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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

WILLIAM FRANCIS DOUGHERTY, Plaintiff and Appellant, v. SEARS ROEBUCK AND CO., Defendant and Respondent.	A129652 (Contra Costa County Super. Ct. No. 05-02335)

William Francis Dougherty sued Sears Roebuck and Co. (Sears) for age discrimination after Sears terminated his employment. The matter proceeded to a jury trial and the trial court granted Sears's motion for a nonsuit on the issue of punitive damages. After hearing all of the evidence and arguments, the jury found Sears liable for age discrimination against Dougherty but, subsequently, the trial court granted Sears's motion for judgment notwithstanding the verdict (JNOV). Dougherty appeals and argues that the lower court erred when it granted Sears's motions for nonsuit and JNOV. He also challenges various evidentiary rulings made by the superior court.

We conclude that Dougherty presented sufficient evidence to support the jury's verdict and to have the jury consider the question of punitive damages. We therefore reverse the trial court's granting of Sears's motions for a nonsuit and a JNOV. We, however, reject Dougherty's claims of prejudicial evidentiary errors.

BACKGROUND

The Employment of Dougherty and Sears's Policies

Sears is a nationwide retailer headquartered in the Chicago area that provides in-home repair services for appliances through its product services division. The services division is comprised of regions, and each region is divided into districts. The districts contain various service centers that have parts departments.

In July 2002, Sears consolidated its districts. In Northern California, Concord merged with the San Jose and Fresno districts to form a new Mid-Cal District. The "hub" for the new Mid-Cal District was located in Fresno.

In July 2002, Sears also changed the way repair parts were delivered to the service technicians. Sears began having parts shipped directly to a service technician's home, rather than having the service technician go to a service center to pick up replacement parts. Sears reduced the number of employees in the parts departments in the various services centers outside of Fresno.

Dougherty began working for Sears on May 15, 1962. He first worked as an apprentice, then as an in-home service technician, which was the job he held until Sears terminated his employment on April 2, 2003. As a service technician working out of Sears's Northern California service center in Concord, Dougherty drove a van to customers' homes and repaired appliances. Sears had a "Product Repair Services Driver's Operating & Safety Manual" (safety manual) that was given to every technician. Under the heading "Motor Vehicle Collisions," the safety manual provided in pertinent part the following: "If it is determined that you caused or contributed to [a work-related motor vehicle] collision, you will be subject to disciplinary action, up to and including termination."

The safety manual stated that "[f]or an associate who drives a vehicle for Sears as a condition of employment, the following is a non-exhaustive list of events that will result in an associate's loss of his/her privilege to drive for Sears, and thus, may lead to immediate termination: [¶] Motor Vehicle Collisions—During the most recent five-year period, you cause or contribute to 3 motor vehicle collisions as determined by the

Collision Preventability Guidelines while driving a Sears' vehicle and/or while on company business."

The safety manual also contained a provision providing for possible alternative employment for a person losing his or her privilege to drive for Sears. This provision states: "An associate who loses his/her privilege to drive for Sears may apply and be considered for any open, available position in which he/she is qualified. Sears expressly disclaims any obligation to find an associate who loses his/her privilege to drive for Sears a non-driving position. Further, Sears is not obligated to give an open, available position to associates that have lost their privilege to drive for Sears."

The Suspension of Dougherty's Driving Privilege

Dougherty admitted that he backed his repair van into a parked car in April 1998. Two years later, in July 2000, Dougherty rear ended a vehicle in heavy stop and go traffic. Although there was little or no damage, he was found to have caused or contributed to the collision. One year later, in September 2001, Dougherty rear ended a vehicle and was found to have caused or contributed to this accident.

Sharon Giampapa, Sears's district human resource manager, could not locate any supporting documentation for Dougherty's April 1998 accident. Consequently, Sears did not suspend Dougherty's driving privilege or terminate his employment in September 2001. Dougherty received a performance memorandum regarding the driving policy and a reminder that causing or contributing to three accidents within a five-year period could result in his loss of employment with Sears. Sears also sent him to a driver safety-training course.

In February 2003, Dougherty backed out of a parking space and hit a parked vehicle. He did not report the accident to Sears until the following day. Once he did so, Sears told him that he would lose his driving privilege pending further investigation.

On February 14, 2003, Dougherty received a form recommending suspension of his driving privilege. The heading of the form stated, "Approval to Terminate Form." Dougherty met with Gary Willis, the district service manager of the Mid-Cal District, and Roberta Burton, the district operations manager at Sears. The job posting for Sears dated

February 28, 2003, listed only one job in a parts department in the Bay Area, and that was a part-time position in Mountain View. Dougherty indicated that he needed medical benefits and was told that part-time positions did not have medical benefits. He stated that he did not want a part-time job.

The Termination of Dougherty's Employment

Dougherty did not apply for any non-driving position with Sears during the six-week paid suspension period. Sears terminated his employment on April 2, 2003, approximately six weeks after the suspension of his driving privilege. Thereafter, Dougherty elected retirement and Sears provided him with his retirement benefits. Dougherty did not reapply for a job with Sears after the termination of his employment in April 2003.

Lawsuit

Dougherty filed a charge with the Department of Fair Employment and Housing in November 2003, asserting gender and age discrimination. Dougherty filed a lawsuit against Sears in the superior court on November 5, 2005, and a second amended complaint on May 10, 2006. On May 24, 2007, Sears filed a motion for summary judgment/summary adjudication. The court denied Sears's motion as to all of Dougherty's claims except as to his cause of action for retaliation.

A jury trial on Dougherty's age discrimination claims began on March 24, 2010. At trial, Giampapa testified that when a service technician lost his or her driving privilege, Sears did not automatically terminate that person's employment. She stated that all service technicians are qualified to work at Sears's parts department.

In 2002, when Curt Lenhart was the district service manager of the Concord district, service technicians with Sears, Elizabeth Mizerski and Hector Espinoza, lost their driving privileges. Mizerski testified that she began working as a service technician in Concord at Sears in January 1999. She was involved in three accidents during a five-year period, and Sears suspended her driving privileges in July 2002, when she was 41 years old. Giampapa testified that she did not remember whether an approval to terminate form

was completed for Mizerski.[1] In July 2002, about six weeks after losing her driving privilege, Mizerski received a full-time job with medical benefits at Sears's parts department in Concord. She testified that she found out about the job when it was offered to her; she asserted that she did not have to apply and interview for it. Willis disputed this assertion and testified that Mizerski applied and interviewed for the position in the parts department. Mizerski worked in the parts department one year and then returned to a driving position in July 2003.

