 640 and Janken v. GM Hughes Electronics (1996) 46 Cal.App.4th 55 say only that harassment and discrimination are different claims for purposes of individual defendant liability. Neither case says anything about whether these different claims are reasonably related.

California and Ninth Circuit cases show harassment and discrimination claims are reasonably related. Baker v. Children's Hospital Medical Center (1989) 209 Cal.App.3d 1057, 1065 (harassment and discrimination reasonably like retaliation); Yamaguchi v. United States Dept. of the Air

Force (9th Cir. 1997) 109 F.3d 1475, 1480 (sex discrimination reasonably like sexual harassment); Oubichon v. North American Rockwell Corporation (9th Cir. 1973) 482 F.2d 569, 571 (same).

The reasonable relationship between harassment and discrimination claims is also shown by the many cases holding discriminatory harassment of an employee evidences that their later termination was likewise discriminatory. E.g., 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.

Defendants cite only two other California cases about what claims are reasonably related for administrative exhaustion purposes. Okoli v. Lockheed Technical Operations, Co. (1995) 36 Cal.App.4th 1607 says race and age claims are not reasonably related. Yurick v. Superior Court (1989) 209 Cal.App.3d 1116 says gender and age claims are not related. Neither case applies here because Nazir's claims involved the same protected characteristics, such as religion and national origin.

Laypeople are not required to draw fine legalistic distinctions between what is legally considered "harassment" and what is legally considered "discrimination." B.K.B. v. Maui Police Dept. (9th Cir. 2002) 276 F.3d 1091, 1100 ("We construe the language of EEOC

charges 'with utmost liberality since they are made by those unschooled in the technicalities of formal pleading' [citation omitted]").

Whether the agency actually investigated reasonably like claims is irrelevant in the Ninth Circuit. 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; cf. Martin v. Nannie & the Newborns, Inc. (10th Cir. 1993) 3 F.3d 1410, 1413, 1416 fn.7. The two appellate and one trial court decisions defendants cite from other jurisdictions are unpersuasive.

3. Continuing Violation Doctrine Makes Earlier Claims Timely

Nazir's opening brief established that if his October 2005 FEHA charge exhausted administrative remedies for harassment, the continuing violation doctrine makes Nazir's claims for harassment before October 2004 also timely. AOB30-31. Defendants do not now claim otherwise. RB29-30.

V. FAILURE TO PREVENT DISCRIMINATION AND HARASSMENT

Defendants concede reversal of summary adjudication of Nazir's harassment or discriminatory discharge claims would mandate reversal on this claim. RB50.

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VI. DISCRIMINATORY DISCHARGE

A. Proving Discriminatory Discharge: Overview

Defendants concede discriminatory discharge can be proven with either direct or circumstantial evidence. RB30. There is abundant evidence Nazir's termination was discriminatory and pretextual. AOB33-68. Nazir cited abundant evidence in response to defendants' Fact 56, the fact in which defendants assert their articulated reason for discharge. AA:V6:1412:20-1427:22.

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

1. Introduction

Direct evidence shows Petersen had discriminatory animus against both Muslims and people of color. This evidence, even alone, demonstrates triable issues whether Nazir's discharge was discriminatory, precluding summary adjudication.

Defendants argue that only discriminatory comments made by the decisionmaker specifically about the contested employment decision qualify as "direct evidence," citing only one First Circuit federal case and one California Court of Appeal decision. RB30-31.

Defendants' argument is inconsistent with Reeves v. Sanderson Plumbing Products, Inc. (2000) 530 U.S. 133, 152; cf. Kelly v. Stamps.com, Inc. (2005) 135 Cal.App.4th 1088, 1101 (remark pregnant employee had "checked

out"); Lam v. University of Hawaii (9th Cir. 1999) 164 F.3d 1186; Dominguez-Curry v. Nevada Transportation (9th Cir. 2005) 424 F.3d 1027, 1039; Cordova v. State Farm Ins. Cos. (9th Cir. 1997) 124 F.3d 1145, 1149 (discriminatory remark directed at different employee).

Defendants also argue the direct evidence of discriminatory animus is too old, but cite no supporting California or Ninth Circuit authority. RB32. Ninth Circuit law is contrary. Mustafa v. Clark County School District (9th Cir. 1998) 157 F.3d 1169, 1179-80 (remark several years old).

Further, if "five years is a relatively short time and is not so long as to attenuate the [same actor] presumption" against discrimination, Horn v. Cushman & Wakefield Western, Inc. (1999) 72 Cal.App.4th 798, 809 n.7, then evidence of discriminatory animus of comparable age must logically also not be too attenuated.

Summary judgment must be denied, even if there is strong or 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). Defendants do not argue otherwise and cite no contrary authority.

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.

Nazir's opening brief established that Petersen's silence and his evasion in the face of this statement was an adoptive admission. AOB35-37. Defendants make three arguments otherwise.

Defendants first argue "no adoptive admission can be found where there is no clear accusation of wrongdoing," citing only Gilbert v. City of Los Angeles (1967) 249 Cal.App.2d 1006, 1008-1009. RB32. California's Supreme Court has repeatedly held otherwise:

> "'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.)"

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People v. Geier (2007) 41 Cal.4th 555, 590; cf. People v. Roldan (2005) 35 Cal.4th 646, 710-711 ("defendant heard the comments").

Defendants secondly argue adoptive admission requires that "the only possible explanation for a failure to respond" is an admission. RB31-32. Defendants cite only a federal First Circuit case for this proposition. California's Supreme Court has repeatedly held otherwise. People v. Edelbacher (1989) 47 Cal.3d 983, 1011; In re Estate of Neilson (1962) 57 Cal.2d 733, 746.

Defendants thirdly and finally argue the adoptive admission was too long ago. Evidence regarding discriminatory animus five years earlier "is a relatively short time and is not so long as to attenuate" it. Horn v. Cushman & Wakefield Western, Inc. (1999) 72 Cal.App.4th 798, 809 n.7. Further, passage of time goes only to the weight, not admissibility, of evidence.

