Filed 10/8/19 Williams v. Ralphs Grocery Co. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TROY WILLIAMS, Plaintiff and Appellant, v. RALPHS GROCERY COMPANY, Defendant and Appellant.	B282156 (Los Angeles County Super. Ct. No. BC495977)

APPEAL from a judgment of the Superior Court of Los Angeles County, Debre Katz Weintraub and J. Stephen Czuleger, Judges. Affirmed in part; reversed in part.

Burkhalter Kessler Clement & George, Daniel J. Kessler and Joshua A. Waldman for Defendant and Appellant.

Livingston Bakhtiar and Ebby S. Bakhtiar for Plaintiff and Appellant.

Ralphs Grocery Company (Ralphs) appeals from a judgment entered after a jury trial in favor of plaintiff Troy Williams. Williams, who worked for Ralphs for over 27 years, filed this action after Ralphs terminated his employment because it concluded he stole a case of lemonade. The jury found Ralphs defamed Williams by publishing statements that Williams was terminated for stealing or dishonesty, and it awarded economic and noneconomic damages. On appeal, Ralphs contends the special verdict form was fatally defective because it omitted questions on Ralphs's affirmative defense of the common interest privilege. Ralphs also argues the jury's award of economic damages is not supported by substantial evidence. We agree the special verdict form was defective and reverse.

Williams cross-appeals from the trial court's grant of summary adjudication in favor of Ralphs on Williams's claims of race, disability, and age discrimination, failure to accommodate, and failure to engage in a good faith interactive process. At the time of his termination, Williams was a 43-year-old African-American with a shoulder injury he sustained while stacking pallets. We affirm the grant of summary adjudication as to Williams's causes of action for race, age, and disability discrimination because Williams failed to present evidence raising a triable issue of material fact showing the reason for his termination was pretextual. However, the trial court erred in concluding Williams had not raised a triable issue of fact on his claims for failure to accommodate and failure to engage in a good faith interactive process. We affirm in part, reverse in part, and remand.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Williams's Employment with Ralphs*[1]

Williams worked at a Ralphs's store in Torrance, known internally as store No. 88 (the store). Williams began working for Ralphs's predecessor Alpha Beta Company as a courtesy clerk in 1983. From 1997 until his termination in December 2010, Williams worked as a receiver for Ralphs. His duties included receiving products from vendors, ensuring vendors provided timely deliveries, reconciling receipts, and overseeing organization of the store's backroom. Starting in 2009 Keven Fisher served as the store manager for the store, and assistant store manager Cynthia Wong acted as Williams's immediate day-to-day supervisor. Prior to the alleged theft, Williams had a good work record and was well-liked by fellow employees and management.

1. *Williams's shoulder injury*

In late 2009, while stacking pallets, Williams heard a "pop" in his right shoulder, accompanied by pain. Williams did not seek medical attention for the injury. Williams informed Wong of the injury when he next saw her, as early as the next day. Wong told Williams to return to work.

Williams testified that after his injury he experienced almost daily pain, declaring, ". . . I experienced pain and limitations with my right shoulder as it related to lifting, pulling,

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[1] The factual background regarding Williams's employment, injury, and termination is taken from evidence submitted by the parties in support of or in opposition to Ralphs's motion for summary adjudication. We note where the facts are in dispute.

pushing activities on a near daily basis, but I did the best I could." Sometimes the pain "became unbearable" and required Williams to ask for help from his coworker and helper Mario, "but help was not always available." Williams did not inform Wong he was relying on Mario for help.

Williams told Wong around 20 times about his shoulder pain, including when he had to perform heavy lifting, including stacking pallets, and when Wong gave him tasks she expected him to perform immediately. Williams "let[] her know [his] shoulder . . . was becoming a problem" in case she wanted him to do "strenuous activities." Wong would "shrug off" Williams's complaints and tell him he was fine, to "quit complaining," he "can get it done," and to "stop acting like a baby." Williams did not complain to any other supervisor about his injury. Williams could endure the pain caused by his injury while at work. He "just worked through the pain," and "if it got too unbearable, [he got Mario] to help, but it was often. . . . When [he] did a lot of excessive lifting and stuff, [he] would let her know." Williams "didn't have a[n] issue working," but needed "to slow down a little bit and be more efficient" to deal with the pain. Williams's injury did not affect his daily life outside of work.

Fisher testified Wong was required to inform Fisher upon learning of an employee's disability and need for accommodation. Wong denied Williams ever informed her he had pain in his shoulder when he lifted objects or performed other work duties.

Williams filed a workers' compensation claim after his termination. He did not file for workers' compensation earlier because he did not feel the pain was bad enough to stop him from working and because he did not want to make less money. Williams reported his pain to Wong with the hope she would

make an adjustment to his work that would alleviate the pain. But he never specifically told her he could not do the job, and he never requested an accommodation.

2. *Wong's racial comments and treatment of Williams*

On six or seven occasions, Wong asked Williams questions such as "'why do you guys' color coordinate your clothes and tennis shoes"; "'why do you guys' like listening to [rap] music . . . so loud"; and "'why are you guys' always so argumentative." (Italics omitted.) Williams considered Wong's comments about "you guys" to be generalizations about African-Americans. Williams never reported Wong's statements to a supervisor.

Third-party vendor representative Gerald Wells, who is also African-American, once overheard Wong refer to Black people as "nigg--s" at another Ralphs store. After realizing Wells overheard her, Wong apologized to him and noted she had "black friends." Kelly Anne Eason, a Ralphs employee who had worked with Wong at the store, witnessed Wong make offensive "racial jokes" and refer to another person as a "negro." Wong denied ever making racial comments to Williams or making racial jokes while at Ralphs.

According to Williams, Wong "talk[ed] down" to him. She also assigned Williams extra work, especially when he was overwhelmed with other assignments and while he was taking his lunch break. When Williams had to work through lunch and failed to clock out for his lunch break, Ralphs bookkeeper Laurie Brown asked Williams to fill out a form to record his time as if he had taken a lunch break. Although Williams protested to Wong, Wong required Williams to fill out the form. Williams was aware Brown and Wong were good friends.

Williams also had a conflict with Brown over his duties with respect to the Kroger Accounting System (KAS). In the summer of 2010, Brown's duties with respect to the KAS program were supposed to be transferred from Brown to Williams, but Williams refused to assume Brown's duties because she was four months behind. Wong told Williams he had to take over the program, but Williams complained to Fisher, who required Brown to address the backlog before transferring her duties to Williams. Williams never formally complained about Wong's or Brown's behavior.

