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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

ANA FLORES, Plaintiff and Respondent, v. COUNTY OF LOS ANGELES PROBATION DEPARTMENT, Defendant and Appellant.	B287382 (Los Angeles County Super. Ct. No. BC625953)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael P. Linfield, Judge. Reversed with directions.

Law Offices of Hausman & Sosa, Jeffrey M. Hausman, Larry D. Stratton; Greines, Martin, Stein & Richland, Timothy T. Coates and Alan Diamond for Defendant and Appellant.

Schimmel & Parks, Alan I. Schimmel, Michael W. Parks, Arya Rhodes; Chami Law and Pouya B. Chami for Plaintiff and Respondent.

The County of Los Angeles Probation Department (County) appeals from a judgment following a jury trial on claims by appellant Ana Flores that she experienced unlawful sexual harassment and retaliation by the County. Flores was employed by a third party staffing agency, AppleOne, and assigned to the County. While there, she reported what she claimed was sexual harassment by a County probation officer. After her report, she requested a transfer and was assigned to a different probation office where her work assignments were less desirable. She claimed that the less desirable assignment was due to her harassment report. She quit the same day that AppleOne intended to terminate her position with the County because of attendance issues.

Flores prevailed at trial only on her retaliation claims against the County. The jury awarded damages of $62,127.20, and the trial court awarded attorney fees of $687,000.

On appeal, the County argues that: (1) the jury's finding on retaliation was not supported by the evidence; and (2) the trial court abused its discretion in awarding attorney fees that did not account for Flores's limited success on her claims. We agree with the first argument and therefore need not reach the second.

Flores's primary argument is that her transfer to a less challenging job was retaliation for her harassment report. But the evidence showed she *requested* the transfer. The evidence also showed that her diminished responsibilities in the new location did not affect her job performance or her opportunity for advancement with the County. Rather, she had attendance issues due to her child care situation which had nothing to do with her harassment complaint.

The other forms of retaliatory conduct that Flores identifies, such as complaints and rumors about her conduct in the workplace, did not materially affect the conditions of her employment. We therefore will reverse the jury's verdict on Flores's retaliation claims and the trial court's award of attorney fees, and direct that judgment be entered in favor of the County on all of Flores's claims.

BACKGROUND

1. The Evidence

a. *Flores's employment with the County*

Flores was employed by Sentinel Offender Services, a private firm, working with GPS monitoring equipment when she was recruited by probation director Eric Ufondu to work with the County. He recognized her experience with the relevant monitoring equipment and offered her the opportunity to assist probation officers in the "A.B. 109" program located in Lancaster.[1] She accepted, seeing it as an opportunity to eventually become a probation officer.[2]

An outside staffing firm, AppleOne, supplied clerical workers to the County. Flores obtained a clerical position with AppleOne assigned to the County and began work at the

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[1] The program is named after Assembly Bill No. 109, which transferred the responsibility of monitoring probationers leaving state prison to the counties.

[2] To be hired for a permanent County probation position, employees must pass a civil service examination. Flores took the examination unsuccessfully in May 2014. She was scheduled to take the examination again about a year later but did not show up for the examination. She testified that at that point she no longer wanted anything to do with the County.

Lancaster probation office in October 2013. At the time, the probation office was located in the Antelope Valley courthouse, but in April 2014 it moved to its own building in Lancaster.

As a clerical employee, Flores's job duties in the Lancaster office included working the front desk, answering telephone calls, and working with "special assignments" relating to GPS equipment and A.B. 109. She testified that she took advantage of opportunities to use her experience with the monitoring equipment when possible: "[W]henever the special assignments would come through or were scheduled, I would involve myself helping all officers correct any reports or . . . review the reports on the G.P.S. equipment, especially if there was any malfunction on the system."

Cedric White was one of the probation officers in the Lancaster office. Flores and the County provide very different descriptions of the relationship between Flores and White.[3]

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[3] The parties also have very different positions on how this court should review the evidence concerning the relevant events. Flores does not distinguish between evidence relating to her harassment claims and her retaliation claims and simply argues that, consistent with the substantial evidence standard of review, this court should interpret the evidence in her favor as the prevailing party. The County argues that it prevailed on Flores's harassment claims, and the court should therefore interpret the evidence relating to those claims in the County's favor. We need not resolve this dispute. As discussed below, we interpret the evidence relating to the issue of retaliation in favor of Flores as the prevailing party. The evidence concerning White's alleged harassment is not directly relevant to the retaliation claim, and we therefore need not decide which party's version to accept.

Flores testified that in November 2013, White began making inappropriate comments to Flores of a sexual nature. He also called her repeatedly, followed her, and drove past her home without an invitation. Flores testified that White even pulled her over, using his vehicle's emergency lights when she was driving, to make inappropriate comments and demands to see her. Flores attempted without success to stop these overtures.