Nazir's opening brief separately argued Petersen adoptively admitted the statement attributed to him by evasion when he pretextually refused an investigation. AOB36-37, citing Cornwell v. Electra Central Credit Union (9th Cir. 2006) 439 F.3d 1018, 1033. Defendants cite no contrary facts or law.

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

Nazir's opening brief argued that Petersen's discriminatory animus was directly evidenced by Petersen's conduct tricking Nazir into eating pork a year before firing Nazir, knowing this violated Nazir's Muslim religion, and lying under oath to cover up what he did. AOB37.

Defendants' only contrary argument (other than claiming lack of evidence the dish was pork, discussed in Section VIII) is that Nazir supposedly never made this contention below. RB32.

Nazir did make this argument below, albeit without using the unnecessary word "direct." AA:V6:1329:14-16 ("Much additional evidence of discriminatory animus... [includes] all of the evidence of harassment against Mr. Nazir"); AA:V6:1331:16-18 ("The harassment of Mr. Nazir... included... attacking Mr. Nazir's religious beliefs about not eating pork"); AA:V6:1335:10-12 ("Defendant Petersen tricked Mr. Nazir into eating pork, in violation of his religious beliefs, despite knowing of those beliefs").

4. Management Condoned Harassment

Nazir's opening brief established that tolerance by Petersen, and by other United managers, of harassment against Nazir was evidence of discriminatory animus. AOB38, 23, 66. Defendants' response about Petersen's tolerance of harassment is twofold.

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First, defendants argue "Nazir cites no authority, because there is none" to show tolerance of harassment evidences discrimination. RB34. Actually, Nazir cited four cases in the discriminatory discharge section of his opening brief showing "[t]olerating discrimination demonstrates discriminatory animus, evidencing pretext." AOB66. Defendants cite no contrary authority.

"Inaction constitutes a ratification of past harassment." McGinest v. GTE Service Corp. (9th Cir. 2004) 360 F.3d 1103, 1120. Innumerable cases hold that evidence of an employer's hostility towards a protected group evidences that discharge of a member of that group was discriminatory. E.g., United States Postal Service v. Aikens (1983) 460 U.S. 711, 716; EEOC v. Farmer Brothers Co. (9th Cir. 1994) 31 F.3d 891, 897-898; Heyne v. Caruso (9th Cir. 1995) 69 F.3d 1475

Second, defendants claim Nazir did not argue below that tolerance of harassment demonstrates discriminatory animus. RB45. Nazir did argue this below, although not using the unnecessary word "direct." AA:V6:AA1325:1-6 ("There is abundant evidence that Defendants' articulated reason for firing Mr. Nazir was pretextual... Defendants never investigated any of the many complaints Mr. Nazir made about slurs, harassment, retaliation and other discrimination by white employees against Mr. Nazir"). AA:V6:AA1329:14-16.

Separately, defendants claim tolerance of harassment of Nazir by United managers other than Petersen isn't evidence Nazir's discharge was discriminatory. RB33-34. That argument is dispelled in Section VI.B.6.

5. Petersen Made Racist Comments About People of Color

Petersen made a particularly disgusting racist statement about people of color, quoted in the sealed portion of Nazir's opening brief. Petersen also made another tellingly racist statement, also quoted there. AOB38.

Nazir's opening brief established that evidence of a decisionmaker's discrimination against one minority group is admissible evidence of discrimination against a plaintiff of another minority group. AOB38. Defendants apparently concede this, and cite no contrary legal authority. Defendants also do not deny Petersen's racist slurs are direct evidence of his discriminatory animus.

Defendants' only argument is that this evidence can't be considered in reviewing summary judgment because it wasn't presented until the new trial motion, RB33, and shouldn't be considered in reviewing denial of a new trial, RB54-55. Defendants' sole argument is addressed in Section II.B.

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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. AOB14.

As Nazir's opening brief showed, this is exactly the type of anti-Muslim stereotyping held sufficient direct evidence of discriminatory animus to preclude summary judgment. AOB40. Defendants do not argue otherwise.

Instead, defendants argue "discriminatory comments or actions by non-decisionmakers that are removed in time and context from the termination decision" are irrelevant to proving the termination was discriminatory. RB33.

Defendants cite two cases. However, Justice O'Connor's concurring opinion in Price Waterhouse v. Hopkins (1989) 490 U.S.228, 277 does not say non-decisionmakers' statements don't show the employer's discriminatory animus, only that they don't "justify shifting the burden of persuasion to the employer."

The only other case defendants cite is Horn v. Cushman & Wakefield Western, Inc. (1999) 72 Cal.App.4th 798, 809-810. Horn held a non-decisionmaker's isolated ambiguous remark ("[t]his is 1994, haven't you ever heard of a fax before?") was "entitled to virtually no weight in considering whether the firing was pretextual or whether the decisionmaker harbored discriminatory animus." Id.

Horn did not find the statement inadmissible, only that given the particular facts the statement understandably carried little weight.

Ordering a Muslim employee reported to the FBI as a "possible terrorist" without a scintilla of evidence is not a "stray remark" and it is not ambiguous. It is hateful discriminatory conduct calculated to have devastating consequences, including questioning of coworkers, neighbors, family and friends and imprisonment.

Also, Doyle was Petersen's Director. Evidence of discriminatory animus by a decisionmaker's supervisor is admissible. Metroyer v. Chassman (9th Cir. 2007) 504 F.3d 919.

Further, reporting Nazir to the FBI as a possible terrorist wasn't isolated conduct. United management's tolerance of discrimination and harassment against Nazir was pervasive. AOB23, 66. "Inaction constitutes a ratification of past harassment." McGinest v. GTE Service Corp. (9th Cir. 2004) 360 F.3d 1103, 1120.

More broadly, evidence of discrimination by non-decisionmakers is admissible circumstantial evidence of discrimination. Abrams v. Lightolier, Inc. (3d Cir. 1995) 50 F.3d 1204, 1214; Josey v. John R. Hollingsworth Corp. (3d Cir. 1993) 996 F.2d 632, 641; Estes v. Dick Smith Ford, Inc. (8th Cir.1988) 856 F.2d 1097, 1103; 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.