3. *The lemonade incident*

On November 12, 2010, at the end of Williams's shift, Williams brought two cases of lemonade bottles in a shopping cart to one of the store's checkout lanes. Earlier in the week Williams had asked another employee to order him two cases of the lemonade for his son's football practice because the lemonade was on sale. The cases contained six bottles of lemonade each, totaling 12 bottles. Williams placed flattened cardboard boxes over the top of the cart, which partially obstructed view of the cart's contents. Williams planned to bring the cardboard boxes home to place under his car to catch leaking oil. Before entering the checkout lane, Williams attempted to balance the flattened boxes on the floor, but they would not stay upright, so he returned them to the top of his cart.

Williams entered the checkout lane of cashier Tiffany Connor. Williams adjusted the cardboard on top of his cart, so the cart would fit in the lane. Williams handed Connor one bottle of lemonade. Connor scanned the single bottle six times. During the transaction, Williams was distracted by a coworker and a

manager, who handed him his paycheck. Williams did not review his receipt after paying or subsequently notice anything wrong with the transaction.[2] Williams exited the store with 12 bottles of lemonade, having paid for only six.

Brown witnessed Williams's transaction from the store's front desk, directly behind Connor's checkout lane.[3] She observed Williams's cart was partially covered by flattened cardboard boxes. At the conclusion of Williams's transaction, Williams pushed his cart to the end of the aisle near the front desk and left it there for about a minute. Brown observed the cart contained two shrink-wrapped cases of large bottles of lemonade, with a label on each case stating the case contained six bottles.[4] Brown found the transaction unusual because of the flattened cardboard and that the cases of lemonade were still shrink-wrapped, so she checked the Ralphs accounting system and learned Williams had paid for only one case with six bottles of lemonade.

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[2] At his deposition, Williams did not recall whether he reviewed the receipt.

[3] Williams contends the video recording of the incident shows Brown did not see the transaction because she never looked up from the front desk. The video evidence does not, however, show whether Brown observed the transaction, and Brown stated in her deposition and declaration she saw it.

[4] Williams notes Brown wore reading glasses in 2010. However, there is no evidence Brown was not wearing her glasses at the time of the incident.

4. *Ralphs's investigation and Williams's termination*

Brown called Ralphs's anonymous hotline to report a potential theft and spoke with Richard Bouchard, an investigator with Ralphs's loss prevention department. Brown relayed to Bouchard what she had seen.[5] Brown then checked Ralphs's accounting system again to determine whether Williams had paid for the six bottles of lemonade earlier in the day. He had not. Brown called Bouchard and informed him of this. On November 22 Brown submitted a written statement to Bouchard, in which she summarized her observations of the incident.

After receiving Brown's phone call, Bouchard contacted Ralphs's senior labor relations manager, Kirk Reynolds. Reynolds's duties included evaluating employee misconduct and implementing discipline, including termination. Reynolds instructed Bouchard to investigate the incident and suspend Williams if Bouchard confirmed Williams exited the store on November 12 with bottles of lemonades for which he did not pay. As instructed by Reynolds, Bouchard reviewed security camera video footage of the incident and sales documentation that confirmed Williams had purchased only six bottles of lemonade on November 12, 2010. After watching the video, Bouchard believed Williams had intentionally tried to conceal the second case of lemonade under the flattened cardboard in order to steal it, testifying, "[I]n my mind [Williams's conduct] led me to believe

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[5] Williams asserts Brown told Bouchard "she had witnessed Williams 'steal' lemonade." There is no evidence Brown made such a statement to Bouchard. Williams relies on Bouchard's testimony, but Bouchard testified Brown told him Williams "didn't pay for it," and he denied Brown ever said Williams stole the lemonade.

that he was showing suspicious enough activity that he was trying to conceal it." Bouchard acknowledged Williams's behavior in leaving the covered cart in plain sight at the end of the aisle for about a minute before exiting the store was unusual because "human behavior is you'd probably get out of there as quick as you could," but he noted Williams's behavior was consistent with someone who was very comfortable in the store.

On November 23, 2010 Bouchard interviewed Williams about the lemonade incident with Fisher present. Williams said he remembered buying the lemonade, but he did not remember the quantity he purchased. Bouchard showed Williams the transaction record showing Williams had purchased six bottles of lemonades. Williams responded if that was what the record showed, he must have purchased six. Bouchard told Williams the security video footage showed he had 12 bottles of lemonade in his cart. Williams requested to review the surveillance video, but Bouchard did not allow it because Ralphs's policy was for an employee's review of security footage to happen as part of the grievance process. Williams told Bouchard he believed the lemonade was on sale and Connor probably made an error.

Bouchard described Williams as becoming "very agitated" during the interview. Although Fisher did not observe Williams become agitated, in his deposition Williams admitted he became "very agitated" by Bouchard's questioning.

At the end of his interview, Williams prepared a written statement, in which he stated he purchased an "unknown" quantity of lemonade on November 12 for $18.54. Williams stated he "paid the amount shown on the register." After Williams finished his statement, Bouchard told Williams he was being suspended for taking six lemonades without paying.

Williams asked for a union representative, but Bouchard responded the interview was already complete. After the interview, Williams contacted his union representative and filed a grievance related to his suspension. Williams did not include in his grievance any complaints about Wong or his shoulder injury.

Also on November 23, after interviewing Williams, Bouchard interviewed Connor. Wong was present during the interview, at Bouchard's request, because Ralphs's policy required a supervisor observe interviews between loss prevention personnel and other Ralphs employees. Wong did not actively participate in the interview or ask Connor any questions. Connor stated that on the day in question Williams had told her he had six bottles of lemonade in his cart. Connor could not see into the cart because of the flattened cardboard on top. Bouchard did not question Connor regarding whether she violated Ralphs policy by failing independently to check the contents of Williams's cart during checkout.[6]

In her written statement, Connor averred, "On 11/12/10 Troy Williams came through my line and told me to ring up 6 lemonades. He handed me one lemonade and I charged him for 6 lemonades. I told him . . . not to forget to put his receipts in the prize box. [He] had a lot of broken down boxes on the top of [his] shopping cart."[7]

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[6] A Ralphs cashier has the responsibility to ensure everything in a customer's cart has been rung up in the sale.

