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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DOREEN BETSON, Plaintiff and Appellant, v. RITE AID CORPORATION, Defendant and Respondent.	B235747 (Los Angeles County Super. Ct. No. BC427992)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Affirmed in part, reversed in part.

Shegerian & Associates and Carney R. Shegerian for Plaintiff and Appellant.

Hodel Briggs Winter, Glenn L. Briggs, Theresa A. Kading and Beth C. Kearney for Defendant and Respondent.

Doreen Betson sued her former employer, Rite Aid Corporation,[1] for wrongful termination, discrimination, retaliation and harassment, and defamation. On appeal she challenges the summary adjudication of her causes of action for discrimination (based on age, disability, and taking leave[2]); retaliation on the basis of disability and taking leave, harassment based on age, and compelled self-defamation. Her causes of action for disability harassment, failure to accommodate, failure to engage in the interactive process, and defamation were tried to a jury. Rite Aid prevailed on each of these causes of action except disability harassment, as to which Betson prevailed. The trial court granted judgment notwithstanding the verdict on the disability harassment cause of action. Betson appeals from that order as well.

We find triable issues of fact regarding the role played by Betson's supervisor in the decision to terminate her. She raised a triable issue of material fact as to both direct and circumstantial evidence of disability discrimination. She also raised triable issues of fact precluding summary adjudication of her causes of action for discrimination and retaliation for taking medical leave. We conclude that summary adjudication was proper on the causes of action for retaliation on the basis of disability under the Fair Employment and Housing Act (Gov. Code, § 12900 et seq., (FEHA)) and compelled self-defamation, as well as the claim for punitive damages. Betson informs us she is not pursuing her causes of action for age discrimination and harassment, and we treat them as abandoned. We reverse in part and affirm in part the summary adjudication order.

Based on evidence presented at trial regarding the damages Betson suffered as a result of her supervisor's disability harassment, we conclude the trial court erred in granting judgment notwithstanding the verdict and reverse that order.

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[1] Rite Aid answered the first amended complaint as "Thrifty Payless, Inc. dba 'Rite Aid' (erroneously sued herein as 'Rite Aid Corporation') . . ." But its reply brief on appeal is filed on behalf of "Rite Aid Corporation." We follow that designation and refer to defendant and respondent as "Rite Aid" in this opinion.

[2] The leave claims are based on the California Family Rights Act (CFRA), Government Code section 12945.2.

FACTUAL AND PROCEDURAL SUMMARY

We draw our factual summary from the evidence submitted on summary adjudication and at trial. Doreen Betson worked for Rite Aid from 1987 to 2009. She spent the last six years at store 5462 in Beverly Hills as a shift supervisor. Her supervisor, store manager Paul Lorenzana, described her as a good employee, good at customer service, dealing with the public, money counting, merchandising, problem solving, and knowledge of operations. As a shift supervisor, her duties included cashiering, making sure everyone was performing his or her assigned duties, stocking, "planograms,"[3] and helping in the pharmacy. Betson reported to Lorenzana and assistant store manager Alvin Legaspi.

On February 11, 2008, Betson fell on a stairway at the Beverly Hills store and injured her knee, right shoulder, and neck. She reported the fall to the shift supervisor. Initially she was diagnosed with a cracked knee, given pain medication, and referred to a specialist. On her physician's orders, she took seven days off work. Rite Aid then sent her to a workers' compensation physician, who diagnosed her with a sprained and bruised knee. The work restrictions of this physician provided that she not lift anything heavier than 20 pounds, avoid climbing ladders, and limit kneeling, bending, and squatting. Betson informed Lorenzana of these work restrictions. She returned to work with a limp and was complaining of pain. She visited the workers compensation medical group several more times in February and March 2008 and received a doctor's note with work restrictions each time. She provided these notes to Lorenzana. Although her knee had not healed, Betson was told in March 2008 that no further visits with the workers compensation medical group were authorized. After that, she treated with a private physician, who also imposed work restrictions. She gave these restrictions to Lorenzana.

Eventually, Betson's physician told her she required surgery to repair torn muscles and ligaments in her knee. She had the surgery on August 25, 2008. Her leave was

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[3] Betson described planograms as replacing everything on a merchandise shelf with new items.

extended to December 16, 2008. Prior to the injury, Betson had a good relationship with Lorenzana. But in the period between her injury and the surgery, she was subjected to negative comments by Lorenzana. He said he did not believe she fell, or that she did it on purpose. When accusing Betson of faking her injury, Lorenzana threatened her by saying, "'Rite Aid is trying to get rid of these long-term employees and for your wages, they could get two employees.'" He looked very angry at her when he made statements about her disability. Lorenzana told Betson she was too slow at work because of her disability. Legaspi called her "'one-legged'" and "'a kangaroo'" in reference to the limp due to her knee. On one occasion, Lorenzana demanded that Betson hurry up because she was walking too slowly in the store. In another incident, Lorenzana threw merchandise at Betson in an extremely angry manner as she processed a refund. One day, when she was experiencing severe pain in her knee, Betson asked to go home, but Lorenzana refused, saying that he did not care and that she had to stay. In addition, Betson was repeatedly ordered to perform tasks in violation of her work restrictions.

Betson returned to work on December 16, 2008 with restrictions to avoid lifting more than 10 pounds with her right arm, and to refrain from squatting or stooping. She informed Lorenzana of these restrictions. He did not discuss them with her. After she returned to the store, Lorenzana and Legaspi told customers they could come to her register, which they referred to as the "'handicap register.'" They told Betson she had to remain at the cash register because she was unable to perform "real work" due to her handicap. Lorenzana said she was of little help to him. After the surgery, on one occasion Legaspi called Betson "'a handicap.'"

In December 2008, Jeffrey Storm, a Rite Aid Loss Prevention Manager, discovered suspicious transactions at the Beverly Hills store involving several employees in possible under ringing or refund fraud. Rite Aid's Voids and Returns Policy allowed customers who sought a refund without a receipt to exchange the purchased item or receive a Rite Aid gift card, but cash would not be offered on any refund if the customer had no receipt. Where a customer presented a receipt for a refund, the customer was to complete a return receipt. The original receipt was to be stapled to the refund and placed

in the drawer. Rite Aid policy provided that employees who failed to comply with these refund policies were subject to disciplinary action, up to, and including, discharge.

Storm reviewed a video of store transactions which indicated that Betson was involved in three transactions in which she made refunds against Rite Aid policy. In the first transaction, she processed a cash refund by scanning a bottle retrieved from a drawer under her cash register. There was no customer present and no receipt, no customer signature on a receipt, and no notation on the receipt that Betson approved the refund. She closed her register drawer without removing cash and placed the refund slip in her pocket. But at the end of Betson's shift, the register's cash balanced, indicating the amount of the refund had been removed.

In the second transaction, Betson manually entered the price for a cash refund, but the video showed no merchandise was present. Her register was over balance by only 48 cents, which established that the money for the refund was removed at a later time. In the third transaction, Betson processed a cash refund of $43.29 for COQ10, but the customer at the register at the time was not associated with this refund, there was no receipt for the product, the customer was not given a refund slip to sign, cash was not removed from the register drawer, and Betson did not sign her approval on the refund slip. It was inferred that the cash was removed from the drawer at a later time because Betson's register was short only 13 cents.

Storm showed the video to Betson, who denied making refunds without a customer present. She did not remember the specific transactions she was shown. Storm suspended Betson pending further investigation. The identity of the person or persons involved in the decision to terminate Betson is contested. Storm spoke with Rite Aid Human Resources manager Frank Granillo about his investigation of Betson. Granillo claimed that he alone made the decision to terminate Betson during his conversation with Storm. He said he spoke with Lorenzana only after the decision was made. At that time he directed Lorenzana to tell Betson that her employment was terminated, and to arrange her final paycheck. Betson was terminated on January 6, 2009. Four other employees also were terminated as a result of the same investigation.