The court admitted into evidence Sears's response to an interrogatory that Sears was not asserting that Mizerski replaced any specific person but that "there was an open position in the parts and service center in the Concord unit at the time that Ms. Mizerski began working as a support specialist." Sears stated that it was "currently unaware of the name of the person who [had] left" the parts and service center.

Hector Espinoza, another service technician, also testified at trial. He worked in the service centers in Union City and Hayward, which were also in the Concord district (later the Mid-Cal District). In June or July of 2002, Espinoza acknowledged that Sears suspended his driving privilege after he was involved in three accidents within a five-year period. Espinoza was 40 years old at the time his driving privilege was suspended. His supervisor, Mike Whelan, told him that he would be working inside the shop and possibly mentoring other technicians. He testified that he worked in the mentoring position for about one month. The jury considered evidence that "at the time Sears suspended Hector Espinoza's driving privilege, Sears did not have an open and available full-time mentoring position." After about one month, Espinoza did supervisory work for Mike Lund.[2] Espinoza testified that he never saw a job posting for either the mentoring or supervisor position.

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[1] Counsel asked: "And you have no knowledge that a tech manager ever filled out a [Request to Terminate Form] for Ms. Mizerski; is that correct?" Giampapa responded: "I don't remember that."

[2] Lund had taken over Whelan's position.

After a short time, Lund told Espinoza he could no longer do the work of a supervisor or mentor and offered him a job in the parts department in Concord for one-half the pay rate he had received as a service technician. Lund told Espinoza that he either had to work for the Concord parts department or have his employment with Sears terminated. Espinoza decided not to accept the job because the reduced pay and long drive to Concord did not make the job worth it to him. He testified that he did not know whether that position was actually open at the time it was offered to him. His last day of employment with Sears was August of 2002.

Sears presented evidence that the only job available in the Bay Area in 2003 when Dougherty lost his driving privilege was a part-time position in Mountain View. A job posting dated February 28, 2003, was admitted into evidence as Exhibit 24. At the time Dougherty lost his driving privilege, Willis, not Lenhart, was the supervisor.

Burton, Willis, and Dougherty met in February or March 2003.[3] Willis testified that he did not know Dougherty's age, but he knew Dougherty had 40 years of service with Sears. He stated that he believed that he discussed the "Approval to Terminate" form with Dougherty. During this meeting, Dougherty asked about other positions with Sears and a possible unpaid leave of absence from Sears. According to Dougherty, Willis reported that there were no jobs available. Willis asked Burton to go into another room and look on the computer to determine whether there were jobs available. Burton returned and stated that there were no job openings. Dougherty testified that Burton and Willis did not provide him with any copy of the job postings or show him the job postings.

Burton testified that they discussed at the meeting with Dougherty a part-time sales job in either Mountain View or San Bruno. She stated that the part-time job "was presented as a possibility." Dougherty, according to Burton, asked about medical

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[3] It is unclear from this record or the briefs submitted by Dougherty and Sears exactly how many times Dougherty met with Willis. It appears that they met at least twice. When it is unclear from the record whether questions were discussed at the first or a subsequent meeting, we have simply set forth the information discussed at the meeting without specifying whether it was the first or a later meeting.

benefits and stated that he needed medical benefits for his disabled wife.

At one of the meetings, Dougherty asked about getting a job in the parts department. He pointed out that Sears gave Mizerski a position; Dougherty also asked about Espinoza. Willis informed Dougherty of a possible part-time job opening in the South Bay. Dougherty testified that Willis told him that he had to "retire or be fired" and that he was costing the company too much money.

Dougherty asked if Sears could create a full-time non-driving position for him to train junior technicians. Willis responded that no such position existed. Alternatively, Dougherty requested an unpaid personal leave of absence during the one-year suspension period so he could maintain his seniority and benefits. Willis wrote the questions down and gave them to Giampapa.

Giampapa responded in writing to the questions posed by Dougherty at his meeting with Willis. Giampapa indicated that a part-time position did not include medical benefits. At trial, Giampapa admitted that the Consolidated Omnibus Budget Reconciliation Act (COBRA) would have applied to Dougherty, and that he could have retained medical benefits under COBRA with a part-time position. Giampapa stated that she could not recall whether she ever told Dougherty that he could get COBRA coverage if he worked part time.

On April 2, 2003, Dougherty met with Willis and Giampapa. Dougherty refused the part-time sales position. Sears's leave of absence policy allowed for a maximum personal leave of 12 weeks and only for good cause. Giampapa told Dougherty that he could not be granted a personal leave of absence for the period of his driving suspension. Dougherty was told that he could reapply as a service technician after his one-year suspension was over and that he would likely be rehired if there was a position open at the time.

Dougherty testified that he was "absolutely not" told about the part-time job in Mountain View. He testified that he might have been told about a part-time position in the parts department in Redwood City. He stated that he told Willis and Burton that he was not interested in a part-time job because he needed medical benefits. He testified

that he was told there were no full-time positions. He admitted that he had no knowledge as to whether there was an available full-time position.

No one at Sears told Dougherty that he could reapply at Sears after 60 days and retain his seniority. Under Sears's policy, if an employee reapplies and returns to work for Sears at least 60 days after termination, but prior to the one-year anniversary of the termination, that employee retains seniority with the company.

Dougherty presented evidence that Giampapa knew his age. Giampapa testified that she looked at Dougherty's accident reports when creating her request to terminate Dougherty's employment, and the accident reports contained Dougherty's date of birth. Giampapa confirmed that she knew Dougherty was eligible for retirement benefits, which required an employee to be at least 55 years of age.

Frank Tuzzolino testified that he worked in the parts department of Sears in Concord. He left Sears for military duty in February 2003. He stated that he worked part time and his hours varied between 32 and 40 hours a week. He reported that his position did not have any benefits. Contradicting Tuzzolino's testimony, Giampapa replied, "I believe so," when asked whether Tuzzolino worked full time. Tuzzolino stated that he received his same position at Sears when he returned in March or April 2004.