[7] Williams asserts Connor wrote her statement only after Bouchard told her Williams's cart contained 12 bottles of lemonade. There is no evidentiary basis for this assertion. Although Bouchard testified at his deposition he "spoke to

Connor later spoke with her supervisor Suzie Toth-Haberman about her interview with Bouchard. Connor relayed to Toth-Haberman that "she was told that she rung up the order wrong." Prior to November 12 Connor had been terminated for failing to submit accurate time cards. She was reinstated under an agreement between Ralphs and her union but was placed on "last and final" status.

Bouchard documented his findings in a report. Bouchard did not reach any conclusion, in his report or otherwise, whether Connor violated store policy by failing to charge Williams for all 12 bottles of lemonade. He provided the report, witness statements, security video footage, and transaction documentation to Reynolds.

Reynolds reviewed the report and supporting documents. Reynolds found Williams had offered inconsistent explanations concerning the lemonade, including that initially he did not remember how many he purchased; he did not remember how many he told Connor he had in his cart; he must have bought six if that is what the transaction record showed; and the lemonades must have been on sale. Reynolds found these varying explanations suggested Williams was not being truthful. Reynolds noted Connor's statement included the detail she told Williams "not to forget to put his receipt in the prize box," which

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[Connor] first and then asked her to write a statement about it," Bouchard also testified Connor "immediately" told him Williams said he had six lemonades, something Connor "specifically" recalled. Connor testified at her deposition that only after she completed the written statement did she ask Bouchard how many lemonades had been in the cart, at which point Bouchard told her there were 12 bottles.

suggested Connor had an accurate recollection of the transaction. Reynolds considered Connor's written statement that Williams had told her to charge him for six lemonades and Williams's statement that the quantity of lemonade he purchased was "unknown" to be reconcilable, and he found Williams had not refuted Connor's version of events. Although Reynolds was aware of Connor's last and final status, he did not question Connor's veracity because her version of events was not contradicted by Williams's written statement.

After reviewing the video, Reynolds found it suspicious that Williams had flattened cardboard on top of his cart and adjusted the cardboard at the time he entered Connor's checkout lane. Reynolds also noted Williams appeared to review his receipt in the video, and he felt Williams should have known the quantity of lemonades he purchased.

On December 8, 2010 Reynolds had a grievance meeting with Williams and a representative from Williams's union. At the meeting, Reynolds discussed the witness statements with Williams. Williams admitted he had only paid for six bottles of lemonade but left the store with 12. Williams told Reynolds he had told Connor he had 12 bottles of lemonade in his cart. Reynolds found this statement was significant because it was inconsistent with Williams's earlier statements, including Williams's statement to Bouchard during his interview that he did not recall the quantity of lemonades he had purchased and did not remember what he told Connor about the number of lemonades. Williams did not raise Wong's alleged acts of discrimination and harassment at the meeting or otherwise during the grievance process. Williams also did not reference his

shoulder injury at the meeting. On December 17, 2010, Reynolds terminated Williams for stealing six bottles of lemonade.

In his declaration, Reynolds denied that Williams's age or race played a role in Reynolds's decision to terminate him. Reynolds denied ever communicating with Wong, Brown, or Connor concerning Williams prior to Williams's termination. Reynolds added, "Wong played no role, whatsoever, in my evaluation of this case or in my decision to terminate Williams." Reynolds denied having knowledge of Wong's racial comments to Williams or Williams's shoulder injury at the time of his decision to terminate. Williams testified he had no reason to believe Reynolds knew about his shoulder injury. Wong denied having any role in the decisions to suspend and later to terminate Williams or in the investigation, other than sitting in the interview of Connor.

B. *Williams's Complaint*

On November 20, 2012 Williams filed a complaint against Ralphs,[8] alleging Ralphs's employees falsely accused him of stealing a case of lemonade in order to justify his termination, and he was terminated because of his disability, age, and race. Williams also alleged Wong, Brown, and Connor published false statements about him, which "insinuated and/or suggested that he was a thief . . . ; that he lacked integrity; that he was unethical; that he was immoral; that he was dishonest; that he had acted in a fraudulent manner; and that he was incompetent."

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[8] Williams also named as defendants Ralphs employees Wong, Brown, and Connor (erroneously sued as "Conner"), but voluntarily dismissed them before trial.

Williams alleged causes of action for (1) disability discrimination; (2) age discrimination; (3) race discrimination; (4) harassment; (5) failure to prevent discrimination and harassment; (6) failure to engage in a good faith interactive process; (7) failure to accommodate a disability; (8) retaliation; (9) wrongful discharge in violation of public policy; (10) defamation; and (11) intentional infliction of emotional distress. The first eight causes of action were brought under the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.).

C. *Ralphs's Offer of Reinstatement*

On July 19, 2013, in a letter from Ralphs's counsel to Williams's counsel, Ralphs unconditionally offered to reinstate Williams's employment. The letter stated, "Although the evidence is clear that Mr. Williams left Ralphs' premises with 6 lemonades in his cart that he did not pay for, Ralphs believes that your client now understands the applicable company policies and severity of his actions. Ralphs trusts that he will not repeat them again."

At his deposition, Reynolds testified Ralphs would not rehire an employee fired for dishonesty, and he had never rehired an employee fired for theft unless "it end[ed] up not being theft." Reynolds was not involved in or aware of Ralphs's reinstatement offer at the time it was made.

D. *Summary Adjudication Proceeding*

1. *Ralphs's motion for summary judgment or, in the alternative, summary adjudication*

On May 2, 2014 Ralphs filed a motion for summary judgment or, in the alternative, summary adjudication. In support of its motion, Ralphs submitted deposition testimony, declarations, and other evidence relating to its investigation of the lemonade incident and its decision to terminate Williams.

Ralphs argued it had a legitimate, nondiscriminatory reason for terminating Williams, and Williams could not show the decision to terminate was motivated by discriminatory animus based on Williams's disability, age, or race, thereby defeating Williams's first, second, and third causes of action. As to Williams's fourth and fifth causes of action for harassment and failure to prevent harassment, respectively, Ralphs argued the alleged conduct was not sufficiently severe or pervasive.[9] With respect to Williams's sixth and seventh causes of action, for failure to engage in a good faith interactive process and failure to accommodate, Ralphs asserted Williams could not establish he had a disability under FEHA, or had requested an accommodation for his injury.[10] As to Williams's tenth cause of

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[9] Ralphs did not address the fifth cause of action to the extent it alleged failure to prevent discrimination.