On October 15, 2009, Betson filed a claim with the California Department of Fair Employment and Housing for wrongful termination, harassment, discrimination, denial of accommodation, failure to prevent discrimination or retaliation, retaliation, and denial of medical leave based on age, disability and retaliation for protected activity. A right to sue letter was issued by the Department of Fair Employment and Housing.

The First Amended Complaint is the charging pleading. It alleges causes of action for discrimination, retaliation and harassment on the basis of disability (counts 1 through 3); failure to accommodate disability or to engage in the interactive process (counts 4 and 5); discrimination and harassment on the basis of age (counts 6 and 7); negligent hiring and retention and negligent supervision (counts 8 and 9); defamation and compelled defamation (counts 10 and 11); discrimination, harassment and retaliation for taking leave under the CFRA (counts 12 through 14); and failure to pay wages (count 15). The trial court sustained a demurrer and dismissed the causes of action for negligent hiring, retention and supervision and harassment for taking leave. Plaintiff voluntarily dismissed the cause of action for failure to pay wages.

Rite Aid's motion for summary adjudication of the issues was granted as to the causes of action for discrimination and retaliation, as well as age harassment and compelled self-defamation. A jury trial was held on the remaining counts for disability harassment, failure to accommodate, failure to engage in the interactive process, and defamation. In a special verdict, the jury found that Rite Aid did not fail to accommodate Betson's disability. The jury found that Rite Aid did not inform anyone other than Betson that she had committed fraud, had stolen from Rite Aid, or had engaged in theft. It found for Betson on the disability harassment cause of action and awarded $250,000 for past noneconomic loss and $250,000 for future noneconomic loss. The trial court granted judgment notwithstanding the verdict on this cause of action and entered judgment for Rite Aid. This timely appeal followed.

DISCUSSION

I

We begin with Betson's challenge to the court's grant of summary adjudication on her causes of action for discrimination, harassment, retaliation and compelled self-defamation.

"The standard of review for an order granting or denying a motion for summary judgment or adjudication is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).) The trial court's stated reasons for granting summary relief are not binding on the reviewing court, which reviews the trial court's ruling, not its rationale. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) [¶] A party moving for summary adjudication 'bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law' on a particular cause of action. (*Aguilar*, *supra*, 25 Cal.4th at p. 850, fn. omitted.) 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' (*Ibid*, fn. omitted.) 'A defendant bears the burden of persuasion that "one or more elements of" the "cause of action" in question "cannot be established," or that "there is a complete defense" thereto. [Citation.]' (*Ibid*.)" (*Lidow v. Superior Court* (2012) 206 Cal.App.4th 351, 356.) Following established principles, we liberally construe the evidence submitted by the party opposing summary adjudication and resolve any doubts concerning the evidence in favor of that party. (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 951.) The moving defendant's showing is strictly construed. (*Asahi Kasei Pharma Corp. v. CoTherix, Inc.* (2012) 204 Cal.App.4th 1, 7.)

II

Betson argues that she raised triable issues of material fact precluding summary adjudication of her causes of action for discrimination based on disability under FEHA and on her cause of action for discrimination based on her exercise of her rights under the

CFRA by taking a medical leave (Gov. Code, § 12945.2).[4] The CFRA is part of FEHA, a statute "intended to give employees an opportunity to leave work for certain medical reasons without jeopardizing job security. [Citation.]" (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487 (*Rogers*).)

Under FEHA, it is an unlawful employment practice for an employer to discharge a person from employment because of various criteria, including age, physical disability, or medical condition. (Gov. Code, § 12940, subd. (a).) The elements of a discrimination cause of action under FEHA are "'(1) the employee's membership in a classification protected by the statute; (2) discriminatory animus on the part of the employer toward members of that classification; (3) an action by the employer adverse to the employee's interests; (4) a causal link between the discriminatory animus and the adverse action; (5) damage to the employee; and (6) a causal link between the adverse action and the damage.'" (*McCaskey v. California State Automobile Assn.* (2010) 189 Cal.App.4th 947, 979, quoting *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713.)

Discrimination cases may be proven "in either of two ways: by direct or by circumstantial evidence." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 549 (*DeJung*), citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356 (*Guz*).) Where the plaintiff relies on circumstantial evidence, 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 trying claims of discrimination based on a theory of disparate treatment.[5] (*Ibid.*) The *McDonnell Douglas* test does not apply where plaintiff presents direct evidence of discrimination.

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[4] Government Code section 12945.2, subdivision (l) makes it an unlawful employment practice for an employer to discriminate against any individual because of that individual's exercise of the right to medical leave under the CFRA.

[5] Betson's claims are for discrimination based on disparate treatment rather than disparate impact. (*DeJung*, *supra*, 169 Cal.App.4th 549, fn. 10.)

(*DeJung*, *supra*, 169 Cal.App.4th at p. 550, citing *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1144 (*Trop*).)

Betson argues she provided both direct and circumstantial evidence sufficient to raise triable factual issues precluding summary adjudication.[6] As we explain, Lorenzana's role, if any, in her termination is significant under either approach. Betson's theory is that either Lorenzana made the decision to terminate her, or as a supervisor, he influenced the decision. In either case, she argues, Lorenzana's animus tainted the decision, requiring reversal of the summary adjudication on the causes of action for discrimination based on disability and use of CFRA leave. Rite Aid takes the position that Lorenzana had no role, or involvement in, the decision to terminate Betson. We first resolve an evidentiary dispute regarding that issue, and then address whether Betson raised a triable issue of material fact about Lorenzana's role.

III

As just noted, Rite Aid takes the position that Lorenzana had no role in the decision to terminate Betson, which was made by Granillo alone. Betson disputes this.

A. Granillo's Version

Rite Aid relied on a declaration by Granillo regarding the circumstances of the decision to terminate Betson. On January 7, 2009, Storm contacted Granillo and said he was investigating several employees in Beverly Hills store for "'under ringing'" and refund fraud. According to Granillo, Storm told him that he reviewed a recorded video surveillance which showed three separate cash refund transactions handled by Betson. She was not handling them in accordance with Rite Aid policies. Storm reported that when given an opportunity to explain the handling of these transactions, Betson said she could not remember what happened. When asked to provide a written letter of

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[6] The parties do not argue that this is a "mixed motive" case in which both legitimate and illegitimate factors contributed to the employment decision. The Supreme Court has granted review to determine whether this doctrine applies under FEHA. (*Harris v. City of Santa Monica* (2010) 181 Cal.App.4th 1094, review granted April 22, 2010, S181004.)

explanation regarding the three transactions, she wrote that she could not remember them. Granillo also stated that Storm told him he did not believe Betson was truthful in the interview.

Granillo said that, based on Storm's summary of the investigation, he concluded that Betson had engaged in fraudulent refund transactions and decided to terminate her for a violation of Rite Aid's refund policies and standards of conduct. He explained this decision to Storm. He did not consult Lorenzana, Legaspi, or any other Rite Aid employee before deciding to terminate Betson; the decision to terminate her was his alone. Based on the information provided by Storm, Granillo declared that he had a "reasonable, honest, and good faith belief" that Betson had violated Rite Aid policies and engaged in fraudulent refund transactions. Granillo's declaration attached copies of Rite Aid's voids and returns policy, its returns and exchanges customer policy, and Rite Aid's Standards of Conduct, a part of the employee handbook.

Granillo declared that he spoke with Lorenzana about terminating Betson only after he had made the decision to terminate her. He told Lorenzana to tell Betson she had been terminated and to process her final paycheck. This was consistent with his common practice of making the decision to terminate on his own and then having the subject employee's store manager communicate that decision to the employee.