In contrast, the County cites testimony from White and others that Flores acted provocatively around the office and pursued White. She flirted with him, referred to him as sexy, and asked to be assigned as his clerk. White testified that, despite this inappropriate conduct, the two eventually became friends.

b. ***The May 30, 2014 Mi Ranchito incident***

On May 30, 2014, there was an incident in the parking lot of the Mi Ranchito restaurant near the Lancaster probation office that led to Flores's harassment complaint. Again, the parties offer very different versions of this incident.

According to White, he went to pick up food at the restaurant. While in the parking lot, he saw a truck that he recognized as belonging to another probation officer, Christopher Joy. He saw two sets of legs hanging out of the driver's side of the vehicle and, concerned, went over to investigate. There he saw Flores and Joy in an intimate encounter, kissing and hugging. White and Flores exchanged angry words, and White left. White testified that he had no sexual interest in Flores and was not bothered by her encounter with Joy.

According to Flores, as corroborated in some respects by Joy,[4] White confronted the two as they were standing in the parking lot reviewing some real estate documents. White approached aggressively and demanded to speak with Flores. They spoke apart from Joy, and White used threatening and aggressive language about Joy, including profane slurs. He asked Flores, "[I]s that why you don't want to go out with me?" Flores felt afraid and threatened and told White that he needed to stay away from her. After White left, Joy said that he needed to report the incident and suggested that Flores should as well.

c. *Flores's harassment complaint and the County's investigation*

Flores called her supervisor, Becky Choy, the evening of May 30 to tell her about the incident and also submitted a written summary of past incidents she had experienced with White. Flores met with Ufondu the following week and explained to him what had happened. Ufondu told her that there would be an investigation, that Flores should not talk with anyone about it, and that White would be reassigned so that Flores would not be exposed to him.

Ufondu subsequently told White that he should not have any contact with Flores and should not discuss her complaint with other employees. White was assigned to another office. Ufondu confirmed his instructions in a letter to White. After receiving that instruction, White never attempted to contact Flores.

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[4] Joy and Flores later married. When their intimate relationship began was also disputed at trial.

However, there was evidence that White contacted other County employees, requesting them to provide statements that would support his version of events. White e-mailed several versions of his own draft statement to several probation officers, including his supervisor, Sharmane Franklin, and a friend, Terrence Turner. In his communication to Turner, White included a subject line entitled, "Bitch Made." The exchange of drafts with Franklin suggested that Franklin was providing assistance in editing White's statement.

After her harassment complaint, Flores heard reports of rumors in the office (which she attributed to White) characterizing her as "flirtatious," "sleazy," and a "slut," and claiming that she was having an affair with Joy. Richard Wilke, an AppleOne vice-president, also heard rumors from head clerks at different County facilities that Flores was "in a love triangle."

On one occasion White was permitted to return to the Lancaster probation office to attend a meeting. The visit occurred on September 11, 2014. Flores did not see White, and her testimony was unclear whether she was aware he had come to the office at the time. Nevertheless, she testified that the incident caused her anxiety. She complained to AppleOne and the County about White's presence in the building.

The County's investigation took nearly a year to complete. Effective June 3, 2015, the County suspended White for three days without pay for "[i]nappropriate conduct toward others (based on sex)"; "[f]ailure to exercise sound judgment"; and "[d]iscourtesy with fellow employees, including disrespectful, insulting language."

d. *Flores's transfer*

In September 2014 Flores requested that AppleOne move her to a County office in Valencia, where she intended to move.[5] On September 15, 2014, AppleOne offered her a position for the same pay in the East Fernando Valley adult probation office, located on Delano Street in Van Nuys (the Delano Street Office).

Several days later Ufondu sent an e-mail to Monica Rivas at AppleOne saying that he was "just informed" that Flores would be transferring to the "Van Nuys office." He asked for confirmation that she would be reporting to the "ESFV Adult" (i.e., the Delano Street Office) and "not AB109" (referring to a different A.B. 109 facility in Pacoima). Rivas confirmed that AppleOne was transferring Flores and said that "the location has not been confirmed at this point."

On September 19, 2014, Rivas informed Flores that she would be working at the County's citation division in Van Nuys (Citation Division). Flores responded with an e-mail stating, "Thank you Monica!" That same day, Rivas informed Ufondu that Flores was "confirmed to start" at the Citation Division the next Monday.

Flores's job at the Citation Division consisted of scanning citations all day. She did not work with GPS equipment or meet the public.

A week after arriving at the Citation Division, Flores e-mailed Rivas asking if there were any openings at the Valencia juvenile office, as the "Van Nuys office is very strict over arrival time." Flores said that in the Lancaster office they had accommodated her hours to permit her to arrive later and work

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[5] By late 2014 Flores was living with Joy near Valencia.

later to make up the time. Rivas responded that there were no positions available at the Valencia facility and that "[a]ll of our shifts with County [are] 8-5pm. Antelope Valley was kind enough to work with your schedule but not all facilities are. Most aren't."

In December 2014 Flores called AppleOne to end her employment. AppleOne was intending to terminate her position with the County that same day. The County had requested that Flores be removed because of attendance issues.