Burton testified at her deposition that Tuzzolino's departure created an open position in the Concord parts department. She stated that the opening was in 2002 when Mizerski took a position in the parts department. At trial, she retracted her statement that Tuzzolino's departure resulted in an open position. She explained that her timeline had been wrong and insisted that Tuzzolino's departure did not create a new position. Burton stated that there was no full-time parts position in the Concord unit in 2003. Tuzzolino and Burton testified that the Concord parts department shrank as a result of the consolidation effort through the end of 2002.

Other Sears managers, including Giampapa, testified that they never created a non-driving position for a service technician when the person lost his or her driving privilege and no position was open and available when Dougherty lost his driving

privileges. Giampapa asserted that Sears did not necessarily fill every position when employees left the company.

Jury Verdict and Motions

At the close of Dougherty's case in chief, Sears moved for nonsuit on the issue of punitive damage liability. The trial court granted this motion.

At the end of the entire trial, the jury returned with a special verdict in favor of Dougherty. The jury found, by a vote of 11 to 1, that Sears discriminated against Dougherty on the basis of his age. By a vote of 9 to 2, the jury awarded him $33,564 in lost earnings; by the same vote, it awarded him $33,564 in other economic loss. Thus, the jury awarded Dougherty a total of $67,218 in economic damages. By a unanimous vote, the jury awarded him nothing for past and future noneconomic loss, including emotional distress and other mental suffering. Judgment on the verdict was entered on May 13, 2010.

On May 28, 2010, Sears filed a motion for JNOV. The trial court granted Sears's motion for JNOV and explained: "The undisputed evidence established that plaintiff was terminated from Sears after he declined the only part-time, non-driving position that was available. Argument that there were other jobs available or created for other younger employees was just that[—]argument by a very skilled trial attorney. However, this does not constitute substantial evidence." On August 30, 2010, the court vacated the original judgment on the special verdict and entered judgment in favor of Sears.

Dougherty filed a timely notice of appeal.

DISCUSSION

I. *The Trial Court's Grant of a JNOV*

A. *Standard of Review*

In the present case, the jury found that Sears discriminated against Dougherty on the basis of his age when it terminated his employment. The trial court granted Sears's motion for JNOV, finding that substantial evidence did not support the verdict and stated the following: "The undisputed evidence established that plaintiff was terminated from Sears after he declined the only part-time, non-driving position that was available.

Argument that there were other jobs that were available or created for other younger employees was just that[—]argument by a very skilled trial attorney. However, this does not constitute substantial evidence."

" 'A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support.' " (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770.) "In ruling on a motion for JNOV, ' "the trial court may not weigh the evidence or judge the credibility of the witnesses, as it may do on a motion for a new trial, but must accept the evidence tending to support the verdict as true, unless on its face it should be inherently incredible. Such order may be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, the result is no evidence sufficiently substantial to support the verdict. [¶] On an appeal from the judgment notwithstanding the verdict, the appellate court must read the record in the light most advantageous to the plaintiff, resolve all conflicts in his favor, and give him the benefit of all reasonable inferences in support of the original verdict." ' [Citation.]" (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1320.) The testimony of a single credible witness may constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) " 'If the evidence is conflicting or if several reasonable inferences may be drawn,' " the trial court erred in granting the JNOV motion and we must reverse. (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 877.)

B. *The Law on Employment Discrimination*

California has adopted the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*) for proving claims of discrimination, including age discrimination, based on a theory of disparate treatment. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) " 'Disparate treatment' is *intentional* discrimination against one or more persons on prohibited grounds. [Citations.] Prohibited discrimination may also be found on a theory of 'disparate impact,' i.e., that regardless of motive, a *facially neutral*

employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class. [Citations.]" (*Id.* at p. 354, fn. 20.) The *McDonnell Douglas* test "reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Guz*, at p. 354.)

"At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. [Citations.] While the plaintiff's prima facie burden is 'not onerous' [citation], he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' [Citations]." [Citation.]' [¶] The specific elements of a prima facie case may vary depending on the particular facts. [Citations.] Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. [Citations.]" (*Guz*, *supra*, 24 Cal.4th at pp. 354-355, fn. omitted.)

C. *Applying the Law to the Facts of This Case*

In the present case, there is no dispute that Dougherty, who was 64 years old at the time Sears terminated his employment on April 1, 2003, was in a protected class based on his age and that he suffered an adverse employment action. There is also no dispute that Dougherty was involved in three accidents within a five-year period and Sears's policy mandated the loss of his privilege to drive for Sears. Sears's policy stated that the loss of the driving privilege "may lead to immediate termination." Thus, Dougherty does not

assert that he was qualified for a driving position. Rather, Dougherty argues that, once his driving privilege was suspended, Sears was obligated to offer him alternative employment under a provision in the safety manual. The safety manual provided that "[a]n associate who loses his/her privilege to drive for Sears may apply and be considered for any open, available position in which he/she is qualified."

Sears maintains that Dougherty cannot prevail because there was no evidence that there was any alternative employment available when Dougherty violated the driving policy. Sears's policy provides the following regarding alternative employment: "An associate who loses his/her privilege to drive for Sears may apply and be considered for any open, available position in which he/she is qualified. Sears expressly disclaims any obligation to find an associate who loses his/her privilege to drive for Sears a non-driving position. Further, Sears is not obligated to give an open, available position to associates that have lost their privilege to drive for Sears." Sears contends that the record shows that there was only one non-driving position available when Dougherty lost his job and that was a part-time job. Dougherty told Giampapa and Willis that he was not interested in a part-time job.

Dougherty counters that he presented evidence showing that Sears applied the alternative employment provision in the safety manual in a discriminatory fashion. He maintains that Mizerski, who was 41 years old when her driving privilege was suspended, and Espinoza, who was 40 years old when he had his driving privilege suspended, were treated differently than he. He claims that the evidence showed that they were offered jobs and informed of other options when they lost their driving privileges, while he was told about a "possible" part-time job and told that he had to retire or be fired after his driving privilege was suspended. He insists that Willis and Giampapa decided to terminate his employment the day his driving privilege was suspended. He declares that Sears failed to create or offer him another job and did not provide him with accurate information because of his age.