C. Statistical Evidence Shows Discrimination

Nazir's department completely excluded people of color from positions supervising mechanics, with the temporary exception of Nazir. AA:V13:3268:21-24, AA:V26:6400:13-6402:3, AA:V17:4203:18-25. Nazir was promoted only after years of resistance, and not by Petersen. AOB42-44.

Nazir's opening brief demonstrated that this "inexorable zero" was admissible evidence of discrimination. AOB40-41.

Defendants' sole contrary legal argument is that an employer's failure to hire or promote people of color is irrelevant to whether termination is discriminatory: "the 'inexorable zero' concept would have relevance only if Nazir showed that all persons who were discharged were persons of color, while no whites were discharged." RB44-45.

In support, defendants cite only an unpublished federal trial court decision. That decision does not support defendants. It simply found an "inexorable zero" in a termination case where all employees terminated during a two month period were African American.

Defendants' argument is immediately dispelled by the "same actor" inference cases they cite. RB46-47. If a termination decisionmaker's promotion of an employee is

evidence the decisionmaker did not later discriminate in terminating the employee, then logically the decisionmaker's complete exclusion of non-whites from certain jobs is evidence the decisionmaker's termination of a non-white was discriminatory.

As Estes v. Dick Smith Ford, Inc. (8th Cir.1988) 856 F.2d 1097 noted, "it is hard to see how evidence which suggests that Ford discriminated against blacks in hiring would be irrelevant to the question of whether it fired a black employee because of his race."

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. Defendants cited no contrary authority.

D. No Same Actor Inference Applies

1. Introduction

As discussed in Nazir's opening brief, same actor evidence should be considered along with all other evidence, and given no special weight. AOB42.

No reading of the same actor inference makes it a conclusive presumption or holds that it flatly negates any category of other evidence. In the present case the trial court erroneously found the same actor inference

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"completely negated under the law" at least certain evidence of discrimination. RT31:20-22.

No same actor inference applies in this case because Petersen did not make the promotion decision, AOB42-45, because any acquiescence by Petersen was begrudging, AOB42-45, because Petersen didn't know Nazir was Muslim or Pakistani when Nazir was promoted, AOB45, and because Nazir's subsequent discrimination complaints (and medical leave) during four years were intervening circumstances dispelling any inference, AOB46.

Evidence showing these facts was all admissible, as shown by the cases cited in Nazir's opening brief. AOB42-45. Defendants cited no contrary legal authority.

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

Nazir's opening brief demonstrated triable issues of fact whether Petersen made the decision to promote Nazir. AOB42-45. Among other things, Petersen admitted in deposition that Wysong was "the tie breaker" in choosing Nazir. AA:V15:3683:25-3684:5.

Nazir's opening brief argued "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." AOB44. Defendants cite no contrary authority.

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Wysong became the "tiebreaker" after Wysong 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. That was after another employee complained in writing that no person of color had ever been a mechanic supervisor in Petersen's department. AA:V26:6399:2-13, AA:V26:6418; AA:V13:3268:21-24, AA:V26:6400:13-6401:12.

Nazir identified this same factual information below. AA:V6:1342:23-1344:13 (response to defendants' separate statement Fact 2, which claimed Petersen made promotion decision); AA:V17:4236:13-4245:22 (plaintiff's separate statement of additional facts, detailing Nazir's years-long battle for promotion); RT24:12-25:4, RT28:20-26.

Nazir's opening brief showed that "[n]o 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 [other citations]." AOB44. Defendants do not argue otherwise, and present no contrary authority.

As discussed in Nazir's opening brief, 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

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others. AOB 44-45 (citing 6 cases). Defendants do not argue otherwise, and present no contrary authority.

3. No Same Actor Inference Applies Because Petersen Didn't Know Nazir Was Muslim or Pakistani When Nazir Was Promoted

As Nazir's opening brief argued, "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." AOB45. Defendants do not argue otherwise, and present no contrary authority.

Petersen did not know Nazir was Muslim or Pakistani when Nazir was promoted to supervisor, AA:V15:3643:5-11, as noted in Nazir's opening brief. AOB45. Nazir identified this same evidence below. AA:V6:1344:13-18 (response to defendants' separate statement Fact 2, which claimed Petersen made promotion decision). Defendants cite no contrary evidence.

4. Other Reasons Same Actor Inference Inapplicable

Nazir's opening brief established that "[i]ntervening circumstances, including Nazir's persistent complaints of discrimination and his medical leave, dispel any same actor inference. AOB46 (citing 3 cases). Nazir made this same argument below. RT24:5-11. Defendants cite no evidence and no law contrary.

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Given the intervening events, the four-year gap between Nazir's promotion and termination dispelled any same actor inference. Footnote 7 in Horn v. Cushman & Wakefield Western, Inc. (1999) 72 Cal.App.4th 798, 809 found a five-year gap was not too long to dispel a same actor inference. Plaintiff's counsel apologizes for not noticing this footnote holding and therefore not acknowledging it in the opening brief. Horn is distinguishable on its facts, however, because there were no intervening events in Horn such as medical leave, complaints by the plaintiff of discrimination, or the decisionmaker's discovery after promotion of the plaintiff's protected status.

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

Nazir's opening brief argued that if the same standards used to refuse to investigate white employees who harassed Nazir had been used, Nazir would never have been even investigated, much less fired. AOB46-48. Nazir made the same argument below, AA:V6:1325:1-13, AA:V6:1425:12-1426:15 (Nazir's response to Fact 56, cited in his brief), RT14:6-16:12, 19:17-222:26.

In addition to the fact that Nazir would not have been investigated, much less fired, but for this disparate treatment, 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.

Other than inaccurately arguing this issue was not raised below, and arguing without any legal authority that Nazir's evidence was properly excluded (which it was not), defendants make only a single argument on this issue. Defendants argue that as a matter of law Nazir was not similarly situated to employees who harassed Nazir because there was no allegation of "unwanted physical contact" with Nazir. RB36-37.