2. Proceedings in the Trial Court

Flores filed a complaint alleging claims against White and the County under the California Fair Employment and Housing Act (FEHA). (Gov. Code, § 12900 et seq.) Flores asserted claims against White and the County for harassment based on sex. She also asserted claims against the County for discrimination based on sex; retaliation; and failure to prevent discrimination and harassment.

Following a five-day trial, the jury returned a verdict that: (1) found in favor of White and the County on Flores's cause of action for workplace harassment; (2) found in favor of the County on Flores's cause of action for sex discrimination; (3) found in favor of Flores on her cause of action against the County for retaliation; and (4) found in favor of Flores on her cause of action against the County for failure to prevent discrimination and harassment.[6] The jury awarded Flores $24,627.20 for past lost earnings and $37,500 for past noneconomic loss.

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[6] In postargument briefs requested by the court, the parties agreed that the jury verdicts were not inconsistent. Flores

Both parties filed posttrial motions. Flores moved for statutory attorney fees under Government Code section 12965, subdivision (b), and the County moved for judgment notwithstanding the verdict.

The court denied the County's motion, rejecting its argument that there was insufficient evidence of an adverse employment action to support the verdict on retaliation. The court cited testimony that Flores was "recruited for the position because of her experience and expertise with GPS tracking equipment," but that after she relocated to the Van Nuys office she was "placed in intolerable work conditions," standing for hours and scanning parking tickets all day. The court also cited evidence that Franklin assisted in editing White's statement to make it " 'less offensive' " before White submitted the statement to County investigators. The court concluded that the jury could infer that Franklin's assistance "represented an effort on the County's behalf to assist White in responding to the complaint which was detrimental" to Flores.

Finally, the court upheld the verdict on Flores's fourth cause of action against the County for failure to prevent discrimination and harassment.[7] The court rejected the County's

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additionally argued that the County had waived the issue of inconsistent verdicts in this appeal. As expected, however, the parties' underlying briefs differed on the question of the sufficiency of the evidence to support the verdicts which were rendered in favor of Flores.

[7] The verdict form referred to this claim as "Failure to Prevent Discrimination and Harassment." However, the jury instructions explained that the jury could find in favor of Flores if

argument that the jury's findings in its favor on Flores's causes of action for harassment and discrimination precluded the jury's verdict on the failure to prevent claim, because "a party cannot be held liable for failure to prevent something that never happened." The trial court ruled that Flores "may prevail on her cause of action for failure to prevent so long as she remains the prevailing party on the predicate cause of action for retaliation." The court explained that the law permits liability on the part of an employer for failure to prevent retaliation as well as harassment and discrimination. And the court noted that the verdict was consistent with the jury instructions, which were "approved by the State, and agreed to by both parties in this action."

The court granted Flores's motion for attorney fees. The court disallowed some claimed attorney hours and found that a multiplier of 1.5 was appropriate. The court concluded that the multiplier was warranted in light of counsel's skill and the "difficult issues of fact that required extensive discovery and a one-week jury trial." The court did not attempt to apportion attorney fees between Flores's successful and unsuccessful claims, nor did it consider reducing the requested fees based upon Flores's limited success at trial. The court awarded attorney fees of $687,000. The fees were included in an amended judgment dated January 30, 2018.

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it found that the County "failed to take all reasonable steps to prevent the harassment or discrimination *or retaliation*." (Italics added.) As mentioned, the parties agree that there was no inconsistency in the verdicts.

DISCUSSION

1. Standard of Review

We review the sufficiency of the evidence supporting the jury's retaliation verdict under the substantial evidence standard. Under that standard, we "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) Our task "*begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted," which will support the verdict. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874.)

Substantial evidence is any evidence that is "reasonable in nature, credible, and of solid value." (*People v. Bassett* (1968) 69 Cal.2d 122, 138–139.) Testimony from a single witness may suffice. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) However, a reviewing court must base its determination on a review of the record as a whole rather than just isolated portions. The court should decide whether the finder of fact reasonably rejected contrary evidence as well as reasonably accepted supporting evidence. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652.)

2. The Evidence Is Not Sufficient to Support Flores's Claim that the County Unlawfully Retaliated Against Her for Her Harassment Complaint

Establishing unlawful retaliation under the FEHA requires proof that: (1) the employee engaged in a protected activity; (2) the employer subjected the employee to an "adverse employment action"; and (3) a causal link exists between the

protected activity and the employer's action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).)[8]

There is no dispute here that Flores engaged in protected activity by reporting White's alleged harassment. However, the County claims that the evidence does not support the jury's findings on the second and third elements of Flores's retaliation claim. The County argues that Flores did not suffer any adverse employment action, and that, even if her transfer to the Citation Division was such an adverse action, AppleOne and Flores herself, not the County, were responsible for the transfer.

An actionable adverse employment action is one that "materially affects the terms, conditions, or privileges of employment." (*Yanowitz, supra,* 36 Cal.4th at p. 1051.) Whether particular conduct fits this definition is not "susceptible to a mathematically precise test." (*Id.* at p. 1054.) On the one hand, "[m]inor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable." (*Ibid.*) However, "adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls

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[8] Although Flores was not a County employee, the County did not dispute at trial that Flores was covered by its sexual harassment and retaliation policies, and it acknowledges on appeal that Flores "was covered by FEHA while at the County."

within the reach of the antidiscrimination provisions." (*Id.* at pp. 1054–1055.)

