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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROBERT LEGGINS, Plaintiff and Respondent, v. RITE AID CORPORATION and THRIFTY PAYLESS, INC., Defendant and Appellant.	B267434 (Los Angeles County Super. Ct. No. BC511139)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed in part and reversed in part.

Morgan, Lewis & Bockius, Thomas M. Peterson, Barbara A. Fitzgerald, Jason S. Mills and Kathryn T. McGuigan, for Defendant and Appellant.

Shegerian & Associates, Inc., Carney R. Shegerian and Jill P. McDonell, for Plaintiff and Respondent.

A jury found that Rite Aid Corporation harassed, discriminated against, and wrongfully discharged Robert Leggins, a store manager, based on his disability, retaliated against him for his complaints about harassment and discrimination based on race and disability, and failed to prevent discrimination. It awarded him $3,769,128 in compensatory damages and $5 million in punitive damages. Rite Aid appeals, arguing insufficient evidence supported the verdict, the award of punitive damages was improper, and the trial court made evidentiary errors.

We conclude insufficient evidence supported both the punitive damages award and the jury's finding that Leggins was harassed because of his disability. We further conclude the trial court made evidentiary errors, but they were harmless. We therefore reverse the punitive damages award but otherwise affirm.

BACKGROUND

As this matter is before us on appeal from a judgment in favor of Leggins after a jury trial, we view the evidence in favor of the judgment. (*Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 694 (*Roby*).)

I. Leggins's Employment

Rite Aid operates retail stores, each of which comprises a pharmacy and a "front end" store selling general merchandise. Leggins worked for Rite Aid and its predecessor, Thrifty Payless, from 1985 until 2013. He was a store manager for 25 years, from 1988 to 2013.

A manager's work involved physical labor, as a store typically received dozens of pallets of inventory weekly, which must be unloaded and stocked. From 1996 to 2006, Leggins often

performed physical labor for 40 to 45 percent of his day, increasing in later years to up to 80 percent.

Each store manager reported to a district manager overseeing 10 to 15 stores in a region. Each region also had a human resources (HR) district manager who addressed personnel issues.

A manager's performance was evaluated on sales, profitability, customer service, and employee relations. Rite Aid policies required that managers recognize and praise store employees and treat them with respect. Any employee complaint about a manager could be lodged directly with the HR district manager.

From 1985 to 2010, no employee complaints were lodged against Leggins, and he received only positive job performance reviews.

On August 28, 2006, Leggins sustained serious injuries to his neck and left shoulder when he was beaten during a robbery at a Rite Aid store in Hollywood. He returned to work seven months later but suffered severe pain that sometimes made it difficult for him to walk and use his left arm and leg. Leggins nevertheless worked full time for the next six years, sometimes 15 to 16 hours a day, and often came to work on his days off. He received cortisone shots, took "very heavy" pain medication, and underwent acupuncture treatments. He notified his regional manager, John Petit, of the pain and medical issues, and requested that he be assigned to a lower volume store, which Petit ultimately granted.

Leading up to 2010, Leggins was treated by several different doctors for pain management, continued to take pain medications, including cortisone and steroid injections, and

underwent acupuncture and chiropractic therapy. The pain interfered with work functions to the point that Leggins would at times withdraw to a stockroom so customers and employees would not see him break down.

Leggins informed Rite Aid's district and regional managers about the pain and his medications, and in August 2010 took a leave of absence to undergo surgery, where his third, fifth and seventh vertebrae were surgically fused. His recovery included traction, pain medication, a neck and head brace, and home nursing, with assistants for personal hygiene and daily needs. While recovering, Leggins updated Rite Aid regarding his medical status. He returned to work in January 2011 without restriction, but continued to experience extreme pain that required that he take pain medication at work and go to therapy during lunch breaks.

The condition of Leggins's store declined in his absence. Both the interior and exterior had deteriorated, and the stockroom was oversupplied with inventory that had not been rotated onto the sales floor. Leggins worked 15- to 16-hour days, and his days off, to get the store inspection ready.

On April 10, 2011, three months after Leggins's return, his district manager, Nick Gauger, inspected the store and wrote an evaluation in which he reported that "Leggins's lack of urgency and poor follow-through . . . led to consistent noncompliance relative to poor in-stock conditions, poor signage, and a lack of execution of company programs."

Leggins objected to the negative evaluation, complaining that the interim store manager that Gauger had assigned during Leggins's medical leave had siphoned employees to his own store to improve the conditions there, while allowing Leggins's store to

deteriorate, and it would have been impossible for anyone to rectify the situation in the three months between Leggins's return and Gauger's evaluation. He requested that more employees be assigned to his store, as the store was understaffed with only 11 to 13 employees, while a store nearby had 30. The request was denied, and Leggins was told instead to send some of his employees to the other store. Gauger also assigned Leggins himself to two other stores temporarily to help stock merchandise, ignoring Leggins's objection that he was still suffering major physical issues despite his surgery. Unable to raise his left arm above his head, Leggins worked one-handed.

In May of 2011, Leggins complained to Gauger and HR that he was still recovering from surgery and was unable to clear pallets and do heavy lifting, but Gauger told him, a "big Black guy like you? I mean, I thought you guys were tough. You know, stop being a sissy. . . . [S]top whining and crying." Gauger's visits to the store then became more frequent, and he told Leggins he was "cleaning house." Leggins asked for additional help, but Gauger expected the work to be done despite Leggins's physical limitations.

While lifting merchandise in other stores, Leggins again injured his shoulder and neck.

On several occasions, Leggins informed Rite Aid's HR investigator, Lenora Bejarano, that the extra physical work Gauger had assigned caused pain that Leggins treated by taking strong medications during lunch breaks. He stated Gauger had ignored his complaints, other than to assign him more physical work, called him a "sissy," and commented that Black men should be tougher. Bejarano did nothing in response, other than to tell

Leggins that a "big Black guy like [him was] very intimidating," a comment she repeated five to 10 times in this and later meetings.

After Leggins's complaint to Bejarano, Gauger escalated his harassment campaign. He visited Leggins's store more often, frequently when Leggins was absent, and spread rumors among the employees that Leggins was going to be fired. When Leggins inquired about the rumors, Gauger told him that for "a big Black guy" he "complain[ed too] much."

Bejarano, too, began appearing at the store on Leggins's days off to question employees about his performance as a manager. In response, Leggins showed Bejarano his surgery scar, told her about his daily pain, and asked for help, which he did not receive.

Leggins also complained to Bejarano's supervisor, Jody Moore, about his physical problems and their effect on his ability to work, about Gauger's and Bejarano's refusal to help, and about their racial comments. Moore did nothing.

Leggins was injured again on February 12, 2012, when shelves he was stocking collapsed. He reported the injury and was placed on medical leave for three months, during which his store again deteriorated. He informed Gauger of the store's decline in his absence, but nothing was done to slow it. Leggins returned to work in April 2012 without restrictions. Gauger gave him impossible tasks, and he was forced to come in early, stay late, and work on his days off, and when he asked Gauger for assistance, none came.

On June 19, 2012, Gauger again inspected Leggins's store and thereafter wrote an evaluation criticizing Leggins's customer service, communication skills, accountability, and employee training.

On July 27, 2012, Gauger initiated an advanced step in Rite Aid's disciplinary process, giving Leggins a "last-and-final write-up" that outlined the expectations of a store manager but contained no criticisms specific to Leggins. Leggins protested the de facto censure, arguing his store had deteriorated while he was on medical leave, and he was given no assistance after he returned.

Rite Aid then transferred Leggins to a store in Lincoln Heights.

The Lincoln Heights store was covered on the outside with gang graffiti, and the shopping carts had been stolen. Inside, the sales floor was in disarray and the stockroom overstocked and infested with mice. Employee morale was low, and several employee complaints had been made about Gloria Ramos, the assistant manager.