Preliminarily, we note that the trial court found, and Sears stresses, that the record contains no comments by Sears's management or employees that suggested any

employment decision was related to age.[4] We agree that the record contains no direct evidence of age discrimination. The issue is whether the record contains circumstantial evidence in support of Dougherty's claim and whether the trial court correctly concluded that substantial evidence viewed in the light most favorable to Dougherty did not support the jury's conclusion that Sears terminated Dougherty's employment based upon his age. (See *Begnal v. Canfield & Associates, Inc.* (2000) 78 Cal.App.4th 66, 73.)

Dougherty's evidence in support of employment discrimination based on age may not have been overwhelming, but the record does contain evidence to support the jury's verdict. Dougherty presented evidence that Giampapa and Willis knew how long Dougherty had been working at Sears and knew his age. The accident reports contained Dougherty's date of birth.

Dougherty argued that Sears never intended to apply the alternative employment policy to him even though it had offered positions to the younger Mizerski and Espinoza

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[4] Sears maintains that none of Dougherty's evidence connected the termination of his employment to his age and cites *Brennan v. Townsend & O'Leary Enterprises, Inc.* (2011) 199 Cal.App.4th 1336 (*Brennan*). Sears's reliance on *Brennan,* however, is misplaced.

In *Brennan,* the trial court granted the employer's JNOV motion on the ground insufficient evidence supported a finding that the plaintiff had been subjected to severe or pervasive harassment based on her gender. (*Brennan, supra,* 199 Cal.App.4th at p. 1339.) The *Brennan* court rejected the plaintiff's claims of harassment partially because the evidence did "not show a concerted pattern of harassment of a repeated, routine, or generalized nature" or that the plaintiff found any of the actions offensive. (*Id.* at pp. 1355, 1357.) The court also concluded that the evidence did not show any retaliatory conduct based on the plaintiff's gender. (*Id.* at p. 1361.)

Other than state, "Here, [Dougherty] similarly fails to make a connection between the adverse action (his termination) and his age," Sears provides no analysis of the application of *Brennan, supra,* 199 Cal.App.4th 1336, to the present case. We agree that a JNOV is proper if the record contains no direct or circumstantial evidence connecting the termination of Dougherty's employment to his age but, as we discuss below, the record in the present case does contain sufficient evidence to support the jury's verdict. Here, unlike the situation in *Brennan,* Dougherty did not have to show any pervasive or personally offensive action because his claim was based on an adverse employment action and was not a claim of harassment.

when they lost their driving privileges. In support of this argument, Dougherty testified that the form terminating his employment was presented to him at his first meeting with Willis, and he declared that such a form was not completed right away with regard to Mizerski and Espinoza. In February 2003, Dougherty violated Sears's driving policy and on February 14, 2003, Dougherty received a document with the heading, "Approval to Terminate Form," which announced that his driving privilege had been suspended. This form, as Sears points out, merely recommends that Dougherty's driving privilege be suspended and does not seek termination, but Dougherty emphasized at trial that the heading states, "Approval to Terminate Form."

The "Approval to Terminate Form" included Giampapa's signature, and the date of preparation was the day Dougherty first lost his driving privilege. Giampapa admitted that she would have sent this form with the accident reports to corporate headquarters and it would have included a paragraph indicating that she was recommending the termination of Dougherty's employment.[5]

Giampapa testified that when a service technician lost his or her driving privilege, Sears did not automatically terminate the person's employment. Sears could not locate a termination form for either Mizerski or Espinoza. Giampapa testified that she did not remember whether an approval to terminate form was completed for Mizerski. Thus, the jury could have concluded that Sears treated Dougherty differently than Mizerski and Espinoza when it completed the termination form for him as soon as his driving privilege was suspended and there was no evidence that such a form was completed for either of the younger employees.

The record established that all service technicians were qualified to work at Sears's parts department and that Mizerski was offered a full-time job in July 2002 with the Concord parts department. Mizerski testified that Sears told her about the job and offered her the job. Dougherty thus presented evidence that Sears treated Mizerski differently from him as Sears offered her a full-time position. Dougherty testified that he

[5] Sears did not have in its record the documents attached to or supporting the approval to terminate form for Dougherty.

was told about a part-time position in the South Bay but, unlike the situation with Mizerski, he was told that he would have to apply and interview for the job. Furthermore, he maintained the evidence indicated there was no specific opening when Sears offered Mizerski the position and, contrary to his situation, Sears created a position for Mizerski. Sears vigorously denied that any position was created for Mizerski and claimed that she was filling an open position. Sears, however, could not identify the person who had left the parts and service center or explain how the opening for Mizerski was created. Thus, this evidence supported an inference that Mizerski, unlike Dougherty, was offered a position that was specially created for her.

Although the trial court stated that Dougherty did not present any evidence that a full-time position existed at the time Sears suspended Dougherty's driving privilege in February 2003 and that counsel for Dougherty simply argued this without any supporting evidence, the record does contain evidence in support of this argument. The trial court may not have given much weight to this evidence, or disbelieved it, but that was not the role of the trial court. Espinoza lost his driving privilege in July 2002 and, in August 2002, Sears offered him a job in the parts department in Concord. Dougherty presented evidence that no one was hired in the parts department between July 2003 and February 2003, and therefore that job should still have been open when he lost his driving privilege in February 2003. If the job was not open, Dougherty asserted that the position was specially created for Espinoza. Sears presented evidence that there was a reorganization occurring and that jobs were being reduced but the jury was entitled to give this evidence little weight.

Additionally, Dougherty presented evidence that a position for which he qualified was available when Tuzzolino left his position in the Concord parts department on February 13, 2003. Although Tuzzolino testified that he worked part time and received no benefits, Giampapa testified that she believed Tuzzolino was a full-time employee. Burton testified at her deposition that Tuzzolino's departure created an open position in the Concord parts department. At trial, she retracted this statement and stated that she mistakenly believed Tuzzolino had left in 2002 and created the opening that Mizerski

filled. She testified that Tuzzolino's departure did not create an opening and that there was no full-time parts position in the Concord unit in 2003. She added that she did not observe any new people working in the Concord parts department in 2003. Giampapa testified that Sears did not necessarily fill every position when employees left the company, and Tuzzolino and Burton testified that the Concord parts department shrank as a result of the consolidation effort through the end of 2002.