B. Betson's Evidence From Storm and Lorenzana

In her separate statement, Betson disputed Rite Aid's evidence that Granillo made the decision to terminate her without consulting anyone other than Storm. She cited excerpts from her own deposition, and from the depositions of Storm and Lorenzana. Storm was asked about his conversation with Lorenzana before Betson was terminated. He said Lorenzana "was basically happy that I was going to be talking to her because, in his words, quote/unquote, 'She was nothing but problems.'" This appears to be a reference to the meeting Storm held with Betson regarding the questionable transactions. Storm was asked whether Granillo expressed any opinion about Lorenzana "wanting or not wanting" Betson to return from medical leave. Storm answered: "Well, he just made

the comment that Paul [Lorenzana] didn't want her back, basically, he . . . wasn't interested in having her employed back at the store."

Betson also cited Lorenzana's deposition testimony in which he asked to clarify a previous answer. Lorenzana testified: "The question on did I talk to anybody about Doreen Betson's termination. And the answer is yes. I spoke to Jeff Storm and Frank Granillo." At deposition, Lorenzana testified that he "sometimes" had input with regard to terminating employees and "sometimes" was allowed to suggest that employees be fired. He never told anyone at Rite Aid that Betson should *not* be fired. He testified he was not consulted in the decision to terminate Betson.

In reply, Rite Aid addressed the additional disputed factual issues raised by Betson in her separate statement. Number 31 was "Granillo recalled that Lorenzana told him that he (Lorenzana) did not want Betson back at the Beverly Hills store. He repeated it to Mr. Storm. His declaration is at odds with that recollection." Rite Aid contends that Betson's citation to page 196 of Granillo's deposition supporting this issue must have been to Storm's deposition, because there is no page 196 in the Granillo deposition. Page 196 of Storm's deposition is the excerpt we have quoted in which Storm testified Lorenzana told him he did not want Betson back at the store. Rite Aid's response to this conflicting evidence is: "While there is a difference in the recollections of Mr. Storm and Mr. Granillo, there is no inconsistent testimony on the part of Mr. Granillo."

Rite Aid's response to the conflict between the testimony of Storm and Granillo is not helpful. Betson presented testimony by Storm and Lorenzana from which a jury could reasonably infer that Granillo consulted with Lorenzana before deciding to terminate her, and that Lorenzana expressed a desire to be rid of Betson because of her disability. This raises a triable issue of fact regarding the role played by Lorenzana in the decision to terminate Betson.

C. Betson's Deposition Testimony

Although we have concluded that Betson raised a triable issue of material fact as to Lorenzana's role in the termination decision, we address the parties' extensive arguments regarding whether deposition testimony by Betson was admissible on this

question. The parties focus on the following testimony by Betson at the second of her three days of deposition: "Q. Did Paul Lorenzana ever tell you at any time that it was his decision to terminate your employment?" "A. Yes." Rite Aid objected to this evidence in the trial court on hearsay grounds.[7] In addition, it argued that the alleged statement by Lorenzana was not admissible as an authorized party admission under Evidence Code sections 1220 and 1222 because there was no evidence Lorenzana was authorized by Rite Aid to speak on the subject addressed, citing *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 70 (*Morgan*).) The trial court sustained the objection on these grounds.

Betson's deposition testimony about Lorenzana's alleged statement that he made the decision to terminate her is hopelessly contradictory and confused. After testifying to the statement just quoted, Betson went on to say that this conversation occurred after she left the room with Storm the second time. She testified: "Before I could tell him [Lorenzana], before I said to him, I said, 'You know I didn't do that,' he said, "I know, but it's my decision and my decision I have to fire you.'"

Rite Aid argues this testimony conflicts with Betson's testimony two weeks before, on her first day of deposition, and should have been excluded for that reason. That day, Betson was asked what Storm said to her when he met with her on January 6, 2009 regarding his investigation. She answered: "No. I remember at the end he said that Paul [Lorenzana] told him to fire me because I was stealing, and I was—that I wasn't honest, and he said, 'Sorry,' that it was Paul's decision, not his. That is all I remember."

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[7] This was the only one of Rite Aid's evidentiary objections on which the trial court ruled. But the parties do not argue on appeal that any other objection should have been sustained. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534 (*Reid*) [if trial court did not expressly rule on evidentiary objections, it is presumed they have been overruled, the trial court considered the evidence in ruling on the motion, and the objections are preserved on appeal]; *Rickards v. United Parcel Service, Inc.* (2012) 206 Cal.App.4th 1523, 1526, fn. 2 [where trial court did not rule on evidentiary objections, but no argument is made on appeal that the objections should have been sustained, appellate court will not address objections].)

Although neither side cites it in the separate statements, the record on appeal includes the next page of Betson's deposition on the first day, in which she is describing a conversation with Lorenzana after she left the meeting with Storm. She said: "After I left I went to Paul and I said, 'Paul—' before I said it to Paul he said—I said, 'Paul, you know I didn't do this.' [¶] He said, 'I know, but it's my decision.'"

Rite Aid cites additional contradictory testimony by Betson on the first day of her deposition. On page 180 of her deposition Betson said she did not speak with Lorenzana at any time after she met with Storm. She also said that Storm told her that it was Lorenzana's decision to fire her. As a result, she believed it was Lorenzana's decision to fire her. No one else told her that it was Lorenzana's decision, she thought that because of what Storm said.

After a recess, Betson testified that Lorenzana did *not* tell her that it was his decision to fire her, but that Storm told her that. She said after she denied misconduct, Lorenzana said, "'I know,' but it was his decision to fire me." This testimony followed: "Q. He told you that it was his decision to terminate you? A. No. That is what he told Jeff. He just said no. Q. How do you know that is what Paul told Jeff? A. Because I heard about it. Q. Who did you hear about it from? A. I don't remember. Q. When did you hear about it? A. After my termination." At first, Betson said she did not want to reveal the name of the person who told her what Lorenzana told Storm, but eventually she identified Storm as the source of the statement.

The trial court ruled inadmissible Betson's testimony that Lorenzana told her he made the termination decision. It found Lorenzana's statement was inadmissible hearsay under Evidence Code section 1200, and that it did not satisfy the party admission exception under Evidence Code section 1222[8] because there was no proof Lorenzana was

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[8] Evidence Code section 1222 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and [¶] (b) The evidence is offered either after

authorized to speak on behalf of Rite Aid or that he was involved in the decision to terminate her employment. (See *Morgan, supra*, 88 Cal.App.4th 52, 70 [the admissibility of an out-of-court statement required that the employee making the statement had significant involvement in the process leading to a challenged decision].)

On appeal, Rite Aid argues that Betson cannot raise a triable issue of material fact by contradicting her prior sworn admission, citing *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573 (*Union Bank*) and *Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613. This point was not raised in the trial court and therefore Rite Aid has forfeited the argument. (*Tutti Mangia Italian Grill, Inc. v. American Textile Maintenance Co.* (2011) 197 Cal.App.4th 733, 740.)

In any event, the cases cited by Rite Aid are inapposite. In *Union Bank*, the plaintiff had made admissions in discovery that the defendant had not taken an inappropriate role in the transactions at issue. Applying the leading case, *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21–22 (*D'Amico*), the court held that the plaintiff was barred from creating a triable issue of material fact by submitting declarations which contradicted her admissions. (*Union Bank*, *supra*, 31 Cal.App.4th at p. 593.) In *Visueta v. General Motors Corp.*, *supra*, 234 Cal.App.3d 1609, one of the appellants submitted a declaration in opposition to a motion for summary judgment which contradicted his deposition testimony. Applying *D'Amico*, the court ruled that admissions made during the course of discovery govern and control over contrary declarations lodged on a motion for summary judgment. (*Visueta*, at p. 1613.) Here, the issue is contradictory deposition testimony by Betson rather than the submission of a declaration that contradicted her earlier deposition testimony. We are cited no authority for the proposition that *D'Amico* extends to *internally inconsistent* deposition testimony. We conclude that it does not.

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admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to admission of such evidence."