By December of 2012, Leggins had painted the store exterior, improved the stockroom, personally retrieved shopping carts from the community, and implemented effective customer service policies. However, he found Ramos to be uncooperative and abusive. When he spoke to her about employee complaints and her performance, she stated, "I don't have to listen to your old Black ass." Ramos told Leggins he had been transferred to the store "to be fired," and Gauger had told her she was going to be the next store manager. From August to December 2012, Ramos repeatedly called Leggins a "nigger" and used the phrase "old Black ass." Leggins complained about Ramos to Bejarano, Moore, and Sky Norris, Rite Aid's loss prevention manager, but they did nothing.

In August 2012, Gauger left Rite Aid's employ.

In December 2012, Jilbert Shahdaryan became Leggins's district manager. Leggins informed Shahdaryan about his health problems and Bejarano's failure to assist him. Shahdaryan offered no assistance, but compared Leggins to a drill sergeant and stated that a "big Black man" like him was "pretty intimidating." Leggins reported this treatment to Moore, who did nothing.

On December 17, 2012, Leggins was suffering from neck pain that radiated down his arm, which a physician had warned meant he should stop working. He therefore informed Shahdaryan in an email that he had to leave work early to take pain medication, and closed the store 14 minutes early, at 10:46 p.m. The district office, which normally returned schedules containing errors, accepted Leggins's holiday schedule.

Per the holiday schedule, Leggins's store closed at 5:00 p.m. on New Year's Day.

On January 21, Bejarano, Shahdaryan, and Norris suspended Leggins for closing his store five hours early on New Year's Day.

On February 6, 2013, he was fired for closing the store early.

After the termination, Leggins was devastated emotionally and financially. He was unable to find employment, his savings dwindled, and he was forced to sell his home of 20 years.

II. Lawsuit

In 2013, Leggins sued Rite Aid. After substantial law and motion practice resulting in a pared-down complaint, the matter proceeded to trial on causes of action for discrimination, retaliation and wrongful termination based on age, disability,

and race in violation of the Fair Employment and Housing Act. (Gov. Code, § 12900 et seq.; FEHA.)[1]

A. *Trial*

At trial, Leggins testified to the facts outlined above.

Bejarano, a Rite Aid HR manager, testified that in April 2012 she received an email from Rosie Barbosa forwarding an email from Farhana Parveen, an employee in Leggins's store. The Parveen email caused Bejarano to become concerned that Leggins was treating Parveen unfairly, and that she and other associates feared Leggins would retaliate against them for complaining. Bejarano also received complaints from hourly store supervisors working for Leggins, which caused her to have concerns about Leggins's behavior toward his employees.

Prompted by the communications, Bejarano initiated an investigation. She spoke with several employees and concluded there were multiple operational problems with Leggins's store, including its basic cleanliness. But more importantly, Leggins's employees were afraid to go to him with concerns, because he would be "abrupt" or "short" with them. Further, it appeared some employees did not want to work with Leggins, as they accepted schedules granting only 32 hours per week where they were contractually entitled to a 40-hour work week. Rite Aid had a policy, captioned "RAPTAR," of recognizing, appreciating, and praising employees and treating them with respect. Bejarano concluded Leggins was not "supporting the RAPTAR culture in the store at all." She concluded Leggins should be disciplined in writing and transferred to another store.

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[1] Undesignated statutory references will be to the Government Code.

In June 2012, Bejarano spoke with Leggins, counseled him on the deficiencies she perceived, and offered him a transfer to a lower volume store, which he accepted.

Bejarano testified she never used derogatory language toward Leggins, and he never told her about any personal physical problems that prevented him from working full time or doing his job. Nor did he inform her about any negative conduct toward him by Ramos or Gauger.

Bejarano testified that in July 2012, she, Gauger, and Moore visited Leggins's new store in Lincoln Heights to observe conditions there. Outside, she observed trash in the planters and parking lot and graffiti on the building. Inside, merchandise was in disarray and a new hazmat policy had not been implemented. On July 27, 2012, Bejarano issued Leggins a "last-and-final" evaluation reflecting his poor overall performance, to which he did not object.

Bejarano testified that in December 2012, she learned Leggins had closed his store 35 minutes early one night. When she asked Leggins about it, he informed her he had experienced pain that required that he take oxycodone, the side effects of which prevented his continuing to work that day. This was the first Bejarano learned that Leggins suffered any medical problem. Leggins informed her the medication did not impact his ability to do his job.

Bejarano testified that in January 2013, Ramos reported to her that Leggins had closed his store five hours early on New Year's Day. Bejarano spoke with seven to 10 employees and determined that no justification existed for closing the store early. She also concluded morale at the store was low, most of the employees feared Leggins, and none wanted to work there.

One month after initiating her investigation, Bejarano prepared a five-page report. She recommended that Leggins's employment be terminated due to (1) his closing the store early on New Year's Day and (2) his failure to resolve the issues that had resulted in his last-and-final warning. The report included 23 attachments supporting her conclusions, and was reviewed by Jody Moore, Rite Aid's senior HR representative, and forwarded to Chris Weinans, Rite Aid's senior associate advocacy manager responsible for reviewing personnel cases. Both Moore and Weinans testified they reviewed Bejarano's report and approved her recommendation.

Shahdaryan testified that Leggins's employment was terminated solely for his having closed his store early on New Year's Day.

B. *Verdict*

The jury found Rite Aid was not liable for race-based harassment, discrimination or termination; failure to prevent harassment; or retaliation or wrongful termination based on Leggins's medical leaves.

However, the jury found Rite Aid was liable for disability-based discrimination, retaliation and wrongful termination; retaliation and wrongful termination for complaints concerning race- and disability-based harassment; and failure to prevent discrimination.

The jury awarded Leggins $1,269,128 in economic damages, $1.5 million for past noneconomic loss, and $1 million for future economic loss. The jury also found that Rite Aid acted with malice, fraud, or oppression, and awarded $5 million in punitive damages. Thereafter, the trial court awarded Leggins $1,037,286 in attorney fees and $20,985.10 in costs.

The trial court denied Rite Aid's motions for new trial and judgment notwithstanding the verdict. Rite Aid timely appealed the judgment, the order addressing fees and costs, and an order amending the judgment.

DISCUSSION

I. Wrongful Discharge Based on Disability and Retaliation

The jury found Leggins was discharged both because he was disabled and because he complained about harassment.

Rite Aid contends insufficient evidence supported the jury's conclusions because (1) no substantial evidence indicated that Leggins suffered a "disability" within the meaning of FEHA, or that Rite Aid knew of any disability; (2) Leggins never complained about being harassed due to his disability; and (3) no evidence suggested that Leggins's complaints or disability were motivating factors in Rite Aid's decision to discharge him.

A. *Leggins's Disability and Rite Aid's Knowledge*

Rite Aid contends no substantial evidence indicated that Leggins suffered a "disability" within the meaning of FEHA, or that Rite Aid knew of any disability.

To prove discrimination based on disability, an employee must show both the fact of a disability and the employer's knowledge of it. (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 444.)

"Physical disability" includes, as pertinent here, any physiological disorder or condition that affects a musculoskeletal system and makes working difficult, either by itself or due to the effect of a mitigating measure (such as pain medication). (§ 12926, subd. (m).) The "touchstone of a qualifying handicap or disability is an actual or perceived physiological disorder which

affects a major body system and limits the individual's ability to participate in one or more major life activities." (*Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1061, superseded on another ground by § 12926.1, subd. (d).) "*[P]ain alone* without some corresponding limitation on activity *is insufficient* to establish a disabling impairment." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 348, first italics added.) However, "disabling" pain may constitute a disability. (Cf. *id.* at p. 347 [plaintiff failed to show pain was disabling].)

An employee must inform his employer that he has a disability. (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222.) An " ' "employer [is not] ordinarily liable for failing to accommodate a disability of which it had no knowledge." ' " (*King v. United Parcel Service, Inc.*, *supra*, 152 Cal.App.4th at p. 443.)