Whether or not employees are similarly situated is a factual issue normally reserved for a jury in employment discrimination cases. Graham v. Long Island R.R. (2d Cir. 2000) 230 F.3d 34, 39; Clayton v. Meijer, Inc. (6th Cir. 2002) 281 F.3d 605, 612; Mandel v. County of Suffolk (2d Cir. 2003) 316 F.3d 368, 379.

Employees need not have the same supervisor, work under the same standards, or engage in the same conduct to be similarly situated. Aragon v. Republic Silver State Disposal, Inc. (9th Cir. 2002) 292 F.3d 654, 660; McGuinness v. Lincoln Hall (2d Cir. 2001) 263 F.3d 49, 53; Graham v. Long Island R.R. (2d Cir. 2000) 230 F.3d 34, 39; Patterson v. Avery Dennison Corp. (7th Cir. 2002) 281 F.3d 676, 680; Bennun v. Rutgers State University (3d Cir. 1991) 941 F.2d 154, 177-178.

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In Heard v. Lockheed Missles & Space Co. (1996) 44 Cal.App.4th 1735, the employer argued it treated the plaintiff a certain way because of his felony conviction. Heard rejected the employer's argument that other employees were not similarly situated if they did not have felony convictions.

The showing necessary to establish coworkers were similarly situated is a "minimal showing." Aragon at 660. "[E]mployees must have a situation sufficiently similar to plaintiff's to support at least a minimal inference that the difference in treatment may be attributable to discrimination." McGuinness at 54.

When Nazir complained about a disgusting slur against Muslims two weeks prior, Petersen said he couldn't investigate because too much time had passed. AA:V13:3249:1-14. Inconsistently, Petersen investigated Nazir for alleged conduct first reported four weeks later. AA:V2:0626:12-22, AA:V2:0642:5-10. These two situations were similar in material ways.

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 didn't allege discrimination explicitly enough, even though he did. AOB47-48. The situations are similar in material ways.

Things Nazir complained about that were not investigated included violence against his car with an associated discriminatory slur, AOB12, a discriminatory flyer that implicitly threatened violence against Nazir because he was Muslim, AOB13, sabotage of Nazir's computer and office door, AOB22, and numerous repulsive discriminatory slurs, AOB12. These complaints were at least as serious as an allegation of non-consensual arm wrestling, and similar enough that a jury could find disparate treatment.

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

Nazir's opening brief established "[c]haracterizing allegations against an employee in the worst possible light is evidence of pretext." AOB49 (citing two cases). Defendants did not argue otherwise or cite any contrary authority.

Nazir's opening brief cited evidence Petersen characterized Nazir's alleged conduct in the worst light by, among other things, checking the national origin discrimination box on United's complaint form without any facts even suggesting national origin discrimination.

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AOB49. Defendants' brief made no contrary factual argument.

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

Nazir's opening brief demonstrated that "[a]ssignment of someone biased to investigate, or someone beholden to them, evidences pretext." AOB49 (citing three cases). Defendants do not dispute this is the law, and cite no contrary authority.

Nazir's opening brief also demonstrated that assignment of someone to investigate who even appears biased evidences pretext when the employer's policies forbid the appearance of bias, because an employer's violation of its own policies evidences pretext. AOB49-50 (citing 3 cases).

The only case defendants cite that they argue is contrary is Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 364-365. There, however, the court found the departures from policy were either plaintiff's fault, or were minor and inconsequential.

Selection of an investigator who is apparently biased is neither minor nor inconsequential. 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.

Nazir's opening brief demonstrated that Petersen was biased or appeared biased, if for no other reason than Petersen's knowledge of Nazir's prior complaints against Petersen. AOB50. Nazir also argued this below. AA:V6:1325:14-20. Defendants cited no contrary evidence.

Nazir's opening brief also argued that Rich was biased and had the appearance of bias, given among other things he considered Petersen his customer. AOB51. Plaintiff also argued this below. AA:V6:1325::20-22. Defendants' brief cited no contrary evidence.

H. Biased Investigation and Policy Violations Evidence Pretext

1. Introduction

Nazir's opening brief demonstrated that "[a] biased investigation evidences pretext." AOB51 (citing two cases). Defendants cite no authority contrary, providing instead only citations to authority that an investigation need not be "perfect." RB38-40.

Nazir's opening brief also demonstrated that an employer's significant violations of its own policies evidences pretext. AOB49-50 (citing 3 cases).

The only case defendants cite that they argue is contrary is Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 364-365. There, however, the court found the departures from policy were either plaintiff's fault, or were minor and inconsequential.

The evidence discussed in Nazir's opening brief demonstrated that defendants' investigation was biased, deeply flawed in numerous ways, and violated numerous clear and specific company policies and practices that were collectively crucial to ensuring a fair investigation. AOB51-58.

2. United Ambushed Nazir By Not Giving Nazir Avellan's Statements

Defendants ambushed Nazir by not giving him the written statements Avellan provided defendants, much less requiring Avellan to complete the form its policy mandated or otherwise answer the critical questions it asked, such as "exactly how you were touched" and "what exact words" were objectionable. AOB52-53.

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). Defendants cite no contrary evidence or law.

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. AOB53, citing AA:V17:4093:25-4094:8.

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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). It was also required by United's own policies. AA:V16:3916 ¶7, AA:V15:3857:7-3858:14. Defendants cite no contrary evidence or law.

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

As discussed in Nazir's opening brief, defendants ignored the motives of Avellan's employer to get Nazir fired. AOB54.

Defendants claimed they did not even question the honesty of Avellan's boss, even though he denied having a dispute with Nazir in which Petersen witnessed Avellan's boss yelling and swearing at Nazir. AOB54.

Defendants also claim they didn't even consider whether Avellan and her coworkers orchestrated written statements even though the statements used identical language. AOB54.

Defendants cite no evidence or law even attempting to explain these facts or diminish their significance.

5. Avellan's Questionable Statements Credited Without Further Investigation

As shown by Nazir's opening brief, Avellan's statements were questionable. Avellan did not compose "her" statement's third, final, page. The first two pages

were handwritten by United Security Supervisor Knight instead of Avellan.

Contrary to United's normal procedures, 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. AOB55.

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.