Sears argues that Tuzzolino's testimony was "direct" evidence that he worked part time. However, the jury was entitled to believe Giampapa's testimony and conclude that Tuzzolino, who had returned to work in the parts department in 2004, may not have remembered correctly or had a motive to provide an answer that would help Sears. Furthermore, whether Tuzzolino's departure in 2003—when Dougherty lost his driving privilege—created an opening was an issue of fact to be decided by the jury. It was the jury's job, not the trial court's role, to determine which portions of Burton's inconsistent testimony were believable.

Even if the record established that there were only part-time positions available at the time Dougherty lost his driving privilege, as Sears argued, Dougherty presented evidence that Sears never offered him a part-time position and provided him with inaccurate information to dissuade him from pursuing such a position.[6] As already noted, Dougherty's evidence that the termination form was completed as soon as his driving privilege was suspended supported an inference that Sears had decided to terminate his employment without any consideration of offering him an alternative position. Additionally, Dougherty testified that Willis told him at the first meeting that he had to

[6] The job posting dated February 28, 2003, which was trial Exhibit 24, listed only one job in the parts department in the Bay Area, and that was a part-time position in Mountain View. Dougherty testified that he was "absolutely not" told about the part-time job in Mountain View but admitted that he might have been told about a part-time position in the parts department in Redwood City. He stated that he told Willis and Burton that he was not interested in a part-time job because he needed medical benefits. He testified that he was told there were no full-time positions. He admitted that he had no knowledge as to whether there was an available full-time position.

"retire or be fired" and that he was costing the company too much money.[7]

Sears maintains that Dougherty made it clear that he was not interested in a part-time position and never applied for any position with Sears. Dougherty, however, presented evidence that neither Mizerski nor Espinoza had to apply for the positions offered them. More significantly, he submitted evidence that Sears knew the only reason he did not want a part-time job was that he needed medical benefits. Both Burton and Dougherty testified that when told about a possible part-time position, Dougherty asked about medical benefits and emphasized that he needed medical benefits for his disabled wife. He presented evidence that a reduction in pay would not have dissuaded him from taking such a job because he asked about an unpaid leave of absence from Sears.

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[7] Sears devotes a significant portion of its brief to disputing the evidence presented by Dougherty. For example, Sears writes in its brief: Dougherty's contention "that Mr. Willis told him his only options were to 'retire or be fired' is contrary to his own testimony, in addition to that of Mr. Willis and Ms. Burton, who were also present at the meeting." As already stressed, it is not our job to judge the credibility of the witnesses or to weigh the evidence. "If the evidence is conflicting or if several reasonable inferences may be drawn," the JNOV should be denied. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110.) " ' " '[E]very legitimate inference . . . may be drawn from the evidence' " ' " to support a verdict. (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 750.)

Sears also contends that discussions of retirement options with retirement-eligible employees do not constitute substantial evidence of age discrimination as a matter of law. To support this argument Sears cites *Holtzclaw v. Certainteed Corp.* (E.D. Cal. 2011) 795 F. Supp.2d 996. The court in *Holtzclaw* stated "isolated and 'stray' remarks" that a person should think about retirement or old enough to retire were insufficient to demonstrate to show age discrimination " 'when unrelated to the decisional process[.]' " (*Id.* at p. 1014.) Here, Dougherty asserted that Willis made the "retire or be fired" comment when discussing the termination of his employment and therefore, if the jury believed his testimony, it was connected to the decision to terminate his employment. Furthermore, "[a]lthough stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 541.) Accordingly, we conclude that the holding in *Holtzclaw* does not support Sears's position that the trial court correctly granted Sears's motion for a JNOV.

Dougherty claimed that Sears purposefully failed to tell him that he was entitled to COBRA benefits with a part-time position. It is undisputed that Giampapa told Dougherty that a part-time position did not include medical benefits. At trial, Giampapa admitted that COBRA would have applied to Dougherty, and that he could have retained COBRA coverage if he accepted a part-time position. Giampapa stated that she could not recall whether she ever told Dougherty that he could get COBRA benefits if he worked part time and Dougherty denied ever receiving this information. This evidence supported a finding that a part-time job for which Dougherty qualified was available and an inference that Sears deliberately did not provide him with critical information to permit him to consider this position. Thus, the jury could infer that Sears treated Dougherty differently than the younger employees by not offering him a part-time position and simply telling him about a possible part-time position, and by failing to disclose that he could receive medical coverage with COBRA if he had a part-time position.

Sears argues that the information Giampapa provided to Dougherty was accurate, as part-time positions do not have medical benefits. Sears further contends that there is no evidence that Giampapa routinely provided COBRA information to other younger employees who were considering whether to accept a part-time position. The jury, however, could have concluded that this evidence, considered with the other evidence, established that Giampapa purposefully withheld information of medical benefits through COBRA because she knew that Dougherty would not accept any position unless he could receive medical benefits.[8]

Accordingly, we conclude that the record contained substantial circumstantial evidence supporting a rational inference that intentional discrimination, on the basis of age, was the true cause of Sears's actions and that Sears proffered reasons for terminating Dougherty's employment and not providing him an alternative position were "unworthy of credence." (See *Guz, supra,* 24 Cal.4th at p. 361.)

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[8] We need not address Dougherty's argument that the trial court's prior rulings were inconsistent with its grant of Sears's motion for JNOV.

D. *Same Actor Inference*

Sears contends that the same actor inference applies to the present case. Dougherty responds that this inference does not apply and, even if it did, it is simply an inference and the jury's verdict should still stand.

The same actor inference arises " 'where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time . . . .' " (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 809.) In such a situation, " 'a strong inference arises that there was no discriminatory motive.' [Citations.]" (*Ibid.*) The rationale underlying the inference is that " '[f]rom the standpoint of the putative discriminator, "[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job." ' " (*Ibid.*)

Here, Willis and Giampapa terminated Dougherty's employment but, as Sears acknowledges, they did not hire Dougherty for any position with Sears. Sears asserts that Dougherty failed to pursue the part-time job opportunity about which he was told and he failed to reapply for his position after one year despite being told by Willis and Giampapa that he could reapply. The same actor inference should apply, according to Sears, since Dougherty's actions deprived Willis and Giampapa of the opportunity to hire him.