The jury instructions given in this case were consistent with these definitions.[9] The trial court instructed the jury that the County caused an adverse employment action if it took "an action or engaged in a course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of . . . Flores's employment." Consistent with the language in *Yanowitz,* the instructions further explained that an adverse employment action "includes conduct that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion" but does not include "minor or trivial actions or conduct that is not reasonably likely to do more than anger or upset an employee."

Flores argues that the County is responsible for several varieties of adverse employment actions, including: (1) causing Flores's transfer to the Citation Division, where she was given work that was far less challenging than the work she had been doing in the Lancaster office; (2) complaints and workplace rumors instigated by White and his friends; (3) permitting White to return to the Lancaster office for a meeting despite the order that White have no contact with Flores; (4) Franklin's assistance to White in drafting his statement concerning the relevant

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[9] The sufficiency of the evidence supporting the jury's verdict must be analyzed in accordance with the instructions the jury was given. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535 ["where a party to a civil lawsuit claims a jury verdict is not supported by the evidence, but asserts no error in the jury instructions, the adequacy of the evidence must be measured against the instructions given the jury"].)

events; and (5) the protracted nature of the County's investigation of Flores's harassment complaint. None of these arguments identifies actionable retaliation supported by the evidence at trial.

a. *Flores's diminished work responsibilities following her transfer*

Flores claims that she suffered an adverse employment action when she was transferred to the Citation Division rather than to some facility that, like Lancaster, handled A.B. 109 probationers. At the Citation Division, her work was limited to standing and scanning citations all day. Because that facility did not have any responsibilities under A.B. 109, she did not have any opportunity to work with GPS equipment as she had in the Lancaster office.

A transfer resulting in significantly diminished work responsibilities can constitute an adverse employment action. In *Yanowitz,* the court cited to *Wyatt v. City of Boston* (1st Cir. 1994) 35 F.3d 13 in support of its definition of an adverse employment action. (*Yanowitz, supra,* 36 Cal.4th at p. 1055, fn. 15.) *Wyatt* listed as examples of actionable retaliation " 'demotions, *disadvantageous transfers or assignments*, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees.' " (*Yanowitz,* at pp. 1054–1055 & fn. 15, quoting *Wyatt,* at pp. 15–16, italics added.)

However, to rise to the level of an adverse employment action, a different work assignment cannot be one that the employee merely dislikes. Rather, it must be "reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Yanowitz, supra,* 36 Cal.4th at p. 1054.) The change in responsibilities

must be both "detrimental and substantial." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511 (*Thomas*).) "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455 (*Akers*).)[10] Thus, to be actionable as an adverse employment action, a transfer must result in "substantial and tangible harm." (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 393.) A transfer into a comparable position that does not result in such substantial and tangible harm is not an adverse employment action even if it is " 'personally humiliating.' " (*Ibid.*, quoting *Flaherty v. Gas Research Institute* (7th Cir. 1994) 31 F.3d 451, 457.) " 'Mere idiosyncrasies of personal preference are not sufficient to state an injury.' " (*McRae*, at p. 393, quoting *Brown v. Brody* (D.C. Cir. 1999) 199 F.3d 446, 457.)

For example, in *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, the court held that the assignment of a fire captain to special duty rather than patrol duty was not an adverse employment action. The pay and promotional opportunities in the two assignments were the same, and the only reason for the captain's dissatisfaction with special duty was his preference for the "work, schedule, and camaraderie of platoon duty to that of special duty." (*Id.* at p. 358.) The court cited the absence of any authority supporting the proposition that

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[10] The decisions in *Thomas* and *Akers* both predate our Supreme Court's definition of an adverse employment action in *Yanowitz*, but they are consistent with the standard announced in that case and the court cited both decisions with approval. (See *Yanowitz, supra,* 36 Cal.4th at p. 1051, fn. 9.)

"assignment to a less preferred position *alone* constitutes an adverse employment action." (*Ibid.*; cf. *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1389 [a transfer that "in reality was a demotion" could be an adverse employment action].)

Here, the evidence shows that Flores's job in the Citation Division was less interesting than her prior work in the Lancaster office. But there was insufficient evidence to show that her less desirable job duties in the Citation Division "adversely and materially" affected her job performance or her opportunity for advancement in her career. (*Yanowitz, supra,* 36 Cal.4th at pp. 1053–1054.)

The performance problems Flores encountered in her job in the Citation Division were due to her attendance violations, not to the nature of her work. Flores's repeated lateness and absences were the reason that her supervisor in the Citation Division requested that she be removed from the assignment. Flores herself attributed her problems in the Citation Division to the lack of scheduling flexibility to accommodate her child care issues. The flexibility that she had previously enjoyed in the Lancaster office was due to accommodations provided by Ufondu; there was no evidence that she would have received similar accommodations in any other location.[11]

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[11] Thus, to the extent the jury found actionable retaliation based on the *termination* of Flores's assignment with the County, that finding is not supported by the evidence. There is reason to believe the jury made such a finding, as it awarded damages for past lost earnings, which can only be explained as lost wages following Flores's loss of her job at the County.