Defendants cite no evidence or law to explain these facts or diminish their significance.

Lack of thoroughness in investigating potentially exculpatory information evidences pretext. Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95, 120-121. Defendants cite no contrary law.

6. No Investigation of Contradictory Avellan Statements

Petersen and Rich didn't ask Avellan who she talked with about her interaction with Nazir, contrary to normal United policy and practice. Defendants didn't even interview Avellan's own boyfriend, United Security Supervisor Knight. AOB56.

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Avellan told Petersen and Rich she did not know what arm wrestling was. Rich testified it was this that ruled out the possibility Avellan and Nazir had been arm wrestling. Wing told United that Avellan told him Nazir "arm wrestled her." Defendants never interviewed Wing. Rich implausibly testified Wing's statement did not make him even question Avellan's credibility. AOB56-57.

Defendants cited no evidence to explain these facts.

Nazir's opening brief argued "[a]n employer's failure to interview witnesses for potentially exculpatory information evidences pretext." AOB57 (citing three cases). Defendants cite no contrary law.

7. United Didn't Ask Eyewitness Coleman Necessary Questions

United policy required investigators to ask eyewitnesses "What exact conduct occurred?" and to exactly describe "how the complainant was touched."

Defendants didn't ask whether Nazir's elbow was touching the table while he moved Avellan's hand to touch the table (a hallmark of arm wrestling). Defendants didn't ask Coleman to reenact the touching. If they had, Coleman would have demonstrated arm wrestling. AOB57. Defendants cite no evidence to try to explain these facts.

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. Defendants did not ask Avellan what was discussed or do anything to determine if it would offend a reasonable person, violating United's own policy and EEOC Enforcement Guidance. AOB58. Defendants cite no evidence to explain these facts.

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

Nazir timely requested a discharge appeal hearing using company procedure. Nazir made three followup requests, but United never scheduled a hearing, thereby pretextually refusing to consider Nazir's additional evidence. AOB58-59. Defendants cite no evidence to explain these facts.

I. Weaknesses and Implausibilities in Claimed Discharge Reasons Show Pretext

1. Introduction

Nazir's opening brief noted that an inference the employer didn't believe its stated reasons for discharge, and that they were a pretext for discrimination, can be established by showing the stated reasons are implausible, weak or factually baseless. AOB59.

"[A]n inference of dissembling may arise where the employer has given shifting, contradictory, implausible, uninformed, or factually baseless justifications for its actions." Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 363.

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Defendants' brief does not seriously argue otherwise. Instead, defendants' brief claims plaintiff's argument is that good faith but mistaken grounds for discharge show pretext. RB40-41. That was never plaintiff's argument and defendants know it.

2. Arm Wrestling

Petersen, Rich and defendants' attorneys repeatedly describe the physical contact between Nazir and Avellan the same way: "Nazir slammed Ms. Avellan's arm to the table." E.g., RB41; AA:V3:0538:17-0539:16.

In fact, defendants had overwhelming evidence Nazir and Avellan were arm wrestling. Avellan 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. Both Nazir's elbow and Avellan's elbow remained on the table. AOB5, 60. Reasonable factfinders could conclude United knew they were arm wrestling.

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. A reasonable factfinder could conclude Petersen's testimony was knowingly false.

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Despite the evidence, the trial court apparently decided it was undisputed that Nazir "manhandled" Avellan. RT16:14-17.

Defendants' fallback position is that the physical interactions were what would undoubtedly be the world's first case of non-consensual arm wrestling.

It is just plain impossible to physically picture how one could, using only one hand, grab someone else's hand, force and keep their elbow on a table, and move their hand to the table, all the while keeping one's own elbow on the table.

If such a maneuver could even be physically accomplished, how could it be done in a way that an eyewitness would take it at the time as joking, as did eyewitness Coleman? AA:V15:3761:9-3762:20, AA:V15:3805, AA:V17:4109:5-10, AA:V17:4142. As Nazir explained, Avellan smiled and giggled during the arm wrestling. AA:V15:3754:5-3755:1, AA:V2:00345, AA:V14:3581, AA:V14:3473:5-16.

Even if Avellan somehow did not intend to arm wrestle, United had ample evidence Nazir reasonably believed she did, including her admission Nazir said something about arm wrestling to her, which she claimed she didn't understand. AOB60.

These 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. Defendants' brief somehow manages not to cite the case even once, despite the fact Nazir's opening brief cited it ten times.

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.

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.

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. That is hardly cause for discipline.

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.

Avellan told United she was laughing during discussion of her personal life. AA:V17:4108:6-18.

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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. Defendants did not ask the context of this seemingly inoffensive comment. AA:V16:4071:18-4072:24.

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 only man who cleaned even one office. AOB62-63. Rich admitted this would not be gender discrimination. AA:V17:4103:10-20.

Avellan admitted to United she took an alleged statement about Gerwin smelling and not wearing high heels as a joke. AA:V17:4104:13-25. Rich admitted there was not the slightest suspicion Nazir sexually harassed janitors. AA:V17:4095:8-4096:14.

6. Pretextual Warning For Leaving Workplace

The written warning given Nazir for leaving work was pretextual. Petersen had told Nazir he didn't need to track his time as a supervisor, then asked for an accounting going back a year, while Nazir's white replacement was free to come and go as he pleased. AOB15-16.

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

Defendants falsely implied below that the Patel incident, involving returning photos to her, was a reason for Nazir's discharge. AA:V5:1122:6-9, 1123:17-28. It was not. AOB64. Suggesting knowingly false reasons for discharge is evidence of pretext. AOB59.

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. AOB64-66. Defendants presented no evidence otherwise.

Nazir's opening brief established that common pretextual schemes evidence pretext. AOB64-65 (citing three cases). Defendants cite no contrary legal authority.

Defendants' only argument is that this evidence can't be considered in reviewing summary judgment because it wasn't presented until the new trial motion, RB45, and shouldn't be considered in reviewing denial of a new trial, RB54-55. Defendants' sole argument is addressed in Section II.B.