Sears cites no authority that states the same actor inference applies when the person firing the plaintiff advised the plaintiff that he should or could apply for a position. Indeed, there is nothing in this record to show that Willis or Giampapa would have hired Dougherty had he applied for the part-time position or reapplied for his position after one year. We refuse to modify the scope of this inference in the manner urged by Sears. Dougherty was told about a possible part-time job but Willis and Giampapa never offered Dougherty a job. Consequently, the same actor inference does not apply. Furthermore, even if Willis and Giampapa had actually offered Dougherty a job, this evidence would simply have been an inference of no discrimination.

We conclude that the same actor inference does not apply to the present case and the trial court erred when it granted Sears's motion for JNOV. We therefore reinstate the jurors' verdict.

II. *The Granting of Nonsuit on Punitive Damages*

A. *Standard of Review*

At the close of Dougherty's case in chief, Sears moved for nonsuit on the issue of punitive damages, and the trial court granted this motion. In its nonsuit ruling, the trial court determined as a matter of law that the evidence presented by Dougherty was insufficient to permit the jury to find in his favor regarding punitive damages against Sears.

" 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff['s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor." ' [Citation.] A mere 'scintilla of evidence' does not create a conflict for the jury's resolution; 'there must be *substantial evidence* to create the necessary conflict.' [Citation.]" (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291 (*Nally*).)

On review of the grant of nonsuit, the evidence will be evaluated in the light most favorable to the plaintiff. (*Nally, supra*, 47 Cal.3d at p. 291.) "The plaintiff must be given an opportunity to present all the facts he expects to prove before a nonsuit is proper. [Citations.] On appeal we will not consider any ground for the nonsuit not advanced in the trial court, except one which identifies an incurable defect. [Citation.]" (*Loral Corp. v. Moyes* (1985) 174 Cal.App.3d 268, 273.)

In reviewing this nonsuit order, we review the facts in the record by accepting the evidence most favorable to plaintiff as true and disregarding conflicting evidence. (*Nally, supra,* 47 Cal.3d at p. 291.) We inquire if Dougherty brought forward sufficient evidence of a substantial nature, to allow the jury to find by clear and convincing evidence that

Willis or Giampapa on behalf of Sears acted with malice, oppression or despicable conduct, and/or that there was awareness and ratification of the individual's conduct, through the corporate office of Sears. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 605-606.) If so, the punitive damages issue should have been allowed to go to the jury.

B. *Civil Code Section 3294*

Civil Code section 3294, subdivision (a) provides: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." This statute defines malice as conduct that "is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1).) " 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) Finally, " '[f]raud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c)(3).)

Under subdivision (b), of section 3294 of the Civil Code, "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

C. *Evidence of Malice, Oppression, or Fraud*

The first question is whether Dougherty presented any evidence that Willis or Giampapa was guilty of malice, oppression, or fraud. Dougherty argues that he presented clear and convincing evidence that Giampapa and Willis engaged in malice, fraud, and oppression by discriminating against him when Willis told him his option was to "retire or be fired" and when Giampapa failed to advise him about COBRA benefits with a part-time position, failed to advise him that he could retain seniority if he returned to Sears within one year, and failed to advise him that he would have retained his seniority if he was rehired after 60 days. Furthermore, Dougherty contends that he provided evidence that Sears's "legitimate" reason for terminating his employment was pretext for the discriminatory reason, which was his age. He asserts that he submitted evidence showing that Sears failed to inform him about all the open non-driving positions and that he was treated differently than Espinoza and Mizerski.

Sears argues that " ' "[s]omething more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton." ' " (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 716 (*Scott*).) Sears relies on *Scott*, but this case involved wrongful termination in violation of a public policy where the plaintiff's employment was terminated for refusing to violate staffing ratio regulations. (*Id.* at p. 705.) *Scott*, in contrast to the present case, did not involve a claim of discrimination under the Fair Employment and Housing Act. Thus, in *Scott*, "[t]he only evidence of wrongful conduct directed toward [the plaintiff] was her termination for an improper reason." (*Scott*, at p. 716.) The court clarified that "[t]his evidence was insufficient to support a finding of despicable conduct, because such action is not vile, base or contemptible." (*Ibid.*)

The court in *Scott, supra,* 175 Cal.App.4th 702, explained that the plaintiff's rights were not endangered by the school's noncompliance with the staffing regulation. (*Id.* at p. 717.) In contrast, here, Dougherty's rights were endangered by Sears's noncompliance

with the Fair Employment and Housing Act. When the termination of employment is based on a violation of the Fair Employment and Housing Act and the employer denies the decision was based on any discriminatory motive, that action is sufficiently contemptible to support imposition of punitive damages. (See, e.g., *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 912 (*Cloud*).) In *Cloud*, the court held that there was sufficient evidence to support the jury's determination that the defendant corporation discriminated against the plaintiff on the basis of her gender and then attempted to hide the illegal reason for its employment decisions by lying and such evidence supported a claim for punitive damages. (*Id.* at p. 912.) It was the fabrication that constituted the despicable conduct. (*Ibid*.)

Similarly to *Cloud*, here, Dougherty presented evidence that Willis and Giampapa claimed that his employment was terminated because no alternative job was available but, if Dougherty's evidence was to be believed, this claim was a lie.[9] Sears vigorously maintains that the evidence of lying was at best, "vague." However, as already discussed, Dougherty's evidence that Sears's "legitimate" reason for terminating his employment was pretext for the discriminatory reason of his age was sufficient to support the jury's verdict of age discrimination. Thus, the jury should have been provided the opportunity to determine the question of punitive damages.

D. *Sears's Liability*

Since a corporation can be held liable for punitive damages only if bad acts are committed, authorized, or ratified by an "officer, director, or managing agent" (Civ. Code, § 3294, subd. (b)), the second issue that must be addressed is whether Dougherty submitted any evidence indicating that a corporate officer or managing agent of Sears committed, authorized, or ratified the despicable conduct. Sears argues that Dougherty failed to present any evidence that a Sears officer, director or managing agent authorized, ratified, or committed any of the punishable conduct.

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[9] We need not consider whether Dougherty presented evidence of malice or fraud.