We conclude, however, that the trial court correctly excluded Betson's testimony that Lorenzana said he made the decision to fire her as inadmissible hearsay. It was offered for the truth of the matter asserted, that Lorenzana said this to Betson. Betson offers no evidence that Lorenzana was authorized by Rite Aid to make statements regarding this subject matter as required for admission under Evidence Code section 1222. On appeal, for the first time, Betson asserts the statement was admissible as an inconsistent statement under Evidence Code section 1235.[9] Rite Aid objected that this argument was not raised in the trial court. In her reply brief, Betson concedes that she failed to present this argument to the trial court, but asserts that we may consider it as a part of our de novo review and because a new question of law may be raised for the first time on appeal. We disagree. "'The proponent of hearsay has to alert the court to the exception relied upon and has the burden of laying the proper foundation.' (*People v. Livaditis* (1992) 2 Cal.4th 759, 778.)" (*Scott S. v. Superior Court* (2012) 204 Cal.App.4th 326, 342.) The application of Evidence Code section 1235 was not preserved for appeal.

IV

The question of fact regarding Lorenzana's role in the decision to terminate Betson is significant to Betson's argument that she presented direct evidence of discrimination based on disability. She bases this argument on the hostile comments made by Lorenzana regarding her disability, which we set out in detail below. Rite Aid argues that in order to constitute direct evidence of discrimination, Lorenzana's comments must be contemporaneous with the discharge or causally related to the discharge decisionmaking process, citing *Trop*, *supra*, 129 Cal.App.4th 1133, 1147.)

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[9] Evidence Code section 1235 states: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Evidence Code section 770 provides that evidence of an inconsistent statement shall be excluded unless "(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

It asserts that each statement cited by Betson requires an inference from the statement to the ultimate issue, which it characterizes as "whether Granillo terminated her employment because of her disability." Rite Aid also contends there was no causal nexus between Lorenzana's comments and Betson's termination because Lorenzana did not initiate or play any role in the misconduct investigation nor was he the decisionmaker. Finally, it asserts that Betson cannot rely on the timing of her discharge in relation to her disability because temporal proximity must be combined with some other evidence of discrimination to raise an inference of discrimination.

We already have concluded there is a triable factual issue as to Lorenzana's role in the decision to terminate Betson. This undermines Rite Aid's argument that there was no causal nexus between Lorenzena's animus against Betson based on her disability and her termination. As we explain, California courts have declined to view employment decisions in isolation, instead identifying all those involved in the decisionmaking process to determine whether animus harbored by a significant participant tainted the process.

Direct evidence in the context of an employment discrimination action was explained by the *DeJung* court: "Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption. Comments demonstrating discriminatory animus may be found to be direct evidence if there is evidence of a causal relationship between the comments and the adverse job action at issue. (*Trop*, *supra*, 129 Cal.App.4th at pp. 1146–1149.)" (*DeJung*, *supra*, 169 Cal.App.4th at p. 550.) There is no need to engage in the *McDonnell Douglas* burden-shifting analysis where there is direct evidence of discriminatory animus. (*Ibid.*) "[E]vidence of clear discriminatory intent is overwhelmingly probative in a discrimination case because it shines a spotlight on the very thing which is the focus of the litigation." (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 575.)

We agree with Rite Aid that the comments made by Lorenzana were not contemporaneous with the termination decision and focus instead on whether there is a

triable issue of fact as to a causal relationship between his comments and the adverse job action.

DeJung was an age discrimination action brought by a former half-time court commissioner whose position became full-time when the person with whom he had job shared resigned. He unsuccessfully applied for the full-time position. The presiding judge of the court was involved in several levels of the selection process. These included chairing the court executive committee and serving on the panel which interviewed candidates for the position, including the plaintiff. The presiding judge repeatedly said the court was seeking a candidate younger than plaintiff. In a discussion of action by the executive committee, the presiding judge told the plaintiff that "'they want someone younger, maybe in their 40's'" for the position. (*Id*. at p. 540.) Before the selection was made, the presiding judge again confirmed this statement. (*Id*. at p. 541.) When approached by the plaintiff's long-time bailiff, the presiding judge said the plaintiff was "'a great guy, but we're looking for someone younger.'" (*Ibid.*) The *DeJung* court held that if credited by a jury, the presiding judge's comments "would plainly qualify as direct evidence of discriminatory animus." (*Id*. at p. 550.) Since the court was reviewing an order granting summary judgment, the court assumed that the judge made the comments, although he denied doing so. (*Id*. at p. 550, fn. 11.)

The respondent court argued that the presiding judge's comments did not taint the decisionmaking process, which was a multilevel process conducted by several individuals. It characterized the judge's comments as evidence of a stray remark by one of the participants in the decision. (*DeJung*, *supra*, 169 Cal.App.4th at pp. 550–551.) This position was rejected. The reviewing court held the plaintiff was not required to "demonstrate that every individual who participated in the failure to hire him shared discriminatory animus in order to defeat a summary judgment motion." (*Id*. at p. 551.) It held "showing that a significant participant in an employment decision exhibited discriminatory animus is enough to raise an inference that the employment decision itself was discriminatory, even absent evidence that others in the process harbored such animus." (*Ibid.*) The Court of Appeal concluded that since the presiding judge was

involved in three levels of the selection process, the trial court erred in granting summary judgment as to whether age discrimination influenced the decision not to appoint the plaintiff. (*Id*. at p. 552.)

In this case, too, there is a triable issue of fact as to whether Lorenzana was "a significant participant" in the decision to terminate Betson, in light of Lorenzana's testimony that he discussed her termination with both Granillo and Storm. In addition, contrary to his declaration, there was evidence that Granillo knew before Betson was terminated that Lorenzana did not want her working at this store.

Lorenzana made comments which demonstrated an animus against Betson because of her disability. Betson submitted excerpts from her deposition in which she described violations of her work restrictions by Lorenzana. She provided the restrictions to Lorenzana, but he never discussed them with her. She testified that Lorenzana repeatedly told her he thought she injured her knee on purpose, that she was faking her injury, and he did not believe her account of the accidental fall. Betson testified about several incidents with Lorenzana after her injury. One day he threw merchandise at her in an angry manner. On another occasion, while Betson was walking to one of the store aisles, Lorenzana told her to hurry up because she was walking too slow. One day Betson asked to go home because her knee hurt and was told that Lorenzana said she had to stay and that he did not care that she was in pain. On one occasion after her injury, Lorenzana told Betson "'You are too slow of a worker with your physical problem.'" Several times, Lorenzana and Legaspi, in remarks to customers, referred to Betson's cash register station by saying it was the "handicap register." Lorenzana and Legaspi told her: "'[B]ecause you are handicapped, you cannot perform no real work. You got to stay at the register. You are of little help to me.'" Lorenzana said this more than once. On another occasion, Lorenzana told Betson: "'Are you sure you are not faking your—your injury? I don't believe it.' He said, 'Rite Aid is trying to get rid of these long-term employees and for your wages, they could get two employees.'" Betson said after her injury, Lorenzana and Legaspi were "always upset and angry with me, all the time, without any reason."

This evidence of Lorenzana's conduct toward Betson after her injury raises a triable issue of fact as to whether he harbored animus against her based on her disability. But, to succeed, Betson also had to raise a triable issue of fact as to a causal relationship between this animus and her termination. (*DeJung*, *supra*, 169 Cal.App.4th at p. 550.) It is not necessary that she demonstrate that every individual who participated in the adverse employment action shared discriminatory animus in order to defeat a summary judgment motion. (*Id*. at p. 551.) """'[A]n individual employment decision should not be treated as a . . . ["]watertight compartment, with discriminatory statements in the course of one decision somehow sealed off from . . . every other decision.["]'" [Citation.]' (*Morgan, supra,* 88 Cal.App.4th 52, 74 (*Morgan*); see also *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 667 (*Clark*); *Roebuck v. Drexel University* (3d Cir.1988) 852 F.2d 715, 734, fn. 32 (*Roebuck*).) Thus, showing that a significant participant in an employment decision exhibited discriminatory animus is enough to raise an inference that the employment decision itself was discriminatory, even absent evidence that others in the process harbored such animus." (*DeJung*, *supra*, at p. 551.)