[10] Ralphs also moved for summary adjudication of Williams's other causes of action. As to the eighth cause of action for retaliation, the ninth cause of action for wrongful discharge in violation of public policy, and the eleventh cause of action for intentional infliction of emotional distress, the trial court granted Ralphs's motion for summary adjudication, but Williams has not addressed the ruling as to those claims on appeal. "Thus, the

action for defamation, Ralphs argued the claim failed because the statements were true and the common interest privilege applied to bar Williams's claim because the statements were made without malice.

2. *Williams's opposition*

On July 2, 2014 Williams filed his opposition, in which he argued there was a dispute as to whether Ralphs's termination decision was motivated by discriminatory animus. With respect to his sixth and seventh causes of action, Williams argued his injury qualified as a disability under FEHA and Ralphs had an affirmative duty to engage in the interactive process and accommodate that injury, regardless of whether Williams specifically requested an accommodation. Williams filed evidentiary objections to evidence submitted by Ralphs and submitted deposition testimony, declarations, and other evidence in support of his opposition.

Williams filed declarations by two former Ralphs employees. Andre Cutler declared he was a 53-year-old African-American who worked for Ralphs from 1978 to 2011, most recently as a receiver. He was terminated for leaving work early on occasions when he had worked through his lunch periods, despite store director Tom Perrin consenting to the practice.

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claim[s] [are] abandoned." (*Ryder v. Lightstorm Entertainment, Inc.* (2016) 246 Cal.App.4th 1064, 1080, fn. 11; accord, *Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1033 [failure to discuss claim constitutes "forfeit[ure] [of] any contention of error that summary adjudication was improperly granted with respect to that claim"].)

Three months before his termination, he had reported a work-related injury. Cutler was replaced by a 20-year-old woman.

Deborah Luna declared she had worked for Ralphs for approximately 31 years. In 2010, while working as a cashier, she was diagnosed with carpal tunnel syndrome and advised she needed surgery. Despite the diagnosis and a medical note restricting her from performing cashier work, her supervisor required her to finish out the week as a cashier. Without consulting Luna, Ralphs accommodated her by assigning her to a price-integrity position, in which she was required to scan merchandise in different Ralphs stores to ensure correct pricing. The new position impacted Luna's condition more than her previous one because she had to use a cumbersome handheld device for the scanning. She was told she again needed a doctor's note to change positions, which she obtained, stating she was cleared to return to cashiering. Ralphs failed to discuss with Luna any options other than serving as a cashier or in the price integrity unit. After Luna requested to return to cashiering, Ralphs suspended Luna for job abandonment, and he later terminated her for time card fraud, which Luna contends she did not commit.

Williams attached a panel-qualified medical examiner's report from his workers' compensation case, dated August 15, 2012, which diagnosed Williams with "[r]ight shoulder impingement syndrome with full thickness tear of supraspinatus tendon, advanced chronic degenerative tearing of the posterior labrum with fraying degenerative change of anterior labrum, acromioclavicular joint arthropathy with inferior spur MRI." The report stated Williams's injury "preclud[ed] overhead work above the right shoulder with pushing and pulling activities." The

report noted Williams's "present symptoms and need for further treatment are attributed to the industrial accident which occurred on December 16, 2009."

Williams also requested a continuance pursuant to Code of Civil Procedure section 437c, subdivision (h),[11] to enable him to depose unidentified witnesses "all of whom may possess information needed to defeat" Ralphs's motion.[12] Williams supported his request for a continuance with an attorney declaration, in which Williams's counsel, Ebby Bakhtiar, stated his office had "scheduled, or [was] working with Defendants to schedule the depositions of approximately 13 witnesses," including present and former Ralphs's employees who knew Williams and worked at the store. With regard to one unnamed former Ralphs employee who Williams asserted worked for Ralphs for 30 years before being terminated for stealing after reporting a work-related injury, Bakhtiar stated "[w]e did not know about this witness until very recently . . . ." Bakhtiar asserted "defense counsel has cancelled and rescheduled many of these depositions on at least three separate occasions thereby leading to this delay." Bakhtiar stated "there appears to be a high likelihood that these witnesses will have information and evidence that will bear directly upon Ralphs'[s] discriminatory motives as well as Ralphs'[s] company-wide pattern and practice of retaliation and failure to accommodate." Bakhtiar estimated a

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[11] All further undesignated statutory references are to the Code of Civil Procedure.

[12] Williams had previously requested a continuance on June 5, 2014, which the trial court denied.

three-month continuance would be sufficient to enable the taking of the depositions.

Ralphs filed evidentiary objections to the Cutler and Luna declarations and other evidence submitted by Williams. Ralphs argued the Cutler and Luna declarations were irrelevant because they did not involve a common decision maker.

3. *The trial court's hearing and ruling*

At the July 14, 2014 hearing the trial court denied Williams's request for a continuance.[13] The court found the declaration of Williams's counsel did not satisfy the requirements of section 437c, subdivision (h), because it failed to explain how the 13 or more proposed depositions "would be essential to opposing the motion."

The trial court sustained Ralphs's objections based on relevance to the declarations of Cutler and Luna because they lacked a common decision maker.[14] The trial court granted summary adjudication on Williams's first, second, third, sixth, seventh, eighth, ninth, and 11th causes of action.

As to Williams's first cause of action for disability discrimination, the trial court found no evidence Reynolds, as the decision maker, or Bouchard, as the investigator, had any knowledge of Williams's shoulder injury. The court added, "At most, . . . Wong knew [Williams] had shoulder pain. That by itself does not constitute a disability, though, for purposes of

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[13] Judge Debre Katz Weintraub heard and ruled on the motion.

[14] The trial court sustained several other of Williams's and Ralphs's evidentiary objections, none of which is challenged on appeal.

FEHA." The court concluded, "Thus defendants have met their initial burden of demonstrating that [Williams] cannot meet the prima facie case element of a disability discrimination claim that an adverse employment action was taken against [him] because of a disability." The court found Williams's evidence did not raise a triable issue of fact whether "he informed Wong or any other supervisor that he was limited in a major life activity, such as working."

As to Williams's second and third causes of action for age and race discrimination, the court found Ralphs's evidence was sufficient to establish it had a legitimate, nondiscriminatory reason for its decision to terminate Williams. The court concluded Williams had not met his burden to submit substantial evidence from which a reasonable trier of fact could infer Ralphs's stated reason was pretextual and the termination was discriminatory. As to Williams's third cause of action for race discrimination, the court found Williams's evidence of racial animus implicated only Wong, and there was no evidence Wong influenced Ralphs's decision to terminate Williams.