Here, Leggins testified he suffered from excruciating pain that restricted movement in his left arm, rendered him unable to lift items when stocking shelves, and impaired or threatened to impair walking. The pain required him to take medications that impaired his ability to work. He informed his regional and district managers about what he "was going through"; informed Gauger he was "having major issues physically" and was "unable to physically do the stuff that [he] normally do[es]"; informed Bejarano he was taking pain medications at lunch time and was at risk of reinjuring himself; informed Moore about his physical condition and stated he "wasn't able to do the work"; and attempted to tell Shahdaryan that he wanted to talk about the "situation with [his] health," but was told, "I don't want to hear it" and "I already know everything."

This testimony, which the jury believed, constituted substantial evidence both of a disability and Rite Aid's knowledge of it.

Rite Aid argues that not every illness or medical condition rises to a "disability," and Leggins offered no evidence that a physician identified him as suffering from a physical limitation. He had no doctor's note and made no request for an accommodation, but on the contrary repeatedly returned to work without restriction. Therefore, Rite Aid had no reason to believe Leggins was doing anything but "simply complaining about pain and numbness that had been coming and going for a year or more, but which did not affect the achievement of his job duties." (*Arteaga v. Brink's*, *supra*, 163 Cal.App.4th at p. 350.) We disagree. Leggins complained about restricted movement, inability to lift heavy items, occasional inability to work or walk, and incapacitating medications, and requested both help with stocking and transfer to a lower-volume store. His complaints and requests put Rite Aid on notice that he suffered from disabling pain that interfered with the performance of his job. Leggins's lack of a physician's note concerning work restrictions did not establish as a matter of law that he suffered from no disability; it was merely countervailing evidence the jury could weigh against his testimony.

B. *Protected Activity*

The jury found Leggins was not harassed because of his race. However, it found he *complained* to Rite Aid about race-based harassment, complained also about harassment based on disability, and was terminated because of his complaints. Rite Aid contends no evidence supported the jury's conclusion that Leggins was discharged due to his complaints *about disability*

harassment, because he never informed senior management that he had made such complaints, as the only evidence was that Leggins complained about race and age, not disability.

To state a claim of retaliation, a plaintiff must show (1) he engaged in a protected activity, (2) he was subjected to an adverse employment action, and (3) there is a causal link between the protected activity and the adverse action. (§ 12940, subd. (h); *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) An " 'employee is not required to use legal terms or buzzwords when opposing discrimination. The court will find opposing activity if the employee's comments, when read in their totality, oppose discrimination.' " (*Yanowitz*, *supra*, at p. 1047.)

Here, Leggins testified he complained to Bejarano about Gauger in 2011. When asked at trial why he did so, Leggins testified: "The reason why I did that was because I felt he was being very unfair. I said [I had] come off a major injury and I was asked to do these certain things and also sent to other stores. [¶] . . . When I was part of any of these stores and doing this work, because I could not do the physical work, I would tell Nick Gauger and he would make negative comments towards me. [¶] . . . [¶] 'Big Black guy like you? I mean, I thought you guys were tough. You know, stop being a sissy. You know, stop whining and crying.' "

Leggins also testified he complained to Moore that Gauger and Bejarano had ignored his complaints about race-based harassment and disability-based discrimination: "[I] complain[ed] that [Bejarano] did nothing regarding the information that I gave her on the harassment, the discrimination, . . . the issue that I had of my disability where I

wasn't able to do the work and [Gauger] was forcing me and having [me] go down to other stores. [¶] I explained that all to [Moore] and also explained that [Bejarano] is retaliating against me, I'm assuming because I complained, because she's using comments that 'Big Black guy like you is intimidating. I mean, look at your physique.' [¶] And she would come to the store and do investigations and she would be with [Gauger]. And I let her know that [he] is spreading rumors and saying that my days are numbered and I'm going to get fired. She did nothing about that at all. Nothing. [¶] [Moore] said he would investigate it, but nothing came of it."

Leggins's testimony constituted substantial evidence that he opposed unlawful employment practices—harassment due to race and disability.

Rite Aid argues the evidence showed only that Leggins complained "vaguely" about race, and although he mentioned inability to perform certain tasks, he did not complain specifically about harassment or discrimination based on disability. Even if correct, the point would be immaterial because Leggins's complaint about race-based harassment was protected even though the jury ultimately found no such discrimination occurred. (See *Yanowitz*, *supra*, 36 Cal.4th at p. 1043 ["a retaliation claim may be brought by an employee who has complained of or opposed conduct that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA"].)

In any event, Rite Aid mischaracterizes the evidence. Leggins testified he complained to Moore that Bejarano "did nothing regarding the information" he gave her "on the harassment, the discrimination, . . . the issue" regarding his

"disability," which rendered him unable "to do the work," but Gauger forced him to do it and sent him to other stores to help with work there. He testified he "explained that all to" Moore. This testimony permitted the jury to conclude Rite Aid terminated Leggins because he engaged in protected activity.

Rite Aid argues Leggins complained mainly about unfairness, not discrimination or unlawful harassment. The point is irrelevant. Evidence that an employee suffered an adverse employment action after complaining about both lawful and unlawful practices raises a question of fact to be decided by the trier of fact, not a question of law dispositive on appeal.

C. *Causation*

An employer may presumptively terminate an employee at will and for no reason. (Lab. Code, § 2922.) "A fortiori, the employer may act peremptorily, arbitrarily, or inconsistently, without providing specific protections such as prior warning, fair procedures, objective evaluation, or preferential reassignment." (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 350 (*Guz*).) But FEHA makes it unlawful to discharge a person from employment either because of the person's physical disability or because the person has opposed any unlawful employment practice. (§ 12940, subds. (a), (h).)

Because direct evidence of unlawful discrimination is seldom available, courts use a system of shifting burdens to aid in the presentation and resolution of such claims at trial. (*Guz*, *supra*, 24 Cal.4th at p. 354; *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 (*Hersant*).) To establish a prima facie case of physical disability discrimination under FEHA, the employee must demonstrate that (1) he was disabled, (2) he was qualified to do the job but was subjected to an adverse

employment action, and (3) "some other circumstance suggests discriminatory motive." (*Guz*, *supra*, at p. 355.) If the plaintiff establishes a prima facie case, a presumption of discrimination arises. (*Ibid*.)

The employer may rebut the presumption by producing admissible evidence that it discharged the employee for a legitimate nondiscriminatory reason. (*Guz*, *supra*, 24 Cal.4th at pp. 355-356; *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.) A legitimate reason is one that is "facially unrelated to prohibited bias, and which, if true, would thus preclude a finding of discrimination." (*Guz*, *supra*, at p. 358, italics omitted.) Making this showing is " 'not an onerous burden [citation], and is generally met by presenting admissible evidence showing the defendant's reason for its employment decision [citation].' " (*Swanson v. Morongo Unified School District* (2014) 232 Cal.App.4th 954, 965 (*Swanson*).)

If the employer carries its burden, the burden shifts back to the employee to produce substantial evidence that the employer's justification for its decision is either untrue or pretextual, or that the employer acted with discriminatory animus, or a combination of the two. (*Guz*, *supra*, 24 Cal.4th at p. 356; *Hersant*, *supra*, 57 Cal.App.4th 997 at pp. 1004-1005; *Swanson*, *supra*, 232 Cal.App.4th at p. 966 [employee burden to produce evidence from which " 'a reasonable trier of fact could conclude the employer engaged in intentional discrimination' "].)