Had Flores worked out her attendance issues, there is nothing in the record to support a conclusion that her career with the County or AppleOne would have been impeded in any way. If she had chosen to do so, she was still free to take the civil service examination and, if she passed, apply for direct employment with the County. The County was obviously not responsible for her failure to pass the examination the first time she took it. Nor was the County responsible for her decision not to take the examination again. But for Flores's attendance problems, if she had chosen to pursue a career with the County there is no evidence that her less interesting clerical position in the Citation Division would have affected her opportunity to do so.

There is also no evidence that any problem other than Flores's attendance issues impaired her continued employment prospects with AppleOne. Flores's attendance problems were the reason AppleOne intended to terminate her engagement with the County. Wilke explained that Flores had been counseled about her attendance but had failed to correct the problem.

The evidence was insufficient to show that Flores's transfer to the Citation Division was an adverse employment action. We therefore need not reach the County's argument that Flores's *request* for a transfer precluded Flores from proving that the transfer was causally related to her harassment complaint.

b. *Coworker complaints and workplace rumors*

" ' "[W]orkplace harassment, if sufficiently severe or pervasive, may in and of itself constitute an adverse employment action." ' " (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 212 (*Kelley*), quoting *Yanowitz, supra,* 36 Cal.4th at p. 1056, fn. 16.) However, as our Supreme Court has

explained, "a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment." (*Yanowitz, supra,* 36 Cal.4th at p. 1054.)

Flores testified that after she made her harassment report other employees would not talk to her and gave her the "cold shoulder," and friends of White complained that she dressed too provocatively and was too flirtatious around the office. Flores also cites testimony that White attempted to obtain statements from other employees that cast her in a bad light, and that White spread rumors that she was having an affair with Joy and, was promiscuous and a "slut." While unpleasant, none of this conduct rises to the level of actionable retaliation.

Most of the conduct that Flores identifies was no more than "offensive utterance" or a "pattern of social slights." An employer cannot force employees to socialize; thus, "[m]ere ostracism in the workplace is insufficient to establish an adverse employment decision." (*Kelley, supra,* 196 Cal.App.4th at p. 212, citing *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 929; *Yanowitz, supra,* 36 Cal.4th at p. 1054, fn. 13.) Complaints about Flores's clothing and flirtatious behavior around the office, while no doubt hurtful and certainly inappropriate if untrue, were also an unsurprising defensive response by White's friends. As discussed above (and as illustrated by the briefing in this court), Flores and White had very different accounts of their relationship, and White's narrative involved Flores's alleged flirtatious behavior. White's own attempts to solicit statements from coworkers that supported his side of the story, even if inappropriate in light of Ufondu's directive not to discuss Flores's complaint with other

employees, were also efforts to defend himself against Flores's complaint.

In *Noviello v. City of Boston* (1st Cir. 2005) 398 F.3d 76, which our Supreme Court cited in *Yanowitz*, the court explained that "[t]he very act of filing a charge against a coworker will invariably cause tension and result in a less agreeable workplace. [Citation.] The target of the complaint likely will have coworker-friends who come to his defense, while other coworkers will seek to steer clear of trouble by avoiding both the complainant and the target. Although admittedly a source of unpleasantness in the workplace, such behavior should not be seen as contributing to a retaliatory hostile work environment. [Citation.] After all, there is nothing inherently wrong either with supporting a friend or with striving to avoid controversy. We think it follows that those actions that are hurtful to a complainant only because coworkers do not take her side in a work-related dispute may not be considered as contributing to a retaliatory hostile work environment." (*Noviello*, at p. 93; see *Yanowitz, supra,* 36 Cal.4th at p. 1056, fn. 16.)

Moreover, even if White started rumors about Flores, there was *no* evidence that the County "knew or should have known of the coworkers' retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct." (*Kelley, supra,* 196 Cal.App.4th at p. 213.) There is no evidence that Flores ever even complained to the County about the rumors. Flores submitted a complaint to the County after White was permitted to attend the meeting at the Lancaster office on September 11, 2014. The complaint contained a long list of problems that Flores claimed existed in the office and included a general allegation that "[s]ince the

harassment report was made I have been treated differently by staff supervised by Ms. Franklin." But it did not mention rumors circulated by White.