As to Williams's sixth and seventh causes of action for failure to engage in a good faith interactive process and failure to accommodate, the trial court found Williams "only disclosed his pain to Wong but did not . . . tell her or any other supervisor that he was limited in a major life function, the pain itself does not equate to physical disability under FEHA." The court also found there was "no triable issue as to whether [Williams] requested a reasonable accommodation which is required by the statute to trigger the obligation to engage in the interactive process."

The court denied Ralphs's motion with respect to Williams's fourth, fifth, and tenth causes of action for harassment, failure to

prevent discrimination or harassment, and defamation, respectively.[15] On July 23, 2014 Ralphs's counsel filed a notice of the court's oral ruling.

E. *The Trial on Williams's Remaining Causes of Action*[16]

1. *Williams's evidence*

The trial commenced on January 11, 2017 with jury selection.[17] Williams called numerous Ralphs's employees who worked at the store at the time of Williams's firing to testify regarding statements made to and by the employees on the reasons for Williams's termination.

During Ralphs's investigation, Connor told Roman Alonzo, who in 2010 was a general merchandise clerk at the store, about the lemonade incident. Connor told Alonzo Williams risked suspension and termination for lying about the quantity of lemonade he was purchasing. Alonzo was sometimes supervised by Williams, but he "didn't have a reason" he needed to know about the circumstances surrounding Williams's suspension and termination. Rather, he just personally wanted to know why Williams's was fired, although he never asked Connor for the

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15 Although the trial court in its ruling described the fifth cause of action as a claim for failure to prevent harassment, the complaint alleged the claim as a failure to prevent discrimination or harassment.

16 Our recitation of the evidence presented at trial is limited to facts relevant to this appeal. The parties also presented evidence at trial related to Ralphs's investigation and Williams's termination that was materially identical to the evidence presented in the summary adjudication proceeding.

17 Judge J. Stephen Czuleger presided over the trial.

information. Wong and other employees also told Alonzo that Williams had been suspended and terminated. Wong also spoke with Brown about the reason for Williams's termination.

Toth-Haberman, who was a cashier and Connor's supervisor at the store in 2010, was told by a number of employees that Williams had been fired for improperly purchasing marked-down products, but added, "It was all hearsay. Different stories from different people." Ana Pulido, who was a bakery manager at the store when Williams was terminated, heard from a coworker that Ralphs had fired Williams for stealing. She did not need to know this information to perform her job.

Cindy Magana worked in the store as a "POS coordinator" (checking prices) and filled in as a cashier. She saw Williams every day because she gave him products that needed to be processed. Magana noticed Williams's absence and asked Wong what happened. Magana inquired out of her concern for Williams, not to "gossip[]." Wong told Magana that Williams was terminated. Magana also heard "[f]rom talk around the store" that Williams stole bottles of lemonade. Magana discussed Williams's firing with coworkers Martha Beach, Theodore Thomas, Jorge Bonilla, Eric Gonzalez, and Vincent Brown.

Bonilla testified he "heard rumors" about Williams's firing, but "the person in charge said that [the employees] should not make any comments because we did not know what had happened." Bonilla had a different shift from Williams. Beach testified in 2010 she was a floral manager, and at the time Williams's termination was "talked about throughout the store." Beach's position did not require her to know why Williams was fired.

Thomas testified he worked in the produce department at the time Williams was in receiving, and he and Williams interacted in their positions. According to Thomas, about two days after Williams's termination "[e]verybody" at the store was talking about what had happened. Thomas was told by four or five people that Williams was fired for not paying for merchandise, which was stealing. After Williams was suspended, employees joked about paying for their drinks. Thomas had no employment-related reason to know about Williams's firing. Fisher told Thomas and several other employees not to talk about Williams's firing.

Produce manager Gonzalez told seafood manager Blanca Torres that Williams had been terminated for stealing. To perform her job, Torres did not need to know why Williams was terminated.

In 2010 Jason McMinn was a grocery manager in the store. McMinn learned from Wong and Fisher that Williams had been suspended for stealing lemonade. McMinn periodically inquired of Wong and Fisher, "[W]hat's going on with this?" After Williams was terminated, Wong and Fisher told McMinn that Williams was fired for stealing. McMinn asked about Williams out of "concern personally for [Williams]," and because he was third in charge at the store and needed to know whether Williams would be returning to work. But McMinn had no reason to know why Williams was fired. On several occasions after Williams was fired, vendors who had worked with Williams approached McMinn to ask what happened to him. McMinn told the vendors Williams was fired for stealing. According to McGinn, there was no reason the vendors needed to know the reasons for Williams's termination. On other occasions, McMinn

discussed Williams's firing with six or seven Ralphs employees whom McMinn supervised on the night shift. The employees did not have a need for the information.

2. *Ralphs's evidence*

Ralphs's vice president of legal services, Steve Prough, testified it was not unusual for rumors to circulate among Ralphs employees after a termination. Ralphs's policy was to "endeavor to keep personnel matters private," but "if it gets out like it did in [Williams's] case . . . , it sends a message of deterrence. Employees will know that if they engage in theft, they are going to be terminated regardless of who they are."

3. *The special verdict form*

Williams and Ralphs lodged multiple versions of a proposed special verdict form with the trial court. Although Williams's initial proposed special verdict form did not include questions relating to the common interest privilege, Ralphs's initial proposed verdict form and the parties' joint proposed special verdict form lodged on November 19, 2015 contained the same two questions relating to Ralphs's affirmative defense of the common interest privilege. Specifically, the joint proposed special verdict form lodged on November 19, 2015 asked in question No. 22, after asking the jury to determine whether Ralphs made defamatory statements, "In making the statements, did any of the . . . Defendants act with hatred or ill will toward Troy Williams, showing the Defendant[s'] willingness to vex, annoy, or injure Troy Williams?" Question No. 23 asked, "In making the statements, did any of the . . . Defendants have no reasonable

grounds for believing the truth of the statements?"[18] Ralphs lodged a proposed special verdict form on December 30, 2016, two weeks before trial, including the same two questions.

On the morning of January 31, 2017, before closing arguments, the parties finalized the special verdict form with the trial court outside the presence of the jury. The final special verdict form submitted to the jury failed to include any questions relating to the common interest privilege. Ralphs's counsel, Joshua Waldman, raised a concern the verdict form did not sufficiently address Ralphs's statute of limitations defense, arguing the form would "render[] it impossible . . . to determine after the jury reaches a verdict if the jury found that any of the statements that predated [Williams's] termination were time-barred, which could cause problems with respect to causation and damages." Ralphs's counsel did not object to the omission of the common interest privilege from the special verdict form.