To satisfy this burden, the employee may not "simply deny the credibility of the employer's witnesses or . . . speculate as to discriminatory motive." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 862.) Nor is it enough to show that the employer's reasons were unsound, wrong, or mistaken. (*Hersant*,

supra, 57 Cal.App.4th at p. 1005 ["What the employee has brought is not an action for general unfairness but for . . . discrimination"].) Rather, the employee " 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [the asserted] non-discriminatory reasons." [Citations.]' " (*Ibid*.) "[E]vidence that the employer's claimed reason is *false*—such as that it conflicts with other evidence, or appears to have been contrived after the fact—will tend to suggest that the employer seeks to conceal the real reason for its actions, and this in turn may support an inference that the real reason was unlawful. This does not mean that the fact finder can examine the employer's stated reasons and impose liability solely because they are found wanting. But it can take account of manifest weaknesses in the cited reasons in considering whether those reasons constituted the real motive for the employer's actions, or have instead been asserted to mask a more sinister reality." (*Mamou v. Trendwest Resorts, Inc*. (2008) 165 Cal.App.4th 686, 715.)

If, "considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory," the employer is entitled to judgment. (*Guz*, *supra*, 24 Cal.4th at p. 361.)

Here, Rite Aid claimed it terminated Leggins because he closed his store early on New Year's Day, 2013, contrary to company policy, and because he failed to resolve issues that led to advanced disciplinary action against him in July 2012. These are

certainly legitimate reasons facially unrelated to prohibited bias, and if believed would have precluded a finding of discrimination.

But the jury did not believe Rite Aid's reasons, and ample evidence supported its disbelief. First, Leggins also closed his store early on December 17, 2012, without consequence. And he informed Rite Aid before Christmas that he was going to close early on New Year's Day, and Rite Aid did nothing in response. The jury could reasonably infer from these facts that Rite Aid's policy against closing early was not absolute. Second, Leggins made great efforts and substantial progress in improving store conditions and employee relations from July to December 2012, which controverted Rite Aid's claim that he performed his job in an unsatisfactory manner. The jury could reasonably credit Leggins's characterization of his job performance and discredit Rite Aid's characterization. Third, Rite Aid repeatedly ignored and disparaged Leggins's disability and race, while at the same time professing scruples against his disrespectful treatment of employees. The jury could reasonably infer Rite Aid's solicitude for the employees in Leggins's store extended only to those who were not disabled. In sum, substantial evidence permitted the jury reasonably to discredit Rite Aid's justifications for terminating Leggins's employment, and therefore to infer discriminatory animus.

Rite Aid argues that an employee's subjective opinion about his job performance, and the opinions of his coworkers and former supervisors, are insufficient to controvert an employer's claim that the performance was unsatisfactory. We have no reason to quarrel with such a proposition. But here, Leggins described specific accomplishments that Rite Aid never acknowledged and specific complaints it never addressed, which permitted the jury

to infer it had an ulterior reason for disparaging his job performance.

Rite Aid argues that evidence of isolated offhand comments made about Leggins's race and infortitude, and Rite Aid's failure to prevent harassment, have no probative value because the jury found Leggins was not discriminated against due to his age, and further found Rite Aid did not fail to prevent harassment. The argument is without merit. In evaluating Rite Aid's credibility the jury was entitled to examine actions it took that contradicted its representations, whether or not those actions gave rise to independent liability.

II. Rite Aid's Improper Conduct Toward Leggins Failed to Demonstrate Sufficiently Severe or Pervasive Acts to Establish a Hostile Work Environment Claim

Rite Aid contends the evidence was insufficient to show Leggins was subjected to disability-based harassment severe or pervasive enough to create a hostile working environment. We agree.

FEHA prohibits an employer from harassing an employee due to disability. (§ 12940, subd. (j)(1).) "Courts have recognized two theories of actionable sexual harassment under FEHA. ' "The first is quid pro quo harassment, where a term of employment is conditioned upon submission to unwelcome sexual advances. The second is hostile work environment, where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment." ' " (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 141 (*Mokler*).) To create a hostile work environment, harassment must be sufficiently severe or pervasive " ' "to alter the conditions of [the victim's] employment and create an abusive working environment." ' "

(*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609 (*Fisher*).) Whether the "conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances. [Citation.] The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that [he] was actually offended." (*Id.* at pp. 609-610, fn. omitted.)

The factors to consider in evaluating the totality of the circumstances include the nature of the unwelcome acts, their frequency, the total number of days over which they occur, and the context in which they occur. (*Fisher*, *supra*, 214 Cal.App.3d at p. 610.) "In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Ibid.*) " 'The required level of severity or seriousness "varies inversely with the pervasiveness or frequency of the conduct." [Citation.] "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." ' " (*Mokler*, *supra*, 157 Cal.App.4th at p. 142.) "Thus, ' "[c]ourts have concluded that a hostile work environment existed where there was a pattern of continuous, pervasive harassment," ' " but " ' "have concluded that isolated instances of . . . harassment do not constitute a hostile work environment." ' " (*Id.* at pp. 142-143.)

The point at which incidents of harassment fall short of creating a hostile work environment actionable is illustrated in

the sexual harassment context in *Mokler*, *supra*, 157 Cal.App.4th 121. There, a supervisor harassed Mokler, an employee not directly under him, on three occasions over a five-week period. The first occurred when the supervisor asked about Mokler's marital status "and called her an 'aging nun' when he learned she was not married." (*Id.* at p. 144.) The second occurred a week later, when the supervisor "took Mokler by the arm, pulled her to his body, and asked, 'Did you come here to lobby me?' When she answered no, [the supervisor] responded: 'Why not? These women are lobbying me.' He told Mokler she had a nice suit and nice legs, and looked up and down at her." (*Ibid.*) The third occurred one month later, when the supervisor "told Mokler she looked nice and put his arm around her. He then asked Mokler where she lived, demanding to know her exact address. [The supervisor] again put his arm around Mokler and, as he did so, his arm rubbed against her breast." (*Ibid.*) The appellate court concluded these acts of harassment fell short of establishing " 'a pattern of continuous, pervasive harassment' " because they did not create a workplace " ' "permeated with 'discriminatory intimidation, ridicule and insult,' [citation] that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' " ' " (*Id.* at p. 145; see *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279 [harassment may give rise to liability when it creates a workplace "permeated with" " 'intimidation, ridicule, and insult' " that is " 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' "].)

The "law does not exhibit 'zero tolerance' for offensive words and conduct. Rather, the law requires the plaintiff to meet

a threshold standard of severity or pervasiveness." (*Etter v. Veriflo Corp*. (1998) 67 Cal.App.4th 457, 467.) " ' "[S]imple teasing," . . . offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." ' " (*Id*. at p. 463.) Courts must " 'filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." ' " (*Id*. at p. 464.)

Here, Gauger made comments to Leggins's employees that his "days are numbered." He ordered Leggins to perform physical work, knowing Leggins had just come off back surgery, and said, "Big Black guy like you? I mean, I thought you guys were tough. You know, stop being a sissy. You know, stop whining and crying." And on another occasion he said, "Stop complaining. A big Black guy like you complain so much. I mean, I thought you was a strong guy." These mild, isolated events cannot reasonably be construed as severe or pervasive. The jury found Leggins was not subjected to pervasive race-based harassment. We conclude he was likewise subjected to no pervasive disability-based harassment. Therefore, the judgment finding Rite Aid liable for creating a hostile work environment must be reversed.

III. Non-Economic Damages Were Not Excessive

Leggins testified he lost his home because Rite Aid terminated his employment, and he felt demeaned and devastated by his inability to obtain employment. Marita Leggins, his wife, testified he was no longer the same person since the termination and loss of their house. Two mental health experts, Drs. Halpern and Procci, testified Leggins suffered from severe "major depressive disorder" (MDD) caused by Rite Aid's

discrimination. And Dr. Halpern testified Rite Aid's termination of Leggins's employment reactivated the dormant post traumatic stress disorder (PTSD) he experienced after the 2006 robbery. The jury awarded Leggins $1.5 million in past noneconomic loss and $1 million in future noneconomic loss.