In *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, the court defined " 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy." (*Id.* at pp. 566-567.) Whether an employee is a managing agent does not hinge solely on his level or position in the corporate hierarchy. (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822.) " 'Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421.) "The scope of a corporate employee's discretion and authority is . . . a question of fact for decision on a case-by-case basis." (*White, supra,* at p. 567.)

With regard to Willis, the record establishes that he became the district general manager for the Mid-Cal District on January 15, 2003, and there were approximately nine to 10 sales floors in his district. He testified that he was responsible for all the profits and losses in the district during the first quarter of 2003, and was responsible for all revenue income. He also agreed that he was responsible for all human resource activities in the district, all store relationships with retail stores, customer services, and the overall performance of the district. He declared that human resources in his district reported directly to him and that Giampapa reported directly to him during the first quarter of 2003. When counsel asked, whether it was "[f]air to say that you were kind of like Harry Truman in that the buck stopped with you in terms of what went on in the Mid-Cal District," Willis responded, "Correct." This evidence was sufficient to have the jury decide whether Willis was a "managing agent" for Sears.

Sears relies on *Zelly-Zurian v. Wohl Shoe Co., supra*, 22 Cal.App.4th 397, to argue evidence that the top manager has supervisory authority over the plaintiff is insufficient to establish the person is a managing agent. (*Id.* at pp. 421-422.) We agree. However, the foregoing evidence showed that Willis had most if not all of the responsibility for running the stores in the Mid-Cal District. In *White v. Ultramar, Inc., supra,* 21 Cal.4th 563, our Supreme Court concluded that a regional director of eight stores, who supervised 65 employees, and had "most, if not all" responsibility for running the eight

stores, had sufficient authority over corporate policy to be a "managing agent." (*Id.* at p. 577.) Thus, the fact that Willis had to receive approval from the corporate office prior to terminating Dougherty's employment did not mean that the jury could not conclude that he "exercised substantial discretionary authority over decisions that ultimately determined corporate policy." (*Ibid.*) Here, the factual question of whether Willis was a managing agent should have gone to the jury. (See *White*, at pp. 566-567 [whether corporate employee is a " 'managing agent' " is "a question of fact for decision on a case-by-case basis"]. The evidence in the present case established that Willis authorized and ratified Giampapa's conduct and therefore, if the jury found Willis was a managing agent, Sears was liable for any misconduct committed by and authorized by Willis.

Furthermore, Dougherty also presented evidence that corporate headquarters ratified the acts of Willis and Giampapa. Both Willis and Giampapa testified that Dougherty's employment could only be terminated with corporate office approval because he had been with Sears for more than 20 years. Sears maintains that that this evidence was too vague since there is no evidence that a corporate officer was aware of or knew about any alleged misconduct by Willis and Giampapa. Sears argues that the corporate office received only the accident report and discipline history. The record, however, establishes that the corporate office may have received sufficient information to put it on notice that Daugherty's employment was terminated on the basis of his age. When asked what exactly was sent to the corporate office, Giampapa testified: "I don't remember what—I mean, I know that the accident reports would have been a part of it and the performance plans for improvement . . . , those would have been part of it. And I don't remember if there were any other things that went with it." She admitted that there would have been a paragraph indicating that she was recommending termination. At her deposition, she testified that she would provide a face sheet with a chronological history of the accidents, Dougherty's hire date, and a paragraph explaining the basis of the recommended employment termination. The evidence was that the vice president of the corporate office provided approval prior to the termination of Dougherty's employment and therefore saw this information. Sears never submitted into evidence these

documents, including the paragraph written by Giampapa explaining her recommendation to terminate Dougherty's employment. Dougherty contends that Sears's failure to introduce such evidence raised an inference that such evidence would have hurt Sears. (See Evid. Code, § 412.)

We conclude that the evidence submitted by Dougherty was sufficient for the jury to have reasonably found that a "managing agent" of Sears engaged in the wrongful conduct, authorized the wrongful conduct, and/or ratified the wrongful conduct.

III. *Evidentiary Rulings*

A. *Standard of Review*

Dougherty complains that the trial court abused its discretion in making several evidentiary rulings. We review any ruling by the trial court as to the admissibility of evidence for an abuse of discretion. (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1079.) In order for the trial court to abuse its discretion, its decision must exceed the bounds of reason by being arbitrary, capricious, or patently absurd. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) Moreover, even where a trial court improperly excludes evidence, the error does not require reversal of the judgment unless the error resulted in a miscarriage of justice, meaning it is reasonably probable a more favorable result would have been reached absent the error. (Cal. Const., art. VI, § 13; Evid. Code, § 353; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431-1432.) " 'The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

B. *Sears's Document Designating Dougherty as a "Retiree Not Rehireable"*

The trial court granted Sears's motion in limine requesting exclusion of a document in Dougherty's file stating that Dougherty's reason for leaving was that he was a "Retiree Not Rehireable." Dougherty maintains that this evidence was directly relevant because counsel for Sears asked questions of Dougherty that suggested that he would

have been able to go back to work for Sears if he had applied for a job after one year. Dougherty maintains that his award of damages would have been higher if the jury had not been convinced that he should have reapplied to Sears after one year to mitigate his damages. He further argues that this document was evidence of Sears's reprehensible conduct and was therefore relevant to the issue of punitive damages.

Sears argued in its motion in limine that the designation that Dougherty was a retiree and not rehireable was made after Dougherty's employment had been terminated. Sears stated that Dougherty requested paperwork regarding his pension benefits and that in order for the pension benefit paperwork to be processed, Dougherty's employment status had to be entered as "retired" in the computer database. The person entering the data into the computer had to enter the reason for the retirement and the only choice available that applied to Dougherty was "termination with retirement benefits." Sears argued that "[t]his was not a decision made with respect to [Dougherty] personally, nor was it a 'decision' in the normal sense of the word. Rather, the designation arose solely by operation of the computer software." This designation, according to Sears, did not foreclose Dougherty from future employment. If Dougherty had applied for a position, a person would have checked to see why he had this non-rehireable code.

Under Evidence Code section 352, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

We agree with Sears that the lower court did not abuse its discretion in excluding this evidence under Evidence Code section 352. Dougherty presented no evidence that any decisionmaker made this designation or that this designation had any significance. Furthermore, we agree that it would have required a mini-trial on the creation, development, and significance of the computer program. Accordingly, the lower court did not abuse its discretion in refusing to admit this evidence on the basis that the limited probative value of this evidence was substantially outweighed by the probability that its

admission would necessitate undue consumption of time. (See Evid. Code, § 352, subd. (a).)