This legal principle, referred to as the "cat's paw" doctrine, originated with the Seventh Circuit decision in *Shager v. Upjohn Co.* (1990) 913 F.2d 398 (*Shager*) and was adopted by the *DeJung* court. (*DeJung*, *supra*, 169 Cal.App.4th at p. 551.) *Shager* was an age discrimination action based on an adverse employment decision made by a committee. The employer argued that at most, the evidence established that the only member of the committee who harbored any discriminatory animus was the plaintiff's supervisor, and that this was insufficient. The Seventh Circuit rejected that argument, reasoning that if the plaintiff's evidence was accepted, as it had to be on summary judgment, "the committee's decision to fire him was tainted by [the supervisor's] prejudice." (*Shager*, *supra*, 913 F.2d at p. 405.) The *Shager* court held that if the committee "acted as the conduit of [the supervisor's] prejudice—his cat's paw—the innocence of its members would not spare the committee from liability." (*Ibid.*)

Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95 (*Reeves*), also is instructive. It was an action for retaliation in violation of FEHA where the plaintiff, a male employee, had repeatedly complained that female employees were being sexually harassed in the store where he worked. Like Rite Aid here, Safeway attempted to justify summary judgment in its favor on the ground that the decision to terminate the plaintiff was made by Hollis, the district manager, who was unaware that plaintiff had engaged in any protected activity. On this ground, Safeway contended that causation could not be demonstrated. A security officer for Safeway had been asked by the plaintiff's store manager, Demarest, to conduct an investigation of plaintiff for misconduct based on a complaint by another employee. Harrison, who conducted the investigation, reported to Hollis and recommended plaintiff be discharged. (*Id*. at pp. 101–104.)

In support of its motion for summary judgment, Safeway took the position that Hollis alone had made the decision to terminate plaintiff. She was unaware of his complaints of sexual harassment in the store. (*Reeves*, *supra*, 121 Cal.App.4th at p. 107.) But the Court of Appeal held that on the record before it, Hollis' ignorance of plaintiff's complaint was not enough, by itself, "to either conclusively negate this element or to establish plaintiff's inability to prove it at trial." (*Ibid.*) "The issue in each case is whether retaliatory animus was a but-for cause of the employer's adverse action. [Citations.]" (*Id*. at p. 108.) The *Reeves* court held that a plaintiff "can establish the element of causation by showing that *any* of the persons involved in bringing about the adverse action held the requisite animus, provided that such person's animus operated as a 'but-for' cause, i.e., a force without which the adverse action would not have happened." (*Ibid.*) It held that a showing that the ignorance of only some of those involved in the employment action did not conclusively negate causation. (*Ibid.*)

The *Reeves* court relied on *Clark, supra*, 6 Cal.App.4th 639, which held that a plaintiff claiming discrimination need not prove intentional discrimination at every stage of the academic tenure review process because the jury could conclude that an evaluation based on discrimination at any level of the process "'influenced the decisionmaking process and thus allowed discrimination to infect the ultimate decision." [Citation.]'

[Citations.]" (*Reeves*, *supra*, 121 Cal.App.4th at p. 108, quoting *Clark*, at pp. 665–666; *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 421 [because defendant's vice president was a motivating force in adverse employment decision, his animus was imputed to employer].)

We are satisfied that Betson raised triable issues of fact as to Lorenzana's role in her discharge, and also as to whether his animus was imputed to Rite Aid. She presented sufficient evidence to overcome summary judgment on a theory that Lorenzana's comments established direct evidence of discrimination.

V

Alternatively, Betson argues that she raised sufficient circumstantial evidence of discrimination to preclude summary judgment. Claims of discrimination in violation of FEHA are resolved under the *McDonnell Douglas*[10] three-stage test: "[T]he employee must first establish a prima facie case of discrimination, showing '"'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 . . . ."'"' [Citation.] Once the employee satisfies this burden, there is a presumption of discrimination, and the burden then shifts to the employer to show that its action was motivated by legitimate, nondiscriminatory reasons. [Citation.] A reason is '"legitimate"' if it is '*facially unrelated to prohibited bias*, and which if true, would thus preclude a finding *of discrimination*.' [Citation.] If the employer meets this burden, the employee then must show that the employer's reasons are pretexts for discrimination, or produce other evidence of intentional discrimination. [Citation.]" (*Reid*, *supra*, 50 Cal.4th at p. 520, fn. 2, quoting *Guz*, *supra*, 24 Cal.4th at p. 354.)

A. Prima Facie Case

The California Supreme Court has followed the United States Supreme Court in concluding that the specific elements of a prima facie case of discrimination may vary depending on the facts of the case. (*Guz*, *supra*, 24 Cal.4th at p. 355, citing *Texas Dept.*

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[10] *McDonnell Douglas*, *supra*, 411 U.S. 792.

of Community Affairs v. Burdine (1981) 450 U.S. 248, 253, fn. 6.) An employee """may raise a presumption of discrimination by presenting a 'prima facie case,' the components of which vary with the nature of the claim, but typically require evidence that '(1) [the plaintiff] 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* [*v. Bechtel National, Inc.*], *supra*, at p. 355.)" (*McCaskey v. California State Automobile Assn.*, *supra*, 189 Cal.App.4th at p. 979.)

1. Second Prong, Competent Performance

Rite Aid asserts that Betson failed to raise a prima facie case of discrimination because she cannot satisfy the second prong of the test, that she was performing competently in the position she held. It bases this contention on the claim that Betson violated company policies and committed misconduct in her handling of the three customer refund transactions investigated by Storm. Rite Aid acknowledges that Betson declared she processed these transactions in conformity with her training and the policies regarding customer refunds at the Beverly Hills store. But it contends that Betson failed to present any evidence that store practice and policies allowed an employee to issue refunds where no customer was present or to place a return receipt in her own pocket.

But courts have drawn a distinction between misconduct which is allegedly the basis for the adverse employment decision and the ability of a plaintiff to perform job duties: """[M]isconduct is distinct . . . from the issue of minimal qualification to perform a job. An individual may well have the ability to perform job duties, even if her conduct on the job is inappropriate or offensive. Accordingly, the finding of misconduct here cannot preclude [the plaintiff] from showing her qualification for employment as required by *McDonnell Douglas*." [Citation.]' (*Sista* [*v. CDC Ixis North America, Inc.* (2d Cir. 2006) 445 F.3d 161,] 171–172.)" (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 168.)

In addition, Betson submitted evidence raising a triable issue of fact as to whether she engaged in misconduct. We have discussed the refund policies on which Rite Aid relies above. Betson cited deposition testimony in which Lorenzana was asked whether he had trained shift managers that they could override policy at times. He answered: "Sometimes." Lorenzana was asked if there was any policy that prevented shift supervisors "from waiting till [*sic*] they had time to actually process the return till after the customer's already gone; in other words, give a customer their cash back but actually putting the return through their cash register after the customer is gone?" Lorenzana answered: "No." In addition, Lorenzana was asked whether there was a potential legitimate explanation for why Betson handled the refunds as she did. He said he did not know. Storm provided a declaration in opposition to the motion for summary judgment stating that his investigation of Betson was "ultimately inconclusive." He also said "9. I did not arrive at conclusive findings of wrongdoing and did not communicate such to Mr. Granillo." This evidence was sufficient to raise a triable issue of fact as to whether Betson actually committed misconduct in processing the challenged transactions, one element of the prima facie case.

2. Treatment of Similarly Situated Individuals

Alternatively, Rite Aid contends Betson cannot establish an additional element, that other similarly situated individuals outside of the protected class did not suffer from the same adverse action. It cites *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 991, and other cases which have included this step in the prima facie case which must be made by an employment discrimination plaintiff.