Rite Aid argues these damages were excessive, as Halpern also testified Leggins's mental health showed some improvement after he began therapy.

" 'The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial court on a motion for new trial. . . . [A]ll presumptions are in favor of the decision of the trial court [citation]. The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.' " (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 410 (*Kelly-Zurian*).)

Here, substantial evidence indicated that after his termination, Leggins suffered from severe mental distress, including MDD and reactivation of his dormant PTSD. Rite Aid does not dispute that Leggins suffers from mental distress, it merely argues the noneconomic damages award, which equated to 30 years of salary for Leggins, was "assuredly" excessive. But we have no metric by which to conclude the award of nonecomonic damages was so excessive as to shock the conscience. Accordingly, we decline to interfere with the jury's $2.5 million damage award, which the trial court left undisturbed on the motion for new trial.

IV. Economic Damages Were Not Excessive

At trial, Leggins's economist, Dr. Hunt, calculated Leggins's lost future earnings to ages 63.7, 65.7, and 67.7 would amount to $724,654, $879,525, and $1,031,346, respectively. Hunt additionally calculated that Leggins would suffer adverse tax consequences—of specified amounts corresponding to each of the three potential awards—if he was paid these damages in a lump sum, as his tax bracket would go from 14 to 44 percent. The jury awarded $1,055,915 in lost future earnings, which corresponded to no amount or combination of amounts identified by Hunt.

Rite Aid argues the award of future economic damages was excessive because the jury improperly adjusted the award to account for adverse tax consequences of a lump-sum payout. (See *Rodriguez v. McDonnell Douglas Corp*. (1978) 87 Cal.App.3d 626, 667-668 [evidence of tax consequences too speculative to support a damages award].) Nothing in the record supports the argument. The jury did not explain its award, and the award itself does not correspond exactly to any amount identified by Hunt, with or without adjustment for tax consequences. Assuming for argument that an award of future economic damages should not be adjusted to account for tax consequences, we have no basis upon which to conclude the award here was so adjusted.

V. Punitive Damages

Rite Aid contends it cannot be held liable for punitive damages based on the conduct of any supervisory employee involved in the termination of Leggins's employment. We agree.

Pursuant to Civil Code section 3294, a corporate employer may not be liable for punitive damages based on the acts of an

employee unless an officer, director, or managing agent of the corporation was personally guilty of oppression, fraud, or malice or "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." (Civ. Code, § 3294, subd. (b).)

The term "managing agent" in Civil Code section 3294 includes "only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy." (*White v. Ultramar* (1999) 21 Cal.4th 563, 566-567; accord *Kelly-Zurian*, *supra*, 22 Cal.App.4th at p. 422.) "Corporate policy" means the "formal policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate leadership. It is this sort of broad authority that justifies punishing an entire company for an otherwise isolated act of oppression, fraud, or malice." (*Roby*, *supra*, 47 Cal.4th at p. 715.) The "critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy." (*Kelly-Zurian*, *supra*, at p. 421 [the seniormost supervisor in a corporation's Southern California business, having no authority to set or change corporate policy, is not a managing agent]; accord *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1209.)

In *White v. Ultramar*, a regional director of a corporation operating throughout California oversaw eight retail stores and 65 employees. The individual store managers reported to the director, who in turn reported to department heads in the corporation's retail management department. Supervision of the eight retail stores was "a significant aspect of" the corporation's

business. The director's superiors testified "they delegated most, if not all, of the responsibility for running these stores to [the director]." (*White v. Ultramar*, *supra*, 21 Cal.4th at p. 577.) The Supreme Court concluded the director "exercised substantial discretionary authority over vital aspects of [the corporation's] business that included managing numerous stores on a daily basis and making significant decisions affecting both store and company policy." In wrongfully terminating an employee, the director "exercised substantial discretionary authority over decisions that ultimately determined corporate policy in a most crucial aspect of [the corporation's] business." (*Ibid*.) Therefore, the Court concluded, the director was a managing agent whose actions could subject the corporation to liability for punitive damages. (*Ibid*.)

Here, Gauger and Shahdaryan were district managers who oversaw 10 to 15 stores (out of approximately 4,000 nationwide) with about 300 employees. But no evidence in the record demonstrates that either exercised substantial independent decisionmaking that determined Rite Aid corporate policy. On the contrary, Gauger testified it was not a district manager's "position to set any Rite Aid policies."

Leggins argues that Victor Garcia, one of his subordinates who worked as a "stockman," testified that "as a district manager, [Gauger] had full authority to set policy within [his] district . . . the most powerful person overseeing the district." However, nothing in the records suggests that Garcia knew how Rite Aid's corporate policies were set or even that he was referring to corporate policy. Similarly, Tyrone Johnson, a Rite Aid store manager, also testified that district managers set "policies" within their districts. But nothing in Johnson's

testimony indicated he knew how Rite Aid corporate policy was formed or that he was speaking about corporate policy.

Leggins argues that *White v. Ultramar* held that discretionary authority exercised over a zone within a corporate organization suffices to confer managing agent status. He is incorrect. In that case, Ultramar, Inc., was a "large corporation that operate[d] a chain of stores and gasoline service stations throughout California." (*White v. Ultramar*, *supra*, 21 Cal.4th at p. 580 [concur. opn. Mosk, J.].) Lorraine Salla, a supervisor, terminated an employee in retaliation for his testimony at an unemployment compensation hearing. At trial, her superiors testified that "they delegated most, if not all, of the responsibility for running these stores to her." (*Id*. at p. 577.) The Supreme Court concluded: (a) "The supervision of eight retail stores and sixty-five employees [was] a significant aspect of Ultramar's business"; (b) "Salla exercised substantial discretionary authority over vital aspects of Ultramar's business that included . . . making significant decisions affecting . . . company policy"; and (c) her firing the employee constituted an exercise of "substantial discretionary authority over decisions that ultimately determined corporate policy in a most crucial aspect of Ultramar's business." (*Ibid*.)

The lesson to take away is that when a regional supervisor is granted substantial discretionary authority over vital aspects of a corporation's business, the supervisor may be a managing agent. Here, no evidence speaks to how much discretionary authority Rite Aid delegated to its district managers. The only evidence is that in supervising stores and employees, the district managers had no discretion to deviate from Rite Aid policies, but were obligated to follow them strictly. It is not enough that a

supervisor have the authority to manage a set of stores and fire employees. The supervisor must have such power as to make it reasonable to construe his actions as those of the corporation. (*White v. Ultramar*, *supra*, 21 Cal.4th at p. 577.)

The cases upon which Leggins relies are not to the contrary. In *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, an insurance bad faith action, a claims adjustor exercised unfettered discretionary authority to pay or deny insurance claims. The court concluded that in determining whether such employees are the insurer's managing agents, " 'the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy. When employees dispose of insureds' claims with little if any supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation.' " (*Id*. at pp. 1220-1221.)

In *Hobbs v. Bateman Eichler, Hill Richards* (1985) 164 Cal.App.3d 174, the office manager for a securities broker was "in charge" of the office and "supervised all 8,000 accounts in the office, . . . checked to see if suitable securities were being purchased for clients, [and] was responsible for making sure the accounts were not being 'churned.' " (*Id*. at p. 193.) The court concluded he "possessed that broad degree of discretion in decision making which determined Bateman Eichler's corporate policy." (*Ibid*.)

Here, no evidence suggested Rite Aid's district managers enjoyed unfettered discretionary authority such as would permit them to create corporate policy. On the contrary, the only testimony concerning the district managers' authority vis-à-vis

Rite Aid corporate policy was that they were compelled to follow it. They were therefore not managing agents.

Leggins argues Moore and Weinans, Rite Aid's HR managers, were managing agents. We disagree, as no evidence suggested either was empowered with discretion to set or influence Rite Aid policy. On the contrary, Moore testified his responsibility was to enforce Rite Aid HR policies. Power to enforce a policy does not confer status as a managing agent.