4. *The parties' closing arguments*

During closing arguments, both parties addressed the applicability of the common interest privilege. After noting how many store employees and vendors knew Williams was fired for stealing, Williams's counsel argued the privilege did not apply because the employees and vendors "didn't have a need to know anything about why Mr. Williams was fired, yet these people all

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[18] The special verdict form did not ask the jury to decide whether the common interest privilege applied; instead, the proposed form appears to have assumed the communications fell within the privilege, but asked whether there was hatred or ill will, or lack of a reasonable ground for believing the truth of the statements, to negate the privilege.

heard about this false theft allegation: Wong, McMinn, Alonso, Bonilla, Beach, Magana, the list goes on and on." Ralphs's counsel argued the statements of Brown and Connor were protected by the privilege because they were made without malice for purposes of Ralphs's investigation. Ralphs's counsel further argued the "common interest privilege even covers [the] rumors" repeated by other employees because those statements had "a collateral benefit" of demonstrating that even well-liked employees like Williams were "not above the rules[, a]nd if they take product without paying, they will be terminated." In rebuttal, Williams's counsel argued the numerous employees who testified to hearing the false statements about Williams's termination had no need to know about the reasons for his termination as part of their jobs.

5. *The jury instructions*

The trial court instructed the jury following closing arguments. The court instructed the jury with a modified version of BAJI No. 7.05.1, that "Defendant was conditionally privileged to make the statement if you find any of the following to be true: [¶] (1) The interest[] applies to a defendant []who is protecting his own pecuniary or proprietary interest; or [¶] (2) The required relation between the parties to the communication is a contractual, business or similar relationship; or [¶] (3) The request referred to must have been in the course of a business or professional relationship. [¶] . . . [¶] A privilege is abused when a defendant publishes a defamatory statement about plaintiff, [¶] without good faith belief in the truth of the statement; or [¶] without reasonable grounds for believing the statement [is] true; or [¶] [when] motivated by hatred or ill will towards plaintiff."

The court further instructed the jury with a modified version of CACI No. 1723, that "[i]f you find that this conditional privilege applies, Troy Williams cannot recover damages from Defendants even if the statements were false, unless Troy Williams also proves either: [¶] 1. That in making the statements, Defendants acted with hatred or ill will toward him, showing Defendants' willingness to vex, annoy, or injure him; or [¶] 2. That Defendants had no reasonable grounds for believing the truth of the statements."

The court also instructed the jury with a modified version of CACI No. 3946 that, for purposes of awarding punitive damages, "'Malice' means that Ralphs . . . acted with intent to cause injury or that Ralphs['s] . . . conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences."

6. *The jury's deliberations and verdict*

The jury commenced their deliberations on the afternoon of January 31, 2017. At the beginning of the third day of jury deliberations (February 2), Ralphs's counsel noted on the record for the first time the special verdict form omitted any question related to the affirmative defense of the common interest privilege, stating this issue was "discussed" and was "mentioned earlier." Ralphs's counsel stated, "I want to make it clear that defense wanted some reference to that affirmative defense." He added he was raising this because he "wanted to make sure that the record is clear." There were no further discussions of the verdict forms at that time.

Later that morning, after discussing notes from the jury, Ralphs's counsel stated, "Previously, we had discussed off the record an issue that we believed could possibly be an appellate issue, that our affirmative defense of the common interest privilege is not included on the verdict form although we had requested language in our proposed verdict forms." He stated he had raised off the record that the omission "might be a reversible error and suggested that perhaps we try to cure it by adding something to the verdict form." Ralphs's counsel noted Williams did not want to change the verdict form. The court declined to modify the verdict form, explaining, "The jury was properly instructed, and to substitute the verdict form or change the verdict form . . . would be inappropriate."

During jury deliberations, the jurors sent a total of 12 notes to the trial court inquiring on various issues. The jury twice communicated to the trial court it was "deadlocked." Because of the deadlock, on the morning of February 3 the court allowed the parties to present supplemental closing arguments on whether the statements by Ralphs and its employees regarding Williams's termination were substantially true.

On the fifth day of deliberations (February 6), the jury returned its verdict. The jury unanimously concluded Williams was not "subjected to unwanted harassing conduct because of his race."[19] The jury voted nine to three to return a verdict for Williams on his defamation claim. In response to question No. 8 on the special verdict form, the jury found Ralphs or its employees made statements to persons other than Williams that "Troy Williams was terminated for stealing or dishonesty; and/or

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[19] Williams has not appealed from the jury's verdict for Ralphs on his harassment claim.

[¶] Any statement that reasonably implies that Troy Williams stole or was dishonest." In response to question Nos. 15, 16, and 17, the jury further found the statements were not substantially true; Ralphs or "its employees fail[ed] to use reasonable care to determine the truth or falsity of the statements"; and the "statements [were] a substantial factor in causing Troy Williams actual harm."

The jury awarded Williams $504,000 in economic damages for loss of past and future earnings and harm to Williams's "property, business, trade, profession, or occupation" and $300,001 in noneconomic damages for past and future emotional distress, damage to reputation, and "[s]hame, mortification, or hurt feelings." The jury found Ralphs and its "officer, directors, or managing agents" did not act with malice, oppression, or fraud, and therefore awarded no punitive damages.

After the trial court read the verdict, but before it discharged the jury, Ralphs's counsel "strenuously object[ed]" to the verdict and requested "to send the jury back before discharging them to look at [the common interest privilege] issue which was not considered on the verdict form." The court rejected Ralphs's request, noting the court and parties had "spent some time working on [the] verdict form," and Ralphs's counsel raised an objection only after the jury was deliberating. The court excused the jury.

F. *Ralphs's Motion for Partial Judgment Notwithstanding the Verdict*

Ralphs filed a motion for partial judgment notwithstanding the verdict (JNOV), in which it argued for judgment in its favor on Williams's defamation claim based the omission from the

special verdict form of the common interest privilege defense. Ralphs asserted it had included two questions on the privilege in the two versions of the special verdict form it had lodged with the court, including the one filed on December 30, 2016. Further, on January 29, 2017, two days before the jury began its deliberations, Williams's counsel e-mailed Ralphs's counsel a redlined version of the special verdict form, which included the common interest privilege defense. The redlined draft included Ralphs's proposed question No. 22, which inquired whether Connor, Wong, or Brown acted with hatred or ill will toward Williams. Williams's counsel added a comment, "This assumes the privilege does apply. There needs to be a question about the privilege." As to question No. 23 proposed by Ralphs, asking whether the same individuals had no reasonable grounds for believing the truth of the statements, Williams's counsel proposed to delete the question, commenting, "This isn't required."