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K. Tolerance of Discrimination Evidences Discriminatory Animus

Nazir's opening brief described how defendants' tolerance of discrimination against Nazir evidences their discriminatory animus. AOB66-68. Defendants' arguments on this issue are addressed in §VI.B.4.

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.

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

Evidence showing retaliation is discussed in Nazir's opening brief at 68-71. Summary adjudication of each of these distinct claims was error. AOB68-72.

B. Temporal Proximity Evidences Retaliation

Nazir's opening brief demonstrated that temporal proximity evidences retaliatory motive. AOB69. Defendants cite no contrary authority.

Defendants do claim temporal proximity evidence is insufficient by itself to prove pretext. RB48-49. On that legal issue, published cases are divided. RB48-49, AOB69.

In the present case, however, plaintiff presented much additional evidence. AOB70-71.

Defendants also argue "[a]s United articulated a legitimate reason for Nazir's discharge, any relevance of temporal proximity "dropped out of the picture." RB49. Defendants cite no legal authority for this argument. RB49. Case authority is contrary. AOB69.

C. Other Evidence of Retaliation

Defendants' pretextual reasons for discharge evidence retaliation. AOB70. Comparative evidence presented by plaintiff evidences retaliation. AOB70. Defendants' heightened scrutiny of Nazir evidences retaliation. AOB70-71. Defendants' tolerance of earlier discrimination, and earlier retaliation against Nazir, evidences pretext. AOB71.

D. Administrative Remedies Were Timely Exhausted

Nazir's opening brief showed that Nazir timely exhausted his administrative remedies for retaliation. AOB71-72. Defendants do not now argue otherwise.

VIII. FRAUD AND BATTERY

A. Introduction

Nazir's claims for fraud and battery arise from Petersen's conduct tricking Nazir into eating pork, knowing this would violate Nazir's Muslim religion. AA:V1:0029:11-0032:14.

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:V1:0053:23-0054:6 (notice of motion).

Nazir's opening brief established that defendants did not meet even their initial summary adjudication burden on their respondeat superior argument. It also demonstrated that Nazir presented sufficient evidence of respondeat superior. AOB75. Defendants' brief does not even mention their respondeat superior argument, thereby abandoning it.

Nazir's opening brief likewise demonstrated that defendants did not meet even their initial burden to establish that plaintiff "cannot show that Petersen intended to cause Nazir to eat pork." It also showed that Nazir presented sufficient evidence Petersen intended to cause Nazir to eat pork. AOB72-73, 75. Defendants' brief does not even mention their argument that plaintiff "cannot show that Petersen intended to cause Nazir to eat pork," thereby likewise abandoning it.

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. Defendants now (inaccurately) claim summary adjudication was also granted on a fourth factual issue, also raised nowhere in defendants' papers below. RB51-52.

Granting summary adjudication based on any of these unraised grounds 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.

B. Defendants Effectively Conceded Two Grounds on Which Summary Adjudication Was Granted Were Error

Defendants effectively conceded that two grounds they did not raise below, and on which the trial court nonetheless granted summary adjudication, were error.

One ground on which the court granted summary adjudication was "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. Defendants do not even attempt to defend this ruling below, effectively conceding it was error.

A second ground on which the court granted summary adjudication was that it found "no evidence... that Petersen knew it contained pork." AA:V22:5473. Actually, evidence discussed in plaintiff's opening brief at 72-73 demonstrated triable issues. Defendants do not even attempt to defend this ruling below, effectively conceding it was error.

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C. Defendants Failed to Show Nazir Suffered No Fraud Damages Other Than Emotional Distress

Defendants argue summary adjudication of Nazir's fraud (but not battery) claim was granted, and properly so, because Nazir allegedly suffered no damages other than emotional distress. Defendants' argument is erroneous for three reasons.

First, defendants did not meet their initial burden. Defendants didn't move for summary adjudication on this ground. AA:V1:0053:23-0054:6. Defendants' separate statement included no mention of what fraud damages Nazir suffered. AA:V2:0272:24-0273:23. Defendants' memorandum did not mention fraud damages. AA:V5:1138:1-19. Defendants presented no evidence below about Nazir's fraud damages. AA:V2:0272:24-0273:23.

Second, while the trial court's order mentioned Nazir's damages in passing, it never said they were a ground for granting summary adjudication. AA:V22:5473.

Third, Nazir incurred medical expenses to treat his emotional distress. AA:V1:0034:23-25. Defendants presented no evidence otherwise. Medical expenses are damages separate from emotional distress. Nazir was also physically injured by the fraud. AA:V13:3254:19-25.

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D. Defendants Failed to Show the Dish Didn't Contain Pork and Nazir Showed It Did

Defendants' brief argues summary adjudication was proper because defendants supposedly established Nazir "has no admissible evidence that the dish contained pork..." RB50. Defendants' argument is erroneous for two reasons.

1. Defendants Did Not Meet Their Initial Burden

Defendants did not meet their initial summary judgment burden. Defendants' notice of motion didn't move for summary adjudication on this ground. AA:V1:0053:23-0054:6. Defendants' separate statement didn't include any allegedly undisputed fact that the dish did not contain pork, or that Nazir had no admissible evidence it contained pork. AA:V2:0272:24-0274:23.

Defendants presented no evidence the dish did not contain pork. Defendants presented no evidence that Nazir had no admissible evidence the dish contained pork. AA:V2:0273:24-0274:23.

The evidence defendants did present included Nazir's testimony that the chef said the dish included pork. AA:V3:0510:7-17 ("Q. And did you ask anybody whether it had bacon in it? A. After I tasted it, yes....Q. Okay. And what did the chef say? A. That's bacon.").

Defendants presented no evidence that Nazir did not have (or could not get) more evidence the dish contained bacon. There was no interrogatory response saying Nazir

had no evidence the dish contained bacon except what the chef said. There was no testimony by Nazir that he had no other evidence.

"The absence of evidence may be inferred from factually-devoid discovery responses only if the discovery request regarding the matter was *sufficiently comprehensive* (e.g., 'state each fact supporting your contention that...'). Absent such a request, plaintiff's failure to *volunteer* evidence does not establish a lack of evidence. [Citations.]" California Practice Guide: Civil Procedure Before Trial §10:245:22.