In support of its contention that Betson cannot show similarly situated employees were treated differently, Rite Aid cites an incident report completed by Storm regarding his investigation of the Beverly Hills store in December 2008. In addition to Betson, Storm focused on four other employees: Steven Laurel, Miriam Minero, Antonio Nunez, and Mon Mon Yae. When interviewed by Storm and Chris Ojeda, Laurel admitted he had passed out merchandise to other employees, signed a written statement of theft, and signed a promissory note for $1,000. Minero admitted to completing fraudulent refunds

and taking the cash as well as putting fraudulent refunds on Rite Aid gift cards. She provided a written statement of theft and signed a promissory note for $800. Nunez admitted to passing out merchandise to other associates and friends. He said he rang up merchandise without tax. He also provided a statement of theft and signed a promissory note. The fourth employee, Yae admitted mishandling a coupon for her grandmother to generate a gift card. Granillo declared that he made the decision to terminate three of these employees for giving merchandise to customers (friends and other employees).

In contrast to these employees who admitted wrongdoing, here Betson denied misconduct. Storm declared that his investigation as to Betson was inconclusive and that he had not reported conclusive findings of misconduct by Betson to Granillo. He also said: "2. At the Beverly Hills Rite Aid, exceptions were made for long time customers. [¶] 3. Without audio, it cannot be determined whether an object passed over the scanning area has actually been scanned. [¶] 4. Ms. Betson's claim to Mr. Granillo, of transferring cash from a refund to another cashier whom she had processed the refund for can be neither verified nor disproven by reference to the computer compiled reconciliation reports I was shown. [¶] 5. The several cases of under-ringing or giveaways were not equivalent to refund fraud. [¶] 6. I did not tell Mr. Granillo that they were. [¶] 7. I concluded my investigation of Mr. Lorenzana with a finding that fraud had been committed; in my estimation, that was conclusive grounds for termination."

Based on this record, Betson has demonstrated that she was not similarly situated with the other four employees terminated as a result of Storm's investigation of the Beverly Hills store. She did not admit guilt. There is evidence that Storm stated his investigation of her conduct was inconclusive. Storm did not tell Granillo he had reached conclusive findings of Betson's wrongdoing. The evidence submitted by Betson was sufficient to raise a prima facie case of discriminatory treatment.

B. Legitimate Nondiscriminatory Reason for Termination

Since Betson satisfied her burden of demonstrating a prima facie case of discriminatory conduct, the burden shifted to Rite Aid to show that its decision to terminate her was motivated by a legitimate, nondiscriminatory reason. (*Reid*, *supra*,

50 Cal.4th at p. 520, fn. 2.) Rite Aid submitted evidence regarding Storm's investigation of the three transactions handled by Betson, and of Granillo's decision to terminate her for misconduct after discussing the investigation with Storm. This evidence articulated a legitimate nondiscriminatory reason for firing Betson: dishonesty. Under *McDonnell Douglas*, *supra*, 411 U.S. 792, the burden then shifted back to Betson to "show that [Rite Aid's] reasons are pretexts for discrimination, or produce other evidence of intentional discrimination." (*Reid*, at p. 520, fn. 2.)

C. Pretext

The triable issue regarding Lorenzana's role in Betson's termination is determinative of the question of pretext under both the cat's paw doctrine we have discussed, and the stray remarks doctrine.

The California Supreme Court recently approved the cat's paw analysis in *Reid*. The issue arose in the context of the admissibility of "stray remarks" in an employment discrimination action. In a concurring opinion in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228 (*Price Waterhouse*), Justice O'Connor stated that "'stray remarks'—'statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself'—do not constitute direct evidence of decisionmakers' 'substantial negative reliance on an illegitimate criterion in reaching their decision.'" (*Reid*, *supra*, 50 Cal.4th at p. 536, quoting *Price Waterhouse* at p. 277.) Although this doctrine has been adopted by federal circuit courts, the California Supreme Court rejected it. (*Reid* at pp. 536–537.) It cited four reasons for this conclusion.

First, strict application of the stray remarks doctrine would result in the exclusion of relevant evidence. The court concluded: "An age-based remark not made directly in the context of an employment decision or uttered by a nondecision maker may be relevant, circumstantial evidence of discrimination. (*Shager*[, *supra*,] 913 F.2d 398, 402 . . . .)" (*Reid*, *supra*, 40 Cal.4th at p. 539.) The *Reid* court also cited a later decision authored by Justice O'Connor, *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133 (*Reeves*), which held that it is for the fact finder, rather than the court, to determine the probative value of discriminatory remarks which can be considered stray

remarks because they were not made in the direct context of the decisional process. (*Reid*, at pp. 539–540, citing *Reeves*, at pp. 148, 153–154.) The California Supreme Court emphasized that "in ruling on a motion for summary judgment, 'the court may not weigh the plaintiff's evidence or inferences against the defendant's as though it were sitting as the trier of fact.' (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 856.)" (*Reid*, at p. 540.)

The *Reid* court rejected Google's argument that ambiguous remarks were "stray, irrelevant, prejudicial, and inadmissible" (*Reid*, *supra*, 50 Cal.4th at pp. 540–541, quoting *Shager*, *supra*, 913 F.2d at p. 402 . . . ["'task of disambiguating ambiguous utterances is for the trial, not for summary judgment''].) It emphasized that determining the weight of discriminatory or ambiguous remarks "is a role reserved for the jury." (*Id.* at p. 541.) The court in *Reid* also concluded that a rule excluding stray remarks would run afoul of the admonition in Code of Civil Procedure section 437c, subdivision (c) that courts "'shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence.'" (*Ibid.*) It acknowledged that a stray discriminatory remark alone may not create a triable issue of discrimination. (*Ibid.*) "But, when combined with other evidence of pretext, an otherwise stray remark may create an 'ensemble [that] *is* sufficient to defeat summary judgment.' (*Shager*, *supra*, 913 F.2d at p. 403, italics added.)" (*Reid*, at p. 542.)

The Supreme Court held that "discriminatory remarks by a nondecisionmaking employee *can* influence a decisionmaker," citing the cat's paw doctrine as announced in *Shager*, *supra*, 913 F.2d at p. 405. (*Reid*, *supra*, 50 Cal.4th at p. 542.) It affirmed the decision by the Court of Appeal considering assertedly stray discriminatory remarks by decisionmakers and coworkers, reversing summary judgment for the employer. (*Id.* at p. 545.) The *Reid* court noted that two of the persons who made the "so-called 'stray remarks'" supervised the plaintiff and were involved in the termination decisions, "thus calling into question" whether the ageist comments "even qualify as stray remarks." (*Ibid.*)

Here the evidence raised a triable issue of fact as to whether Lorenzana's discriminatory remarks and demonstrated animus influenced the decision to terminate Betson. There was evidence from which a trier of fact could conclude that Betson was not actually terminated for mishandling refunds. Betson denied mishandling the refunds; Storm declared that his investigation of Betson was inconclusive, and he did not tell Granillo otherwise; Lorenzana testified that he trained shift supervisors that sometimes they were to override policy, and there was no policy preventing shift supervisors from putting a refund through the cash register after the customer was gone. Betson raised a triable issue as to pretext sufficient to overcome summary adjudication on her cause of action for discrimination based on disability.

D. Age Discrimination and Harassment

As we have noted, the trial court also granted summary adjudication on Betson's causes of action for age discrimination and harassment. We found no argument regarding these causes of action in Betson's briefs on appeal, and at oral argument, counsel for Betson confirmed that she is not pursuing these causes of action. We treat these issues as abandoned. (*Ortega v. Topa Ins. Co.* (2012) 206 Cal.App.4th 463, 473, fn. 9.)

In summary, we recognize that the ultimate trier of fact may chose not to credit the inference of discriminatory conduct by Rite Aid. But if there is a triable issue of material fact on that issue, it must be resolved by trial, not summary adjudication. "[I]n ruling on a motion for summary judgment, 'the court may not weigh the plaintiff's evidence or inferences against the defendant's as though it were sitting as the trier of fact.' (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 856.)" (*Reid*, *supra*, 50 Cal.4th at p. 540.)