The evidence also showed that the County took steps to separate White and prevent him from retaliating against Flores. White was assigned to another office during the investigation. Ufondu also instructed him not to discuss Flores's complaint with other employees, and specifically advised him that "retaliation against an individual for filing a complaint of this nature is a violation of the County's Policy of Equity." Flores's contention that she was subjected to complaints, rumors, and social slights by other employees therefore cannot support the jury's verdict on her retaliation claim.

c. *White's attendance at the September 11, 2014 meeting in the Lancaster office*

There was no evidence that White's return to the Lancaster office to attend a meeting was intended to retaliate against Flores for her harassment complaint. Indeed, there is no evidence suggesting that the purpose of his attendance had anything to do with Flores. She did not see him in the office, and the evidence is unclear as to whether she was even aware that he was present at the time. Nor did his presence in the building violate any County directives. Ufondu instructed White "[n]ot to have any contact whatsoever" with Flores, not to stay away completely from the office.

Finally, Flores overstates the emotional effect of White's visit to the office. She claims that his mere presence in the building resulted in her request for a transfer. However, as the County points out, that is impossible, as she had already

requested a transfer by September 5, 2014, a week before the meeting occurred.

d. *Franklin's assistance in editing White's statement*

We disagree with the trial court's conclusion that the assistance Franklin apparently provided to White in editing his statement was retaliatory conduct. Even if it showed favoritism to one employee over another in the investigation of Flores's complaint, there is no evidence that Franklin's assistance had any material effect on the "terms, conditions, or privileges" of Flores's employment. (*Yanowitz, supra,* 36 Cal.4th at p. 1054.) Following the investigation, White was disciplined. There is no evidence that White's statement had any role in Flores's transfer or affected her working conditions in any way.

e. *The length of the County's investigation*

There is no evidence that the County extended its investigation as a retaliatory tactic. While Flores might have preferred a quicker result, the length of the investigation did not have any material effect on her working conditions.

Thus, none of the events following Flores's harassment complaint on May 30, 2014, even interpreted in the light most favorable to Flores, can support a finding that the County retaliated against Flores for her complaint. The jury's verdict on Flores's retaliation claim must therefore be reversed.

3. Judgment Must Also Be Entered in Favor of the County on Flores's Failure to Prevent Claim

As noted above, the trial court ruled that the jury's verdict in favor of Flores on her fourth cause of action was valid because it could be based on a finding that the County failed to prevent

the retaliation that the jury found had occurred. The County did not challenge that ruling on appeal.

Having now concluded that the verdict on Flores's retaliation claim is not supported by substantial evidence, we must reverse the verdict on her failure to prevent claim as well. A defendant cannot be liable for a failure to prevent discrimination, harassment, or retaliation under Government Code section 12940, subdivision (k) absent a finding that such discrimination, harassment, or retaliation actually occurred. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289.) The jury found against Flores on her claims for discrimination and harassment, and we now hold that the evidence was insufficient to support the verdict in her favor on her retaliation claim. Thus, there is no predicate finding of harassment, discrimination or retaliation on which Flores's failure to prevent claim could be based.

4. The Trial Court's Attorney Fee Award Must Be Reversed

Government Code section 12965, subdivision (b) gives the court discretion to award attorney fees to a prevailing party in an action under the FEHA. This statute "has been interpreted to mean that in a FEHA action a trial court should ordinarily award attorney fees to a prevailing plaintiff unless special circumstances would render a fee award unjust." (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 976.)

Our holding that there is insufficient evidence to support the jury's verdict on Flores's retaliation and failure to prevent harassment and discrimination claims means that Flores was not the prevailing party. The trial court's award of attorney fees must therefore be reversed along with the verdict on those

claims. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 483.)

DISPOSITION

The amended judgment entered on January 30, 2018, is reversed insofar as it: (1) confirms the jury's verdict against the County on Flores's claims for retaliation and failure to prevent discrimination or harassment; (2) awards damages in favor of Flores; and (3) awards attorney fees and costs in favor of Flores as the prevailing party. The matter is remanded to the trial court for entry of judgment in favor of the County on each of Flores's claims against it, and for further consideration of assessing costs and attorney fees (if any) in light of the new judgment. The County is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

I concur:

HOFFSTADT, J.

Flores v. County of Los Angeles Probation Department, B287382
ASHMANN-GERST, J.—Dissenting

I respectfully dissent.

Initially, I had concerns about whether the verdicts were inconsistent. The court requested, and the parties, provided, letter briefs addressing this issue. While the parties now agree that the verdicts are not inconsistent,[1] I am not convinced. I would reverse the judgment and remand the matter for a new trial on the ground that the verdicts are inconsistent. That said, I turn to the issue of whether substantial evidence supports the jury verdict.

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[1] It appears that defendant and appellant County of Los Angeles Probation Department (County) has taken a different position on appeal than it did in the trial court. In its motion for judgment notwithstanding the verdict (JNOV), the County argued: "As to failure to prevent discrimination and harassment, JNOV is proper because the jury found in favor of the *County* and not [plaintiff and respondent Ana] Flores [(Flores)] as to the underlying claims of discrimination and harassment (i.e. a party cannot be held liable for failure to prevent something that never happened)." Furthermore, relying upon *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, the same cited by the majority (Maj. Opn., at p. 23), the County argued: "Flores did not prevail on her harassment nor her discrimination claims, yet the jury returned an inconsistent verdict against the County as to failure to prevent harassment and discrimination. Accordingly, JNOV is proper." The County does not explain its change of position in its letter brief.