2. Admissible Evidence The Dish Contained Pork Was Presented

Because defendants did not meet their initial burden, denial of summary adjudication was required even without any evidence the dish contained pork. However, admissible evidence submitted below showed the dish contained pork.

Nazir knew the chips in the dish were pork because the taste was like the smoky smell of bacon. AA:V2:0509:21-0510:6 ("Q. And what did you say after you tasted it? A. I said it tastes like bacon.... Q. And had you ever tasted bacon before? A. No. Q. So how do you know it tasted like bacon? A. Because the smell, the smoky smell.")

Defendants claim this evidence was too hard for the trial court to find. RB52 n.9. Actually, it was easy. On the

fraud and battery claims, the only evidence defendants' separate statement cited was the Complaint and two pages of Mr. Nazir's deposition. AA:V2:0272:24-0274:23. Those two pages were where Mr. Nazir testified he knew the chips in the dish were pork because the taste was like the smoky smell of bacon.

The final argument by defendants is that testimony by someone about what they taste or smell is "speculation." It is not. Testimony of taste and smell is admissible. E.g. CACI 202 ("Evidence comes in many forms. It can be testimony about what someone saw or heard or smelled."); People v. Graybeal (Colo. App. 2007) 155 P.3d 614 ¶67 ("The witnesses described prior experiences with marijuana and based their identification on its appearance, taste, and distinctive smell. These matters did not require any technical or specialized knowledge...").

IX. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Defendants moved to summarily adjudicate Nazir's IIED claim for conduct after July 7, 2004 on two grounds, AA:V1:0054:7-16, and argued a third ground in their brief below, AA:V1:0079:18-21.

Cases cited by plaintiff negated one of defendants' three grounds, workers' compensation preemption. AOB77. Defendants' silence in their RB on this issue concedes the point.

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Defendants' argument that Nazir's IIED claim was barred because "there is no common law cause of action for "harassment," AA:V1:0079:18-21, was belied by the only case defendants cited in support, Medix Ambulance Service, Inc. v. Superior Court (2002) 97 Cal.App.4th 109, 118. AOB78. Defendants do not now contend otherwise.

Defendants' third and final argument was that "the timely [post-July 7, 2004] conduct alleged is not sufficiently extreme or outrageous to constitute an actionable claim." AA:V5:1116:1-4 (amended notice of motion).

Defendants' moving papers claimed only one supporting "fact," that "[t]he only incidents alleged in the complaint regarding intentional infliction of emotional distress taking place within two years before the complaint was filed" were: 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. As the AOB noted at 77-78:

> "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."

Defendants' brief does not and could not dispute that the only fact alleged by defendants in support of summary adjudication of the IIED claim was indisputably false, and that the trial court's finding otherwise, AA:V23:5473-5474, was erroneous.

As Nazir demonstrated in his opening brief, the conduct incorporated by reference into the IIED cause of action was sufficiently extreme or outrageous. AOB78. Defendants' brief does not argue otherwise. Instead, it ignores the incorporated allegations as if they did not exist. But exist they do.

Defendants cite CCP §437c(o)(2) and 24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal.App.4th 1199, 1211 for the proposition that "once a defendant meets its burden, a 'plaintiff... may not rely upon mere allegations... of its pleadings to show a triable issue of material fact exits.'" RB53-54.

What defendants fail to note is that they never met their burden of presenting admissible evidence, because the only material fact they alleged was false.

As Nazir pointed out in his opening brief, "'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." AOB24. Defendants cite no contrary authority.

As Nazir pointed out in his opening brief, "'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." AOB24. Defendants cite no contrary authority.

X. EVIDENTIARY RULINGS

A. Introduction

Defendants asserted a staggering 764 objections to plaintiff's evidence. The trial court sustained all but one of defendants' 764 objections. AA:V22:5474, AA:V19:4962-AA:V21:5286. As the record reflects and defendants concede, almost all Nazir's evidence was excluded. RB1.

Inexplicably, the trial court even sustained defendants' objections to paragraphs of Nazir's declaration stating Nazir's employment dates, religion, skin color, national origin and ancestry, even though defendants asserted no grounds for objection. AA:V21:5104:20-27, AA:V22:5474.

The trial court also inexplicably sustained defendants' objection to Nazir's satisfactory performance evaluations, authenticated by Petersen, even though satisfactory performance is part of a prima facie case and evaluations Petersen prepared are admissions. AA:V21:5105:13-24, AA:V22:5474.

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In sum, and as defendants concede, the trial court sustained evidentiary objections to "virtually all" the evidence cited by Nazir's opening appellate brief. RB1.

Nazir's excluded evidence was admissible proof of discriminatory discharge, AOB1-6, 32-68, of retaliation, AOB68-72, of harassment, AOB11-25, of Nazir's exhaustion of administrative remedies, AOB25-32, and of Nazir's other claims, AOB32, and 72-78. See also AOB80-84.

The trial court also overruled every single one of Nazir's 47 evidentiary objections. AA:V22:5474.

B. Exclusion of Nazir's Evidence Was Prejudicial

Noting that "virtually all" the evidence cited by Nazir's opening appellate brief was excluded below, defendants argue that with Nazir's evidence "eliminated, this case is factually simple." RB1-2.

Defendants inconsistently argue elsewhere that Nazir "fails to show 'prejudice' from any alleged error" in the evidentiary rulings below. RB56. In this, defendants are entirely mistaken.

Almost the entirety of Nazir's opening brief was devoted to showing how Nazir's erroneously excluded evidence demonstrated triable issues of fact precluding summary judgment. AOB1-6, 11-84.

"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, quoted at AOB81. Defendants cite not a single contrary case.

C. Standard of Review of Evidentiary Rulings

Defendants mistakenly claim appellate review of evidentiary rulings must be "deferential." RB55. The single case defendants cite, Carnes v. Superior Court (2005) 126 Cal.App.4th 688, 694, does not hold review of evidentiary rulings must be "deferential." Instead, Carnes said the trial court's apparent "wholesale adoption" of defendants' objections gave it "no confidence" that "it is the discretion of the trial court... that we are reviewing." Id.