VI

The trial court also granted summary adjudication on Betson's twelfth cause of action for discrimination based on exercise of her right to take CFRA leave. The gravamen of this cause of action is identical to her causes of action for retaliation, which we address next. She alleged that Rite Aid terminated her "in substantial part" on the basis of her needs due to her health condition. Betson alleges that Rite Aid was aware

her condition had required her to take time off of work and could require her to do so in the future. She alleges that Rite Aid did not want to retain employees who needed to take such leave.

"An employee who takes CFRA leave is guaranteed that taking such leave will not result in a loss of job security or other adverse employment actions. (Gov. Code, § 12945.2, subd. (1); Cal. Code Regs., tit. 2, § 7297.7, subd. (a).)" (*Rogers*, *supra*, 198 Cal.App.4th at p. 487.) California courts rely on cases interpreting the federal Family Medical Leave Act (FMLA), 29 U.S.C. § 2601 et seq., because the CFRA closely parallels FMLA. (*Rogers*, *supra*, 198 Cal.App.4th at p. 487.) "Violations of the CFRA generally fall into two types of claims: (1) 'interference' claims in which an employee alleges that an employer denied or interfered with her substantive rights to protected medical leave, and (2) 'retaliation' claims in which an employee alleges that she suffered an adverse employment action for exercising her right to CFRA leave. [Citations.]" (*Id.* at pp. 487–488.)

Rite Aid argues it was entitled to summary adjudication because Storm and Granillo were unaware that Betson had taken a leave of absence, once again characterizing them as the only persons involved in the decision to terminate Betson. We already have concluded that Betson raised a triable issue of material fact as to whether Lorenzana, the store manager, was involved in the decision to terminate her. As store manager, he was aware of Betson's medical leave.

Alternatively, Rite Aid argues that Betson did not raise a triable issue of fact regarding causation. It argues, in effect, that Betson's mishandling of the customer refunds was an intervening cause of her termination. It also contends that Betson's only evidence that her termination was the product of discrimination is that she was terminated only 23 days after she returned from medical leave. Rite Aid asserts that mere temporal proximity between the protected activity (taking leave) and the termination is not enough to raise a triable issue regarding retaliation.

Betson has raised a triable issue of material fact as to whether Rite Aid's claim that she was terminated for mishandling refunds was pretextual. This precludes summary

adjudication of the leave discrimination claim. In addition, as we have discussed, Betson does not rely solely on temporal proximity to establish she was discriminated against by Lorenzana. She also presented evidence of his continuing hostility, both before and after her leave. Triable issues of fact preclude summary adjudication of the discrimination claim under CFRA.

VII

Betson's second cause of action was for retaliation based on disability in violation of FEHA and the FMLA, 29 CFR section 825.[11] She alleged: "Had plaintiff not required time off to care for her medical condition, she would have retained her job for a substantially longer time and obtained benefits that other employees who did not have physical disabilities did, in fact, receive." Betson's fourteenth cause of action is based on her claim that Rite Aid retaliated against her for taking CFRA leave.

Rite Aid argues that it is entitled to summary adjudication on this claim because Betson never complained about discrimination or harassment to anyone at Rite Aid other than coworkers and therefore there could be no retaliation for unmade complaints. It appears that the conduct on which this cause of action is based does not fall within the definition of retaliation under FEHA in Government Code section 12940, subdivision (h).[12] Summary adjudication on the second cause of action was proper.

But Betson submitted sufficient evidence to overcome summary adjudication on her fourteenth cause of action for retaliation under the CFRA based on the same conduct. "A plaintiff can establish a prima facie case of retaliation in violation of the CFRA by

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[11] At oral argument, counsel for Betson explained that the federal FMLA was cited in error in the first amended complaint. She makes no claim under that statute on appeal. To the extent she alleged a cause of action under this statutory scheme, we treat it as abandoned. (*Ortega v. Topa Ins. Co.*, *supra*, 206 Cal.App.4th at p. 473, fn. 9.)

[12] Government Code section 12940, subdivision (h) provides that it is an illegal employment practice: "For any employer, . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

showing the following: (1) the defendant was a covered employer; (2) the plaintiff was eligible for CFRA leave; (3) the plaintiff exercised his or her right to take a qualifying leave; and (4) the plaintiff suffered an adverse employment action *because he or she exercised the right to take CFRA leave*. [Citation.]" (*Rogers*, *supra*, 198 Cal.App.4th at p. 491.)

Rite Aid claims it was entitled to summary adjudication on this cause of action for the same reasons advanced as to Betson's claim for leave of absence discrimination: (1) the temporal proximity between Betson's return from her leave and termination is not sufficient to establish causation; (2) Betson's misconduct occurred after she returned from leave; and (3) Storm and Granillo were "wholly unaware that Betson had taken a leave of absence." As we concluded in part VI of our discussion, Betson raised triable issues of material fact as to each of these grounds, precluding summary adjudication of the cause of action for retaliation in violation of the CFRA.

VIII

Betson argues the trial court erred in granting summary adjudication of her eleventh cause of action for compelled self-defamation. She alleged that Rite Aid "falsely informed Betson that she was being terminated for stealing, knew that Betson would be forced to inform others of why Rite Aid claimed that she had been fired and in fact Betson told others what Rite Aid said to her. These statements were both unprivileged and false." Betson alleged that she had to republish these statements when she applied for other work and was asked why Rite Aid terminated her.

"In some cases, the originator of a statement may be liable for defamation when the person defamed republishes the statement, provided that the originator 'has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its contents. [Citations.]' (*McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 796.) However, this rule 'has been limited to a narrow class of cases, usually where a plaintiff is compelled to republish the statements in aid of disproving them.' (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277,

1285.) Moreover, the originator of the statement must foresee the likelihood of compelled republication when the statement is originally made. (*McKinney v. County of Santa Clara*, *supra*, 110 Cal.App.3d at p. 798.)" (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 497.)

At deposition, Betson testified that she did not know whether Rite Aid had provided a negative reference about her to any prospective employer. In *Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, the court held that the plaintiff had failed to raise a triable issue of fact that there was a "'strong compulsion'" to republish the defamatory matter to prospective employers "because he failed to show there was ever any 'negative job reference'" attributable to the employer that he had to explain. (*Id*. at p. 373.) On this ground, we conclude that summary adjudication was proper.

IX

The trial court granted summary adjudication on Betson's claim for punitive damages based on Civil Code section 3294, subdivision (b) (section 3294). A plaintiff is entitled to punitive damages under that statute for breach of a noncontractual obligation if it is shown by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. Where the defendant is a corporation, a further finding is required: "Subdivision (b) states, in relevant part, that an employer shall not be liable for punitive damages based on an employee's acts 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.' The statute includes an additional qualification for corporate employers, who may not be liable for punitive damages unless 'the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice [is] on the part of an officer, director, or managing agent of the corporation.' (§ 3294, subd. (b).)" (*White v. Ultramar* (1999) 21 Cal.4th 563, 566, fn. 1 (*White*).)

The Supreme Court has narrowly interpreted "managing agent" in the context of section 3294 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. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White*, *supra*, 21 Cal.4th at pp. 566–567.) The *White* court explained that the authority to hire or fire is not determinative of the managing agent issue. "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*Id*. at p. 577.)

Betson claims she satisfied this requirement through the testimony of John Acosta, a Rite Aid district manager, in another case, *Martinez v. Rite Aid* (LASC Case No. BC401746). But she provides no citation to the record on this appeal to support this assertion and we therefore treat it as forfeited. (See *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.) Betson argues there is a factual issue about whether Rite Aid ratified Lorenzana's actions. But section 3294 expressly provides that punitive damages may be based on a ratification theory only if the ratification is on the part of an officer, director, or managing agent of the corporation. Rather than identifying such an officer, director, or managing agent who ratified Lorenzana's conduct, Betson claims that Rite Aid's continued employment of Lorenzana is sufficient. She cites *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 852 in support of this proposition. The case is inapposite because it arises in the context of liability for sexual harassment from the conduct of a supervisor, rather than corporate liability for punitive damages under the express language of section 3294, subdivision (b). The second case she cites, *Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal.App.3d 908, 915, was decided before subdivision (b) was added to section 3294 in 1980. (Stats. 1980, ch. 1242, § 1, p. 4217; see discussion of legislative history in *White*, *supra*, 21 Cal.4th at pp. 571–572.) It does not apply in light of the 1980 amendment to section 3294.