I disagree with the majority's application of the substantial evidence doctrine in this case.

The majority correctly states the well-settled substantial evidence rule. We review the sufficiency of the evidence supporting the jury's retaliation verdict under the substantial evidence standard. Under that standard, we "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) Our task "*begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted," which will support the verdict. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874.)

Substantial evidence is any evidence that is "reasonable in nature, credible, and of solid value." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.) Testimony from a single witness may suffice. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

In other words, our inquiry on substantial evidence review is whether the evidence adds up to substantial evidence supporting the judgment. (*People v. Jackson* (2014) 58 Cal.4th 724, 749.) Here it unquestionably does.

The jury could have found that Flores's transfer to the Citation Division amounted to an adverse employment action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*) [setting forth the elements of a claim for unlawful retaliation, including subjecting the employee to an adverse employment action].) The Citation Division, unlike other facilities, did not handle Assembly Bill No. 109 (A.B. 109) probationers. At the Citation Division, Flores's work was limited to standing and scanning citations all day. Because that facility

did not have any responsibilities under A.B. 109, she did not have any opportunity to work with GPS equipment as she had in the Lancaster office.

A transfer resulting in diminished work responsibilities can be an adverse employment action. In *Yanowitz,* the court cited to *Wyatt v. City of Boston* (1st Cir. 1994) 35 F.3d 13 (*Wyatt*) in support of its definition of an adverse employment action. (*Yanowitz, supra,* 36 Cal.4th 1055, fn. 15.) *Wyatt* listed as examples of actionable retaliation "'demotions, *disadvantageous transfers or assignments*, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees.'" (*Yanowitz,* at pp. 1054–1055 & fn. 15, quoting *Wyatt,* at pp. 15–16, italics added.)

In *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, the court concluded that the lateral transfer of a junior high school principal to another school could be considered an adverse employment action. That was so even though the principal received the same pay and the school to which she was transferred was "a high-achieving one coupled with a great deal of parental support." (*Id.* at p. 1389.) The court reasoned that the new school did not "present the kinds of administrative challenges an up-and-coming principal wanting to make her mark would relish." (*Ibid.*) The court reversed summary judgment in favor of the defendant school district, finding a triable issue of fact as to whether the principal suffered an adverse employment action. (*Id.* at p. 1390.)

Similarly, here, the jury reasonably could have found that Flores's work in the Citation Division was an adverse change, despite the lack of any change in her compensation. According to Flores, her original position, assisting the A.B. 109 officers, was an "opportunity to expand [her] career." She believed that working for the County would "help grow [her] experience." Unlike her work in the A.B. 109 program, Flores's job in the Citation Division did not involve any work with monitoring or the GPS equipment, skills that led to her recruitment by the County in the first place. And, as the trial court noted when it denied the County's motion for JNOV, her new position "'placed [Flores] in intolerable work conditions,'" standing for hours and scanning parking tickets all day. Thus, contrary to the County's argument, Flores's different work at the Citation Division was adverse not just because it was not to her liking, but because the jury could have found that it involved "'significantly diminished material responsibilities.'" (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511, quoting *Crady v. Liberty Nat'l Bank & Trust Co.* (7th Cir. 1993) 993 F.2d 132, 136.)[2]

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[2] In *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, the court concluded that the assignment of a fire captain to special duty rather than patrol duty was not an adverse employment action. Pay and promotional opportunities were the same in the two assignments, and the only reason for the captain's dissatisfaction with special duty was his preference for the "work, schedule, and camaraderie of platoon duty to that of special duty." (*Id.* at p. 358.) Here, in contrast, there was evidence that Flores's job in the Citation Division involved less responsibility than she enjoyed previously.

The evidence regarding the reason for her transfer from A.B. 109 assignments to generic clerical work is also troubling and supports the jury's finding of retaliation. Richard Wilke (Wilke), AppleOne's regional vice-president who was involved in the transfer decision, testified that AppleOne intentionally did *not* transfer Flores to another A.B. 109 facility because it wanted to eliminate potential interaction between her and Cedric White (White). He also suggested that probation director Eric Ufondu (Ufondu) was involved in that decision.

On cross-examination, Wilke testified that AppleOne transferred Flores "to the closest facility that we had available that was not affiliated with the A.B. 109 contract." He then engaged in the following exchange with Flores's counsel: "Q. Not affiliated with the A.B. 109 contract. That was the contract that Mr. Ufondu was operating under; correct? [¶] A. That is correct. [¶] Q. So the important point there was to make sure that Ms. Flores was not working under the A.B. 109 program; correct? [¶] A. It was important that she had no interaction with Mr. White. [¶] Q. And that came from Director Ufondu, didn't it, sir? [¶] A. I believe it was a mutual understanding that we didn't want her to have any contact with Mr. White; so keeping her off the A.B. 109 portion of our contract was the right thing to do."

The jury could have inferred from this exchange that Wilke had communicated with Ufondu and that they had reached a "mutual understanding" that Flores should be assigned to some location that was not affiliated with the A.B. 109 program.