Review of evidentiary rulings for abuse of discretion amounts in practice 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 Appeals and Writs §8:91; Hurtado v. Statewide Home Loan Co. (1985) 167 Cal.App.3d 1019, 1022, 1025-1027." AOB10. Defendants cite no contrary authority.

Defendants also mistakenly suggest, without explicitly arguing, that evidentiary rulings may not be reversed unless Nazir's opening appellate brief separately addressed each ground for objection to each evidentiary ruling. RB55-56. No case cited by defendants so holds.

It would be impossible for Nazir to separately brief each objection to each contested evidentiary ruling.

Defendants' objections below to Nazir's evidence consumed 325 pages, single spaced. AA:V19:4962-AA:V21:5286.

There are 718 contested rulings on defendants' objections. AOB81. There are 23 contested rulings on plaintiff's objections. AOB79. With an average of about three grounds stated for each objection, briefing each separately would require 2,223 arguments.

Even diminutive arguments of ten words each would consume 22,230 words, exceeding the 14,000 word limit (and leaving room for nothing else).

Instead, Nazir's opening brief addressed evidentiary rulings in groups, AOB79-84, and by discussing the probative value of contested evidence while discussing Nazir's causes of action. AOB1-6, 32-68 (discriminatory discharge), AOB68-72 (retaliation), AOB11-25 (harassment), AOB25-32 (exhaustion of administrative remedies), and AOB32, and 72-78 (other claims). Nazir cited over a hundred cases showing his contested evidence was admissible.

D. Defendants Submitted No Argument Supporting Most Evidentiary Rulings

Notably absent from the "evidentiary rulings" section of Respondents' Brief is any argument that contested evidentiary rulings were correct. RB55-57.

A review of defendants' entire brief reveals arguments supporting only a minuscule fraction of the contested

evidentiary rulings: RB 4, 31-32 (Petersen's adoptive admission of anti-Muslim slur), RB33-34 (statements or actions by non-decisionmakers), RB47 (Objections 127-132), and RB52 (chef's statement to Nazir).

Defendants' brief made no other attempt to justify any other contested evidentiary ruling, thereby conceding these rulings were erroneous. Defendants nowhere dispute Nazir's showing (AOB81) that prima facie evidence of discrimination was erroneously excluded.

Defendants nowhere dispute Nazir's showing (AOB82) that evidence of time-barred discrimination was erroneously excluded. Defendants nowhere dispute Nazir's showing (AOB40-41, 82) that his statistical evidence was erroneously excluded. Defendants nowhere dispute Nazir's showing (AOB82-83) that evidence of anonymous vandalization was erroneously excluded.

Defendants nowhere dispute Nazir's showing (AOB83 and AOB11-23, 38, 66-68) that Nazir's testimony his discrimination complaints were not investigated was erroneously excluded. Defendants nowhere dispute Nazir's showing (AOB83) that evidence of information defendants had that Nazir and Avellan were arm wrestling was erroneously excluded.

Defendants nowhere dispute Nazir's showing (AOB84) that evidence of slurs against Nazir by employees other than Petersen was erroneously excluded.

Other than arguing that a chef's statement was inadmissible, defendants nowhere dispute Nazir's showing (AOB37, 72-77, 84) that evidence Petersen tricked Nazir into eating pork a year before firing Nazir was erroneously excluded.

Defendants nowhere dispute Nazir's showing that evidence Petersen's Director ordered Nazir reported to the FBI as a possible terrorist (AOB40-41, 84) was erroneously excluded.

Defendants nowhere dispute Nazir's showing that evidence was erroneously excluded below that Petersen didn't make the decision to promote Nazir or did it only under pressure (AOB42-45), that Petersen didn't know Nazir was Muslim or Pakistani when Nazir was promoted (AOB45), or that Nazir persistently complained of discrimination and took medical leave after the promotion (AOB46 and AOB 11-23, 38, 66-68, 84).

Defendants nowhere dispute Nazir's showing that evidence was erroneously excluded that defendants decided to investigate Nazir for alleged discrimination under circumstances (no complaint for four weeks and no contention conduct discriminatory) which defendants claimed justified their refusal to investigate Nazir's discrimination complaints. AOB46-48, 84.

Indeed, defendants nowhere dispute almost any of Nazir's showing that his evidence was erroneously excluded.

Nazir's AOB showed that 23 of Nazir's evidentiary objections were erroneously overruled. AOB79-80. Nowhere do defendants dispute Nazir's showing, effectively conceding these evidentiary rulings were erroneous.

Among other things, 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:V15:3683:25-3684:5. D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 22. Defendants do not now argue otherwise.

XI. EXPERT WITNESS FEES

Summary judgment should decidedly be reversed. If not, the $28,096.51 in CCP §998 expert witness fees should be reduced as unreasonable because of Nazir's meager financial resources.

Defendants make only two contrary arguments.

First, defendants claim Nazir "does not argue that the trial court somehow *abused its discretion* in not reducing the cost award based on Nazir's financial resources." RB57.

Defendants are flat out wrong. AOB8 ("[f]ailure to reduce CCP §998 expert witness fees in light of plaintiff's financial condition was erroneous"), AOB8 (standard of review is "abuse of discretion [citation]"), AOB84-85 (why §998 costs should be reduced applying that standard).

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Second, defendants argue it is never abuse of discretion to refuse to reduce §998 costs due to financial condition. RB57. Defendants cite but a single case, Heller v. Pillsbury, Madison & Sutro (1996) 50 Cal.App.4th 1367, 1397, that discussed only ordinary, but not §998, costs.

The later case that does discuss §998 costs holds "the trial court also must take account of the offeree's economic resources in determining what is a "reasonable" [§998] cost award." Seever v. Copley Press, Inc. (2006) 141 Cal.App.4th 1550, 1561.

Defendants cite not one fact even suggesting failure to reduce §998 costs because of Nazir's financial condition was proper.

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: April 27, 2009 Law Offices of Phil Horowitz

by _____
Phil Horowitz
Attorneys for Appellant