Leggins argues Moore was responsible for 800 stores and 4,050 employees. But this simply describes the field over which Moore was obligated to apply Rite Aid policy. It does not suggest he had discretion to form corporate policy.

VI. Hearsay Evidence

At trial, Bejarano testified that in the course of her investigation she interviewed eight Rite Aid employees in addition to Leggins, and what she heard caused her to have "concerns about [Leggins's] treatment towards associates." Rite Aid attempted several times to elicit what the employees had said to her, but the trial court sustained Leggins's repeated hearsay objections and admonished counsel to "word the question around the hearsay issue." The court rejected Rite Aid's argument that the testimony was offered not for the truth of the employees' complaints but for their effect on Bejarano, and permitted Bejarano to testify only about her concerns, not about the content of the employee communications.

In her report to Weinans and Moore, Bejarano attached written complaints from some employees and summarized her interviews with others. Leggins's hearsay objection to the report was also sustained.

Rite Aid argues the out-of-court employee complaints were not hearsay because they were offered for the effect they had on Bejarano, Weinans and Moore, not for their truth. It argues the erroneous exclusion of this evidence prejudiced its ability to show it conducted a good faith investigation and fired Leggins for a nondiscriminatory reason. We conclude Bejarano's report, not her testimony, was erroneously excluded, but the error was harmless.

A. Some Evidence was Erroneously Excluded

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay evidence is inadmissible unless an exception applies. (*Id*. at subd. (b).) An out-of-court statement is not hearsay if offered to prove something other than its truth, for example to explain an action the recipient took in reliance upon it. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 591.)

We review a trial court's evidentiary rulings for abuse of discretion. (See *Garrett v. Howmedica Osteonics Corp*. (2013) 214 Cal.App.4th 173, 181.) " 'A trial court's exercise of discretion in admitting or excluding evidence . . . will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1419.)

1. *Bejarano's Testimony about Employee Complaints*

Rite Aid argues hearsay objections to Bejarano's testimony were erroneously sustained on 14 occasions. However, other than

citing to the page and line numbers in the reporter's transcript, Rite Aid offers no explanation what testimony was excluded, under what circumstances it was offered, or how the exclusion was prejudicial. Some of the excluded evidence was immaterial. For example, at one point the trial court prohibited Bejarano from testifying that she was not told during training that a district manager's assistant was required to administer payment of premium wages to employees for missed meal periods. Although Rite Aid charges—by page and line citation only—that this was error, the issue was completely irrelevant to this case. In other examples, excluded testimony was followed immediately by testimony to the same effect as that which had been excluded.

We are disinclined to engineer Rite Aid's argument for it, but two examples will illustrate that the trial court properly exercised its discretion in excluding the evidence.

a. *Parveen's Email*

In the first, Bejarano testified that on April 16, 2012, she received a long email from Farhana Parveen in which Parveen complained that Leggins mistreated her, and stated she feared he would retaliate should he find out she had complained. When Bejarano was asked at trial to recall what Parveen had said in the email, the trial court sustained Leggins's hearsay objection. The court permitted Bejarano to testify only that the email raised "concerns that [Parveen] was possibly being treated unfairly [by Leggins]." Later, Parveen herself testified extensively about Leggins's bad behavior as a manager and her fear of him, and her email was admitted into evidence.

The only permissible use of the Parveen email during Bejarano's testimony would have been to establish that Bejarano had cause to investigate Leggins's treatment of an employee. But

the inception of Bejarano's investigation was irrelevant because it neither caused nor itself constituted an adverse employment action, nor evidenced any discriminatory intent. Although Leggins's counsel stated in opening argument that the investigation targeted him, and in closing argument that it was biased and unfair, nothing in the record suggests any targeting or bias was due to Leggins's disability or because he opposed an unlawful employment practice.

Relying on *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93 (*Cotran*), Rite Aid argues the conduct of the Bejarano investigation was directly at issue because the good faith of an employer's investigation is key to its defense in a discrimination case. The argument is without merit.

In *Cotran*, female employees reported to their employer that Cotran, their coworker, had sexually harassed them. The employer's HR director investigated the matter, interviewing 21 people on both sides of the issue. No evidence definitively established the alleged misconduct had occurred, but senior management credited the accusing witnesses and dismissed Cotran. (*Cotran*, *supra*, 17 Cal.4th at pp. 96-98.)

Cotran sued the employer for breach of an implied agreement not to fire him except for "good cause." He contended no good cause justified this firing because his sexual relationships with the two women had been consensual, and they harbored ulterior motives for accusing him. The employer's defense was that it conducted a fair investigation and reached its decision in good faith. The trial court ruled the employer was required to prove more, because "good cause" could be established only if Cotran in fact committed the acts for which he was fired. The court so instructed the jury, which returned a verdict for

Cotran. (*Cotran*, *supra*, 17 Cal.4th at p. 99.) The Court of Appeal reversed, and our Supreme Court affirmed the appellate court.

The issue before the Supreme Court was whether an employer, to establish good cause to fire an employee for misconduct, had to prove to the satisfaction of a jury that the misconduct actually occurred. The Court held it did not. The term "good cause" means only an honestly reasoned but not necessarily true conclusion that the employee committed the misconduct, "supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." (*Cotran*, *supra*, 17 Cal.4th at p. 108.) "The proper inquiry for the jury . . . is not, 'Did the employee *in fact* commit the act leading to dismissal?' It is, 'Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?' " (*Id*. at p. 107.) The inquiry thus "focuses on the *employer's response* to allegations of misconduct," not on the "ultimate truth of the employee's alleged misconduct." (*Ibid*.)

Cotran's rationale is largely inapposite in the discrimination context, where an employer need not have good cause to fire an at-will employee and therefore need not act reasonably or support its decision with "substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." (*Cotran*, *supra*, 17 Cal.4th at p. 108.) Here, Rite Aid was not obligated to show that Bejarano possessed reasonable cause to investigate Leggins.

The most we can take from *Cotran* is that an employer who attempts to prove its nondiscriminatory intent by claiming it fired an employee due to complaints about misconduct need not prove the misconduct actually occurred, it need show only that it honestly believed the misconduct occurred, i.e., it relied on the complaints. To show it relied on complaints an employer may show *how* it relied, for example it relied by investigating them. But if its receipt of complaints and its consequent investigation are undisputed, the text of the complaints themselves becomes superfluous to prove the former caused the latter. For an out-of-court statement to be admissible to explain an action the recipient took in reliance upon the statement, the recipient's conduct must be an issue in the case. (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.)

Here, Leggins did not deny that Bejarano investigated employee complaints about him. The text of the complaints was therefore superfluous to establish the reasonableness of the investigation itself. Lacking any other purpose, the out-of-court complaints could have been admitted only to prove their truth, i.e., that Leggins mistreated employees. Such evidence was properly excluded as hearsay.

This is not to say facts supporting the investigation's *results*, i.e., Bejarano's report, were irrelevant. We reach a different conclusion concerning the report, *post*.

b. *Bejarano's Testimony about her Conclusions*

In another example of testimony excluded as hearsay, Bejarano was asked what conclusions she reached concerning how Leggins treated Rite Aid employees. She testified, "With regards to the associates at this point, the store was a mess. After all the investigating I did, it was just like the previous

store, if not worse. I had associates—I had one associate in tears. [¶] These associates did not want to come back to this store. The one particular associate had been there for many, many years."

The trial court sustained Leggins's hearsay objection "as to the associate who didn't want to come back to the store."

Bejarano then testified without objection: "Basically, I concluded nobody wanted to be at that store. . . . It's a problem . . . when I have a store with the entire staff that is—fears the store manager."

The trial court properly exercised its discretion in excluding testimony about the employee not wanting to work for Leggins.