Ralphs's counsel, Waldman, noted in his declaration filed in support of the motion that on January 30, 2017 the parties discussed the special verdict form with the trial court, but the only issue they discussed was the statute of limitations defense. Williams's counsel agreed to finalize the special verdict form that evening. At 8:02 that evening Williams's counsel e-mailed to Ralphs's counsel a revised special verdict form that omitted question Nos. 22 and 23 relating to Ralphs's common interest privilege defense. Waldman stated in his declaration, "Unlike Plaintiff's prior version of the special verdict form . . . , Plaintiff did not send this proposed special verdict form in a redlined version. Unbeknownst to Ralphs'[s] counsel, [t]his version deleted the common interest privilege altogether. Plaintiff's

counsel's January 30, 2017 email that accompanied the proposed special verdict form purported to focus Ralphs'[s] counsel's attention on the specific changes that Plaintiff's counsel made to Ralphs'[s] version of the verdict form. However, Plaintiff's email omitted any reference to the fact that Plaintiff unilaterally elected to delete all questions concerning the common interest privilege affirmative defense . . . ." (Boldface and underscoring omitted.)

The January 30, 2017 e-mail from Williams's counsel, Anthony Nguyen, attached to Waldman's declaration, stated he had "incorporated the changes discussed in Court today," and listed seven "additional changes" he made to the form. None of the seven listed changes addressed the common interest privilege. Ralphs argued Williams's removal of the common interest privilege questions from the special verdict form and his counsel's refusal to allow correction of the form during jury deliberations warranted granting judgment in Ralphs's favor notwithstanding the jury's verdict for Williams.

Williams argued in opposition Ralphs had adequate notice of the changes Williams's counsel made on January 30. Williams attached a declaration from Nguyen, in which he declared the parties had discussed the special verdict form with the trial court off the record on January 30, 2017. During that discussion, "the Court indicated its agreement that the common interest privilege, with the lack of clear language provided and the absence of a model verdict form including such language, should not be a part of the finalized special verdict form. Instead, the Court indicated that the issue was covered by the two jury instructions that were to be submitted on the issue." Williams further argued any error in omitting the defense was harmless

because the jury was properly instructed and the evidence of Ralphs's malice was substantial, defeating Ralphs's asserted privilege.

After a hearing, the court denied Ralphs's motion. The court reasoned, "[B]oth sides concede that the jury was properly instructed on the common interest question. While the reasons why the question was not put in the final verdict are murky, the fact remains that the Court must assume that the jury followed the instructions on the questions given them. [¶] Certainly, they could not have returned the verdict [they] did under these instructions if they had not implicitly followed the instructions, including the instructions on the common interest defense. [¶] Any error, therefore, if one exists, is harmless." Ralphs's counsel conceded, "[I]t's not important why [the questions] got removed," but argued "[a] special verdict that does not deal with every controverted issue . . . is fatally flawed." The trial court acknowledged Ralphs's motion was "not a frivolous motion," and "it is a close call." But the court denied the motion, explaining, "under the facts of this case and the way this rolled out . . . , I don't think there's sufficient cause."

G. *The Judgment*

On February 14, 2017 the trial court entered judgment in favor of Williams on his defamation cause of action for $804,001.[20] Ralphs timely appealed. Williams timely cross-appealed from the judgment and order granting Ralphs's motion for summary adjudication.

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[20] On May 15, 2017 the trial court entered an amended judgment, in which it awarded Williams $54,785.81 in costs.

DISCUSSION

A. *The Trial Court's Summary Adjudication Ruling (Williams's Cross-appeal)*

1. *Standard of review*

Summary judgment is appropriate only if there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c); *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618 (*Regents*); *Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1085.) """"We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party."'" (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; accord, *Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1179 (*Husman*).)

A defendant moving for summary judgment has the initial burden of presenting evidence that a cause of action lacks merit because the plaintiff cannot establish an element of the cause of action or there is a complete defense. (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853; *Husman, supra*, 12 Cal.App.5th at pp. 1179-1180.) If the defendant satisfies this initial burden, the burden shifts to the plaintiff to present evidence demonstrating there is a triable issue of material fact. (§ 437c, subd. (p)(2); *Aguilar*, at p. 850; *Husman*, at pp. 1179-1180.) We must liberally construe the

opposing party's evidence and resolve any doubts about the evidence in favor of that party. (*Regents, supra*, 4 Cal.5th at p. 618; *Husman*, at p. 1180.) "'[S]ummary judgment cannot be granted when the facts are susceptible [of] more than one reasonable inference . . . .'" (*Husman*, at p. 1180, quoting *Rosas v. BASF Corp.* (2015) 236 Cal.App.4th 1378, 1392.)

2. *The trial court did not abuse its discretion in denying Williams's request for a continuance to conduct further discovery*

Williams contends the trial court's grant of summary adjudication must be reversed because the trial court failed to grant him a continuance pursuant to section 437c, subdivision (h), to conduct additional discovery.[21] Section 437c, subdivision (h), provides, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." On the facts here, the trial court did not abuse its discretion in denying Williams's request for a continuance.

The opposing party seeking a continuance must show: "'"(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the

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[21] We deny Ralphs's request to strike Williams's opening brief. Williams's opening brief contains adequate references to the record for review of the trial court's summary adjudication rulings on the merits. (See Cal. Rules of Court, rule 8.204(a)(1)(C).)

reasons why additional time is needed to obtain these facts.'"" (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 656 (*Jade Fashion & Co.*) [affirming trial court's denial of continuance of summary judgment motion where declaration supporting request did not show specific facts that could be obtained by deposing witness or why facts were essential to opposition]; cf. *Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 643-644 (*Chavez*) [trial court abused its discretion in denying request for continuance to depose witness where "[i]t was apparent from the summary judgment briefing that [the witness] likely possesse[d] unique knowledge regarding the primary dispute"].)