C. *Cross-Examination of Giampapa*

Dougherty claims the trial court abused its discretion in refusing to permit Dougherty's counsel to cross-examine Giampapa regarding "the general practices that she ha[d] for investigations." At trial, the court asked Dougherty's counsel the reason for this line of questioning given that the court had already found as a matter of law when granting summary adjudication against his retaliation claim that there was insufficient evidence that Dougherty ever made a claim of discrimination that would require any sort of investigation. Counsel for Dougherty argued that Willis testified in his deposition that he asked Giampapa to conduct an investigation; thus, counsel wanted to demonstrate that the employer had an opportunity to prevent discrimination but failed to do so. The court responded that it would not rule on this issue but would conduct further review.

Dougherty has failed to make any citation to the record that establishes any actual ruling by the trial court that limited his cross-examination of Giampapa. The burden is on Dougherty "to show error by an adequate record." (*Cypress Security, LLC v City and County of San Francisco* (2010) 184 Cal.App.4th 1003, 1014.) Moreover, Dougherty has failed to establish that excluding this evidence resulted in a miscarriage of justice.

D. *Documents Related to Sears's Retention Policies*

Dougherty argues that the trial court should have permitted him to submit into evidence Sears's documents related to its retention policies. Specifically, Dougherty requested to submit into evidence a document entitled, "Job Opportunity Posting Instructions." This document required the posting of all openings "for full-time positions and opening for part-time positions above Grade 6 . . . ." It contained instructions about including information about who filled the position and also required that a record of this posting be maintained for three years.

Dougherty argued in the trial court that the abovementioned document was relevant because Sears did not have a record of the job openings when Dougherty was suspended or any other postings for the period when Mizerski and Espinoza received job

offers after suspension of their driving privileges. Counsel for Dougherty elaborated that there should have been job postings for the positions filled by Mizerski and Espinoza and a list of jobs when Dougherty first lost his driving privileges.

The trial court responded: "If I understand you correctly, this is what your argument is: That the fact they don't have any evidence of any jobs being posted is a circumstantial fact to show that the jobs that were given to Mizerski and Espinoza were, in fact, created for them." Counsel for Dougherty agreed that was the argument.

Counsel for Sears asserted that the job-posting policy and requirements applied only to a "salary grade six or above" and Dougherty had presented no evidence that any of the jobs at issue satisfied that criterion.[10] Counsel for Sears explained that Sears had Exhibit 24, the job-posting list dated February 28, 2003, because it was placed in Dougherty's file when Willis wrote notes on the back of it during his meeting with Dougherty. Counsel for Sears argued that Giampapa created these posting summary sheets for herself and the district and it was not Sears's policy to have them created.

Dougherty's attorney countered that the fact that there were notes on the document was a new argument. Counsel also argued that the posting sheet was dated February 28, 2003, and Giampapa testified that she created these sheets within a few days of the date on them and it was therefore impossible for Willis to have written notes on the back of the job posting because the document had not been created at the time of the meeting between Willis and Dougherty.

The trial court stressed that Giampapa's testimony "made clear" that she created a template for the job listing and she did not create an official form. The court added: "She also testified, sir, that not every job necessarily would go on to that posting. That's the problem." The court found that the request to admit documents related to Sears's

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[10] In his reply brief, Dougherty argues that this argument fails because the part-time position allegedly offered to him "shows up on Exhibit 24." He then cites to a page in the record that contains a list of "Business Acronyms." It is completely unclear how this page cited in the record supports Dougherty's argument. Furthermore, the fact that this job appeared on the job-posting list dated February 28, 2003, does not establish or indicate that this job was a grade six or above.

retention policy was not relevant and any relevancy was outweighed by the prejudicial value. The court also ruled that such evidence would be misleading.

The trial court found that there was no evidence that any other relevant job-posting documents created by Giampapa existed or that there was a policy to keep these documents. The evidence in the record clearly supported this finding. Thus, for example, during the trial, Giampapa identified Exhibit 24, the job listing dated February 28, 2003, as a "template" that she had made for "job postings" and when asked whether she made these postings on a monthly basis, she responded: "Sometimes. I mean, it would really depend, you know, if there was something that I needed to update it sooner, then I would." When asked whether her general practice was to prepare them "on an approximate month[ly] basis," she responded that "[i]t was approximate." Subsequently, she testified that her practice with regard to the posting summary sheets such as Exhibit 24 was not to retain them. She elaborated: "Well, it was a template on my computer that I would—as I would update it or make a change, I would go in and just delete out what I had in there before and put in the new information."

Additionally, as already discussed, the policy to retain the job postings applied only to positions at a grade six and above. There is no evidence that any of the jobs offered Mizerski or Espinoza were at a grade six or above or that Dougherty qualified for any position at a grade six and above.[11]

Accordingly, we conclude the record amply supported the lower court's finding that Dougherty did not establish that Sears had any policy related to the job postings at issue at trial and did not show that any of these jobs were of the type of grade that triggered Sears's policy of keeping the documents for three years.

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[11] Dougherty also contends that a legal hold notice should have been in effect at the latest in April 2004, because Dougherty exhausted his administrative remedies by filing a charge with the Department of Fair Employment and Housing. Thus, the records on job postings should not have been destroyed. This argument does not establish that the lower court abused its discretion in refusing to admit evidence of a policy when Dougherty failed to show that the policy had any relevance to the job postings at issue in this trial.

E. ***Summary Conclusion***

Dougherty has failed to establish that the trial court abused its discretion when it excluded evidence of the document designating Dougherty as a retiree and not eligible for rehire or the document related to Sears's retention policy. He also failed to establish that the lower court abused its discretion when making any rulings regarding the cross-examination of Giampapa.

DISPOSITION

The JNOV is reversed and the matter is remanded to the trial court with directions to reinstate the jurors' verdict against Sears. The order granting nonsuit on the punitive damages is reversed and the matter is remanded to the trial court for further proceedings in conformity with this opinion. Dougherty is awarded the costs of appeal.

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Lambden, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.