The issue at trial was whether Bejarano's conclusion about Leggins was genuine, not whether it was correct. Therefore, out-of-court statements by employees had a permissible, nonhearsay use—to prove Bejarano received and relied upon them in reaching her conclusion. But they also had an impermissible, hearsay use—to show Leggins in fact mistreated employees. Whether the complaints were offered for one purpose or the other was a question for the trial court.

On one hand, the trial court could reasonably conclude that Rite Aid offered the complaints only to explain Bejarano's conclusion.

On the other hand, the trial court could also reasonably conclude that under the circumstances before it, the evidence was offered for an impermissible purpose. Leggins did not deny that Bejarano interviewed several employees, received complaints, and purported to draw conclusions from them. If Rite Aid's goal was to prove only that Bejarano received and relied upon employee complaints, the text of the complaints was superfluous because Bejarano's putative reliance on them was uncontested.

(Leggins did not contend that Bejarano misrepresented the complaints.) Moreover, Rite Aid had ample opportunity to explain Bejarano's motivation and reasoning, and in fact did so at length throughout the trial. Under these circumstances the court could reasonably conclude the evidence was actually offered to prove only that Leggins was a poor manager, which was impermissible.[2]

Although assuredly Rite Aid was entitled to show Leggins was a poor manager, it could not do so by way of hearsay evidence.

c. *Twelve Remaining Instances of Hearsay*

Identifying no specific testimony other than by transcript page and line number, Rite Aid argues conclusorily that "repeated and extensive exclusion of evidence" prevented it from explaining how Bejarano's investigation was conducted, what information it yielded, how that information influenced Bejarano, and how it formed the basis for Rite Aid's discharge decision.

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[2] Quoting *Daggett v. Atchison, T. & S. F. Ry. Co.* (1957) 48 Cal.2d 655, 665, the dissent notes that evidence admissible for any purpose must be received even if inadmissible for another purpose, as any impropriety can be cured by a proper limiting instruction. But since the writing of *Daggett* in 1957, the Legislature and courts have well established that not *all* evidence on a point must be admitted. (Evid. Code, § 352 (Stats. 1965, ch. 299, § 2, operative Jan. 1, 1967).) Here, in the context of its hearsay rulings, the trial court implicitly considered the miniscule probative value of further testimony by Bejarano and the near-certainty that the jury would draw improper inferences from it, and concluded the only use of the evidence would be to prove the truth of matters stated outside of court.

On the contrary, Bejarano testified at length about her investigation and its results.[3] As Rite Aid declines to support its claims with any more detailed discussion, we need not address them further. Suffice to say that each hearsay objection about which Rite Aid complains involved an out-of-court statement that could have been offered either for its truth or for its effect on Bejarano, and in each instance the trial court reasonably concluded the evidence was offered for the former reason rather than the latter.

2. *Bejarano's Report*

After completing her investigation Bejarano wrote a report recommending that Leggins be discharged because he violated Rite Aid policy by closing his store early on New Year's Day and

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[3] The dissent suggests that excluded portions of Bejarano's testimony would have provided more specific context for her generalized testimony, and would have "carried more weight and had a stronger persuasive impact." (Dis. opn. *post*, at p. 10.) We respectfully discern no difference in persuasive impact between Bejarano's supposedly "generalized" testimony—that she received numerous complaints about Leggins, "the associates were afraid to go to" him, "the entire staff fear[ed]" him, and she "had one associate in tears"—and her other testimony about supporting "specifics"—that the tears were caused by an altercation, that associates avoided working with Leggins, or that he had made a "whipping" gesture at them. For example, there would have been no material difference between Bejarano testifying "the staff feared Leggins" and "the staff told me they feared Leggins." In this respect the dissent's discussion of *Moore v. Sears, Roebuck & Co.* (11th Cir. 1982) 683 F.2d 1321 is inapposite, as in that case the evidence of out-of-court statements consisted of employee reports contained in memoranda prepared by the plaintiff's supervisors, not testimony by a witness offered to bolster other testimony by the same witness.

because his "management style ha[d] not allowed him an opportunity to build trust and rapport with his associates," but instead they "only fear[ed] him and fe[lt] disrespected."

The report itself was five pages long and contained Bejarano's summaries of four employees' negative statements about Leggins. The report also contained 23 attachments, including written complaints about Leggins submitted in January 2013 by three Rite Aid employees.

a. *Body of the Bejarano Report*

The body of the Bejarano report listed the reasons for recommending that Leggins be discharged: "**Primary Issue**: Violation of Policy: Other [referring to the early store closing on January 1, 2013] [¶] **Secondary Issue**: RAPTAR Behavior: Rude, negative or inconsiderate behaviors."

Bejarano also summarized her interviews with four Rite Aid employees.

Bejarano summarized the interview with Jesica Campos as follows: "Jesica stated that she wanted to talk to me about concerns she had about Robert, the store manager. She said that she did not feel comfortable coming to work with Robert. She stated that Robert creates conflict in the store amongst the associates. He says things that are not accurate. Jesica has directly told Robert that he comes off strong but nothing has changed. Recently Robert had a meeting with the staff. The meeting was on 12/30/2012. Robert said there were new rules in the store. Some of these rules were: associates cannot talk while at work on the sales floor; during load two associates cannot work in the same aisle; associates cannot help each other with load; if they are assigned a certain aisle, then only that associate can work that load; if they find product that is not for their aisle, they

must take it to the right aisle and leave it for that associate. Robert also gets on them very harshly about the work board. He will yell at them the next time they work and he points his finger at them. Jesica also stated that she has observed Robert be rude towards Spanish speaking customers. Jesica said that he 'shoos them way.' Jesica also stated that she and the other associates are relieved when Robert is not in the store."

Bejarano summarized her interview with Ramos: "Cindy said that [at a 12/30/2012 employee meeting] Robert talked about the talking in the store. She confirmed what Jesica told HRBP. Cindy added that Robert also told them that there was too much talking with customers and they needed to stop talking to them so long and get them out. Cindy also stated that Robert made a gesture with his hand like he was going to whip them when he was talking about the back room process. The back room need[ed] to stay straight or he was going to 'whip' them."

Bejarano summarized her interview with Brenda Gaeta: "Brenda stated that she really doesn't want to come to work anymore. She has been with Rite Aid 10+ years and has never felt like this. Brenda cannot approach Robert and she doesn't want to complain about anything because she lives alone and fears her hours will be cut. She said Robert always answers questions in attack mode. She said that Robert writes work boards that are unreasonable and then the next day will interrogate you on what you didn't get done. He will come up to her and say, 'What did you do yesterday' then laughs it off. Brenda also feels like he doesn't like female associates. Her perception is that he picks and says rude things to all the females but never to Mike. Brenda talked about the meeting on 12/30/2012. She said that Robert told them they were not

allowed to talk. Brenda also referenced the whipping motion Robert made with his hand towards them."

Finally, Bejarano summarized her interview with an employee identified only as "Mike": "Mike has noticed that Robert can be rude or shrew[ish] toward [Campos and Gaeta] for unknown reasons. Mike said that all the associates have been in the store for a very long time and ever since Robert has been there the store has had so much tension. Mike said he sees the frustration with Denise . . . . Mike also recalled a situation when Jesica wanted to take her break but was afraid to ask Robert. Mike asked Robert for Jesica. Robert told Mike the magazines need to get done. He said it again looking this time at Jesica sternly. Mike says all the girls want in the store is to be respected. They don't want special treatment, just respect when Robert talks to them. Mike said he can't tell if it's a guy/girl thing with Robert because Mike does seem to have these issues with Robert. Mike stated that he lives right in the community of the Rite Aid and the customers ask him about Robert and ASM Cindy because they have both been known to be rude towards customers. Customers in his community will ask who are they (referring to Robert and Cindy) and Mike is sometimes embarrassed."

b. *Attachments to the Report*

Most of the 23 attachments to the Bejarano report were admitted at trial and are not at issue here. These included emails and memoranda concerning company policy about store hours, store schedules and alarm reports, emails to and from Leggins, the "last and final" issue to Leggins in July 2012, and a statement written by Leggins.