There was also evidence that Ufondu's motive was not benign, and that he simply no longer wanted Flores under his supervision. A segment of the deposition of Becky Choy (Choy),

Flores's direct supervisor in the Lancaster office, was read at trial. In that segment, Choy testified that Ufondu told her he did not want Flores under his supervision when she transferred to Van Nuys: "So I just want to clarify my question. This is what Ana Flores wrote: 'I want to know if Mr. Ufondu ever told you that he didn't want Ana Flores under his supervision when she was transferred to Van Nuys.' Did he ever make that statement that I just said to you? [¶] A. Umm, yes, he did. Now I'm reading this and I recall back, that's what he did say, because he didn't want Ana, umm, to be in the Van Nuys office because the Van Nuys office is under his supervision."

And, there was evidence suggesting that Ufondu simply did not want to deal with the issues that Flores's presence created. Flores testified that Choy told her Ufondu "did not want [her] under [his] supervision and that was a huge liability to go to his office so he didn't want me there [in the Delano Street office]."[3]

This combined testimony supports a reasonable inference that Ufondu wanted Flores to be transferred to a non-A.B. 109 facility and communicated that desire to Wilke. His restriction precluding transfer to any office involved with A.B. 109 meant that Flores could not continue the GPS work that she had been doing.[4]

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[3] Although the County had objected on hearsay grounds to previous questions concerning what Flores knew about Ufondu's motives, this testimony came in without objection.

[4] It follows that I disagree with the majority to the extent they suggest that Flores's transfer was not an adverse employment action because it did not affect her job performance

The testimony also supports the conclusion that the decision to assign Flores to a location with no connection to the A.B. 109 program was related to her harassment complaint. Wilke's stated justification for that decision was to avoid potential contact with White. The jury might have viewed that justification as a pretext, as the County had already addressed the potential for contact with White by ordering White to stay away from Flores and had permitted Flores to continue working on A.B. 109 matters in the Lancaster office. But even if the reason was real, it was obviously related to her harassment complaint. Thus, the result of Flores's complaint about White's conduct was an assignment that deprived her of the opportunity to work on the GPS issues that had attracted her to the County in the first place.

The County argues that Flores's theory that Ufondu wanted her transferred out of his jurisdiction makes no sense because the Delano Street office to which Flores was originally assigned *was* a non-A.B. 109 facility outside Ufondu's supervision. Ufondu therefore would have had no interest in whether she was assigned to Delano Street or some other facility.

But the evidence on this point was disputed. Ufondu testified that he did not have jurisdiction over any office in Van Nuys. However, Flores testified that the Delano Street office

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or her opportunity for advancement in her career (Maj. Opn., at p. 17). (See *Yanowitz*, *supra*, 36 Cal.4th at pp. 1053–1054.) The evidence supports a finding that Ufondu did not want Flores under his supervision because of the issues that her presence created. Certainly this stigma could have impacted her ability to continue working with the County had she so desired.

was under Ufondu's supervision. As discussed above, Choy also testified (through her deposition) that Ufondu told her the "Van Nuys office" was under his supervision and that he did not want Flores assigned there for that reason. And Wilke testified that the "East San Fernando Valley [i.e., the Delano Street office] has clerks that are dedicated for A.B. 109 and then a section of it that are not."[5] Further, Wilke suggested that was the reason Flores was ultimately not assigned to that office: "Since there was A.B. 109 clerks there, there still would be the potential for interaction [with White]."

We cannot resolve this factual conflict but must credit the evidence that at least some portion of the Delano Street office was devoted to A.B. 109 work under Ufondu's jurisdiction. The evidence therefore supports an inference that Ufondu communicated with Wilke about his desire to assign Flores away from the A.B. 109 program, including the Delano Street office, leading to her assignment to the Citation Division.

This evidence may be far from overwhelming, and the jury could as easily have decided that, as the County contends, AppleOne made its own, unilateral decision to assign Flores to the Citation Division to avoid the potential for contact with White. But the deferential standard of review that we employ on

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[5] Although garbled and unclear, Ufondu also provided testimony that could be viewed as consistent with Wilke's on this point. In testifying about an e-mail he sent to AppleOne asking for confirmation that Flores would "be reporting to the E.S.F.[V]. Adult and not A.B. 109," Ufondu explained that, "You know, there was—there usually—usually a mix of—between the East San Fernando Valley formal grant and the East San Fernando Valley, A.B. 109, Pacoima office."

appeal precludes us from choosing between these two plausible alternatives. Pursuant to the well-established standard of review, we must interpret the evidence in the light most favorable to Flores and, on that basis, I conclude that the evidence was sufficient to establish that the County contributed to the transfer that led to Flores's significantly diminished job responsibilities. The evidence therefore supports the conclusion that Flores suffered an adverse employment action and that the action was causally linked to her harassment complaint. (See *Yanowitz, supra,* 36 Cal.4th at p. 1042.)

_____, J.
ASHMANN-GERST