We conclude the trial court properly granted summary adjudication of Betson's claim for punitive damages.

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The trial court granted judgment notwithstanding the verdict on Betson's claim of disability harassment. It did so on the ground that she did not prove damages as a result of the harassment, an essential element of her claim. We emphasize that by the time of trial, Betson's causes of action relating to her termination, as contrasted with her treatment before that point, had been the subject of summary adjudication in favor of Rite Aid. The issue at trial on her cause of action for disability harassment was the damages she suffered as a result prior to her termination.

"The trial court may grant a JNOV only if the evidence, viewed most favorably to the prevailing party, is insufficient to support the verdict. [Citation.] As a general rule, an appellate court reviewing a JNOV also considers whether sufficient evidence supports the verdict. (*Ibid.*)" (*Cadam v. Somerset Gardens Townhouse HOA* (2011) 200 Cal.App.4th 383, 388.)

At trial, Betson testified that between her injury and the surgery, "for someone to come and humiliate you on a daily basis, telling you, calling you all of these names, it hurts a lot. [¶] And I was so stressful that every time I go home at night, I would cry and cry." She said after surgery, when Lorenzana told her she was too slow, she was sad and said it "hurt." During this period, Betson testified that when she left work, she called her sister and a friend and told them she did not know why Lorenzana was treating her this way and that she did not know what she had done wrong. And she "would cry and cry, like [she] couldn't stop." After her injury, she said "I felt like an outsider. I felt alone. Shunned. I felt ignored. Ashame. [*sic*] There was time when my stomach felt tense. I couldn't eat. I would lie in my bed at night. I couldn't sleep thinking about all of the things that [Lorenzana] have done to me and said to me that is very hurtful. I felt like nobody wanted me. Like I was—like nothing that I did was right."

At trial, Betson was impeached with an excerpt from her videotaped deposition, which was played to the jury: "Q. Ms. Betson, have you experienced any sort of

emotional issue as a result of your termination? A. Yes. Q. And what issues have you had? A. Depression, hard to focus, hard to remember, embarrassment, shock, anxiety, angry, sleeplessness, fright, hurt, nervousness, eating problem, and others. Q. Do you recall specifically what other issues you've had? A. No. Q. Did you have any of these issues before your termination? A. No."

Rite Aid argues that Betson's trial testimony regarding her emotional distress damages *before* her termination must be disregarded as contradictory of her deposition testimony that she did not have emotional distress symptoms *before* she was terminated, citing the *D'Amico*, *supra*, 11 Cal.3d 1, line of authority. We note that she did not seek to correct her deposition transcript to change this testimony regarding damages. We agree that Betson cannot contradict her deposition testimony that she did not suffer emotional distress damages before her termination by testifying to the contrary at trial.

Betson asserts that Rite Aid waived this issue because it did not object during her trial testimony about damages, asserting that the defense: "kept quiet and chose to impeach Betson, gambling on a favorable jury verdict by calling her a liar." We find no merit to this novel argument. The defense was entitled to impeach Betson with her deposition testimony on cross-examination, as it did.

It is logical that the jury inferred that if the harassment evidence is credited—as it was—that Betson was in distress as a result.

Betson cites the testimony of her sister, Ethlemae Dorothy Betson.[13] This witness was asked whether Betson's attitude changed after she returned to work. She explained: "My sister's ways changed. I observed if I ask her to take me to the store, she would take me but she don't go inside. She so ashame. [*Sic*.] She always depressed. She always crying." Defense objections were sustained to the two other portions of Ethlemae's testimony cited by Betson. In these passages, Ethlemae testified that when Betson returned to work after her injury she was "always depressed with the name calling.

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[13] We refer to Ms. Betson as "Ethlemae" to avoid confusion with plaintiff Betson and intend no disrespect.

Calling her one-legged." In the second passage, Ethlemae testified that when Betson returned to work, "every day she would call me crying with all the stuff that goes on." Although the jury instructions are not part of the record on appeal, we assume that the jury was instructed to disregard any answer given when the court sustained an objection. (CACI No. 5002.)

Betson also cites the testimony of her expert witness, psychiatrist Warren Procci. He testified that the actions of Rite Aid managers contributed to Betson suffering from a major depressive disorder. He explained that this is a major psychiatric illness in which a person experiences depressive symptoms beyond the usual level of unhappiness or feeling blue. A person suffering from a major depressive disorder feels depressed nearly every day, for months, with sleep and appetite disturbance, loss of energy, and feelings of worthlessness. Betson had these symptoms. Dr. Procci said Betson also had symptoms of post traumatic stress disorder: "I thought she found herself thinking about some of the painful events associated with what happened in the employment situation, some of the events particularly after she was back on the job in December where she experienced the former supervisor as making fun of her or harassing her or saying things that were unpleasant to her."

Rite Aid argues that Dr. Procci's opinion cannot support an award of emotional distress damages because he "withdrew" his opinion on cross-examination. This argument is based on Dr. Procci's response when defense counsel read him the portion of Betson's deposition testimony (quoted above) in which she said that she had not suffered from a number of emotional distress symptoms *before* her termination. Dr. Procci had not seen this testimony before reaching his conclusions regarding Betson's condition, and agreed that it would have been helpful to have read Betson's deposition. Rite Aid's claim that Dr. Procci withdrew his opinion is based on his answer when asked: "Given your professional experience, your reputation, all the years that you have invested in your career, you want to go back to your office and consider this information, obtain more information, possibly evaluate Ms. Betson further, and reconsider the opinion that you're giving in this case?" He answered: "Yes."

Betson points out that Dr. Procci's testimony was not stricken or recanted. The jury was allowed to consider all of it. She cites to Dr. Procci's testimony later during cross-examination: "Q. In other words, Ms. Betson was fine before the termination of her employment according to her own perception of her feelings and well being; correct? A. I wouldn't necessarily say that." He later explained that in the deposition, Betson was saying that she did not have what she would identify as emotional issues. He said: "That's not the same as asking her her state of mind, her state of emotion, what she might be thinking, what she might be feeling, how she might have understood what was going on at that time." On redirect, Dr. Procci testified: "I think it's relatively common for individuals and oftentimes particularly very hard working individuals and individuals such as Ms. Betson . . . coming here to the country getting a job and working very hard to move herself up to in one degree or another minimize the presence of psychological symptoms."

"'A motion for JNOV may be granted only when there is no substantial evidence to support the verdict, viewing the evidence in the light most favorable to the party securing the verdict. [Citation.] "If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied." [Citations.] The court resolves all conflicts in the evidence and draws all reasonable inferences in favor of the verdict. [Citation.] "As in the trial court, the standard of review is whether any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion." [Citation.]'" (*Hartt v. County of Los Angeles* (2011) 197 Cal.App.4th 1391, 1401–1402.) We conclude the trial court erred in granting judgment notwithstanding the verdict in light of the testimony of Ethlemae Betson and Dr. Procci regarding emotional distress suffered by Betson as a result of harassment.

DISPOSITION

We reverse the order for summary adjudication with respect to the causes of action for disability discrimination, CFRA leave discrimination, and retaliation for taking CFRA leave. The order is affirmed as to the causes of action for age discrimination and harassment, retaliation on the basis of disability under FEHA, compelled self-discrimination, and punitive damages. We also reverse the order granting judgment notwithstanding the verdict on the cause of action for harassment based on disability. Betson is to have her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.