However, the attachments also included written statements submitted to Jilbert Shahdaryan in January 2013 by three Rite Aid employees: Jose Hernandez, Gaeta, and Campos. (A fourth employee complaint is referenced in the report but was not included in the record on appeal.)

These statements were never admitted into evidence.

Hernandez complained Leggins condescended to, ignored, and criticized employees. He stated, "I just want some respect and a thank you. . . . I sometimes feel sad and mad from hearing other people who is also involved with Robert's ways to deal [with] things. . . . Robert is the last person to approach, respect, talk to[], or even be near to him."

Gaeta stated, "I think Robert is kinda mean. When you come to him with a question he comes with a[n] attack. I don't complain cuz I'm scared he will cut my hours. He seems sexist against us girls. . . . He always ignores calls [for help]. . . . He is mean to Hispanic people when they ask for anything. . . . All this is making me and other employees stress out. No one wants to come [to] work cuz he is here. It us[ed] to feel like a te[a]m[;] not no more. Everyone goes the[ir] own way and everyone fighting. [¶] Robert had a meeting with Denise, Pamela, Cindy and myself on [12/30/2012] and said we can't talk. No one can be in the [same] place at once. Don't talk to customers. He said he was gonna be more stric[t], and waved his hand like if he would w[h]ip us."

Campos stated that Leggins "created a hostile work environment" by making rules "such as no talking between the associates and customers or associates working on the same aisle." She stated this "separates us as a team and many of us feel scared to talk about work related things because we feel

Robert will think we were talking about something otherwise. Another thing is his approach when talking to all of us here. He speaks with no respect or filter and has a VERY loud tone of voice and doesn't allow us to respond. . . . Many customers have complained about how he doesn't even acknowledge them when they speak in a language other than English."

c. *Reliance by Weinans and Moore*

Bejarano forwarded the report, with its attachments, to Weinans, who added the following note: "After reviewing the supporting documentation and statements in this case, I would agree with your recommendation to discharge Robert for a violation of Company Policy. . . . Robert also received new complaints from Associates within the store regarding the way Robert was treating them."

Bejarano then forwarded the report, with attachments, to Moore, who, relying upon it, agreed with the recommendation to discharge Leggins.

d. *Exclusion at Trial*

Rite Aid offered the Bejarano report's attachments into evidence before trial, but the trial court excluded them on the ground that they had not been produced in discovery or identified in Rite Aid's exhibit list and were not yet authenticated. Rite Aid never again offered the attachments into evidence as a group.

At trial, the five-page body of the report became exhibit 38, which Rite Aid offered into evidence several times, including after Weinans and Moore each testified they relied upon the report and its attachments in deciding to fire Leggins. In response to Leggins's repeated hearsay objections, Rite Aid argued the report was offered not to prove the truth of matter it contained but to show why Weinans and Moore discharged

Leggins. The trial court sustained Leggins's objections and excluded the report.

This was error.

As discussed above, in an employment discrimination lawsuit the employer must explain its nondiscriminatory reason for subjecting an employee to an adverse employment action, after which the employee must prove the proffered reason is untrue, and a separate, discriminatory reason caused the action.

When the employer attempts to prove its nondiscriminatory intent by showing it relied on complaints about the employee's misconduct, it need not prove the misconduct actually occurred, only that the employer truly believed it had occurred, i.e., truly relied on the complaints. Because the impact of the complaints is central but their truth is irrelevant, they cannot be excluded as hearsay.

The trial court therefore erred in excluding the report upon which both Weinans and Moore relied to fire Leggins.

B. Any Error Was Harmless

When a trial court erroneously denies some but not all evidence relating to a claim, "the appellant must show actual prejudice." (*Gordon v. Nissan Motor Co., Ltd*. (2009) 170 Cal.App.4th 1103, 1115.) "A judgment may not be reversed on appeal, . . . unless 'after an examination of the entire cause, including the evidence,' it appears the error caused a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) When the error is one of state law only, it generally does not warrant reversal unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached." (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 574.)

Rite Aid makes no effort to explain exactly how admission of Bejarano's report, in which she summarized some employee complaints and attached others, would have led the jury to a different result. It argues only that Bejarano's testimony about the gist of the complaints was "no substitute" for the complaints themselves, as the two were "very different" and "not the same." Rite Aid argues the difference was "critical," and the trial court's restriction on the evidence was "untenable" and "undercut the forcefulness" of its claim, but it never explains how any of this is so. We conclude any error was harmless because the thrust of the excluded material was addressed extensively at trial in other testimony.

The excluded summaries and attachments related employee complaints about Leggins. The purpose of the evidence was to show that when Bejarano recommended that Leggins be fired, and Weinans and Moore approved the recommendation, they did so not because Leggins was disabled or had complained about harassment but because he violated a Rite Aid policy mandating that store managers deal with employees in a respectful manner.

But the jury knew this from other sources.

One complaining employee, Parveen, testified at length about Leggins's bad behavior as a manager. She testified she sent an email containing her complaints to Rite Aid management, and the email was admitted into evidence.

Bejarano, when asked what concerns the email caused, testified, "I had concerns that [Parveen] was possibly being treated unfairly [by Leggins]." Although this conduct predated the Bejarano investigation and was thus arguably resolved when Leggins was issued the "last and final" in July 2012, Bejarano,

Weinans and Moore each testified their decision was influenced by Leggins's failure to improve his manner of dealing with employees since he was issued the last and final.

Bejarano testified on several occasions without objection that her interviews with employees led her to conclude Leggins was disrespectful and demeaning to them. For example, she testified she "concluded the associates were afraid to go to Robert. They were afraid to ask for—ask him for simple things. They would have to figure out another way to get assistance on something instead of going to him because he would be abrupt with them or short with them." Bejarano testified: "After the interviews were conducted and I reviewed everything, I really felt and concluded that the associates—it wasn't going to be the best environment to have Robert back in that store. And operationally, as well—and this, again, is in partnership with the [district manager], large-volume store, you know, associate issues to the extent where they fear him, and so written warning and . . . also considered transferring him to another store." Bejarano also testified that "[w]ith regard to the associates at this point, the store was a mess. After all the investigating that I did, it was just like the previous store, if not worse. I had associates—I had one associate in tears. . . . Basically, I concluded nobody wanted to be at that store. . . . The entire staff fears the store manager."

Shahdaryan, a district manager, testified that Ramos "was, basically, concerned and complaining about Robert, and the way he basically was approaching her, talking to her. Just wasn't very healthy. She was just concerned, and she was pretty vocal. . . . She was just very—I think she was already kind of fed up. I had that vibe. It almost felt like she was looking to tell

someone. So I think she just found an opportunity when I was there, and she just told me. She was very, very open and honest and direct, and I don't think she was going to take it, whatever she was feeling. She just wanted to let it out. That's the vibe I had." Shahdaryan also testified that Ramos "just didn't want to take it anymore, and she wanted him to be just more professional and communicate better and approach the situations better and just treat her better as an associate."

Moore and Weinans also testified at length about what they learned about Leggins and how they reacted.

In sum, the jury was well aware that multiple employees complained that Leggins was a disrespectful, demeaning, fear-inspiring manager. If in the face of all this evidence the jury still believed Rite Aid fired him because of his disability, not his behavior, the additional employee complaints covering the same ground, as summarized in and attached to the Bejarano report, would have made no difference.

DISPOSITION

The judgment is reversed as to Leggins's cause of action for harassment, and vacated as to the award for punitive damages. In all other respects, the judgment and orders are affirmed. Each side is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

I concur:

JOHNSON, J.

I will be filing a dissent.

ROTHSCHILD, P. J.