"'The party seeking the continuance must justify the need, by detailing both the particular essential facts that may exist and the specific reasons why they cannot then be presented.'" (*Chavez, supra*, 238 Cal.App.4th at p. 643; accord, *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254 ["'It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show "facts essential to justify opposition may exist."'"]; *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548 [affirming trial court's denial of continuance where plaintiff's "declaration indicate[d] . . . depositions remained to be completed and [plaintiff] had not yet received his expert opinions," but "there [was] no statement which suggest[ed] what facts might exist to support the opposition to the motions"].)

We review a trial court's decision whether to grant a continuance under section 437c, subdivision (h), for an abuse of discretion. (*Jade Fashion & Co.*, *supra*, 229 Cal.App.4th at

p. 656; *Chavez*, *supra*, 238 Cal.App.4th at p. 643.) However, when a party makes """"""a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion,""""""" a court's discretion is substantially circumscribed, and a continuance is """"virtually mandated."""" (*Chavez*, at p. 643.)

Here, Bakhtiar's declaration failed to meet the substantive requirements of section 437c, subdivision (h), or otherwise provide good cause for a continuance. Bakhtiar did not identify the witnesses he sought to depose, the specific facts he believed the depositions would reveal, or why those facts were essential to his opposition. Rather, Bakhtiar provided only general information he sought to depose "approximately 13 witnesses," and "there appear[ed] to be a high likelihood" the depositions would provide "information and evidence that will bear directly upon Ralphs'[s] discriminatory motives as well as Ralphs'[s] company-wide pattern and practice of retaliation and failure to accommodate." Although Bakhtiar stated the potential witnesses knew Williams and worked at the store, he provided no information on the type of information they possessed, for example, whether they were percipient witnesses to discrimination or harassment, or were similarly situated "me too" witnesses. As to the witness identified as a former employee who was terminated for stealing after reporting a work-related injury, Bakhtiar did not provide specific facts about the alleged theft or work-related injury to show the alleged theft was merely a pretext for terminating the employee on the basis of the reported injury, and he did not provide facts showing the termination involved a common decision maker. Given that Williams requested the continuance 19 months after he filed the complaint

(in November 2012), he should have been able to provide additional details to demonstrate the facts to be discovered were ""essential to opposing the motion."" (*Jade Fashion & Co., supra*, 229 Cal.App.4th at p. 656.)

3. *The trial court did not abuse its discretion in sustaining Ralphs's objections to Williams's "me too" evidence*

Williams contends on appeal the trial court erred in excluding the "me too" declarations of Cutler and Luna because the circumstances surrounding their terminations are relevant to show Ralphs's discriminatory motive in terminating Williams and Ralphs's pattern and practice of discrimination. But the trial court properly sustained Ralphs's objections to the declarations because the decision makers involved in the Cutler and Luna terminations were not the same as those involved in Williams's termination.

The "[c]ourts are split regarding the proper standard of review for the trial court's evidentiary rulings in connection with motions for summary judgment and summary adjudication." (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 368; accord, *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 ["we need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo"].) However, "[t]he weight of authority . . . holds that an appellate court applies an abuse of discretion standard" to evidentiary issues arising in the context of a summary judgment motion, except evidentiary rulings turning on questions of law, such as hearsay rulings, which are

reviewed de novo. (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226; but see *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451, ["Because the rulings were determined on the papers and based on questions of law such as hearsay, we find that de novo review is proper in this context."].)

Under either a de novo or abuse of discretion standard, the objections were properly sustained. Evidence of harassment or discrimination of a plaintiff's coworkers may be admissible as "me too" evidence under Evidence Code section 1101, subdivision (b).[22] (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 116 (*Pantoja*); *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 759, 767 (*Johnson*).)

However, *Johnson* and *Pantoja* are distinguishable. In *Johnson*, the "me too" evidence submitted by the plaintiff in opposition to the employer's motion for summary judgment showed that other employees were fired or treated unfairly because of their pregnancy, which the plaintiff relied on to show she was terminated because of her pregnancy, not her alleged falsification of time records. (*Johnson, supra*, 173 Cal.App.4th at pp. 744, 759.) The other employees worked at the same facility, had the same three supervisors, and were fired shortly after their supervisors learned of their pregnancy. (*Id.* at pp. 761-762 & fn. 14.) The Court of Appeal concluded the trial court erred in

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[22] Evidence Code section 1101, subdivision (b), provides, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

excluding the evidence, explaining, "The evidence sets out factual scenarios related by former employees of defendant that are sufficiently similar to the one presented by plaintiff concerning her own discharge by defendant . . . ." (*Id.* at p. 767.)

Similarly, in *Pantoja*, the plaintiff sought to use evidence in her lawsuit for discrimination and sexual harassment that her supervisor used profanity and touched other female employees to rebut the supervisor's testimony he did not harass women in the office, had a policy of not tolerating harassment, and did not direct profanity at his employees. (*Pantoja, supra*, 198 Cal.App.4th at pp. 93-94.) The Court of Appeal concluded the trial court erred in excluding the evidence because it was relevant to show the supervisor harbored gender bias and to attack his credibility in denying the harassment or use of profanity directed at individuals. (*Id.* at pp. 109-110.)

Here, the declarations of Cutler and Luna do not show they worked at the same store as Williams or shared a common supervisor or decision maker with Williams. Cutler identifies Perrin as the store director of the Ralphs store at which he worked. Yet Williams only identified Fisher as the store manager at his store. Luna's declaration is silent as to the store at which she worked or the name of her supervisors or decision makers, instead referring to the fact "Ralphs [failed to] engage in any discussion" over her job options; "as a purported 'accommodation,' Ralphs assigned [Luna] to a position" that was worse for her disability; and "Ralphs terminated" her. Whether this evidence showed the supervisors and decision makers at the store where Williams worked had discriminatory animus on the basis of Williams's race, age, or disability depended on speculative inferences the same individuals were involved in the

decisions relating to Cutler and Luna. Thus, the trial court did not err in determining the declarations were irrelevant and inadmissible.[23]

4. *The trial court's grant of summary adjudication on Williams's discrimination claims was proper*

(a) The parties' burdens on a motion for summary judgment or summary adjudication of FEHA claims

FEHA prohibits an employer from terminating an employee based on the employee's protected status, including his or her race, age, or physical disability. (Gov. Code, § 12940, subd. (a).) California courts apply the burden-shifting approach set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, under which at trial a plaintiff must establish a prima facie case of

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[23] For the first time on appeal, Williams argues Reynolds was responsible for the termination of Cutler. Williams relies on ambiguous deposition testimony by Reynolds, in which Reynolds stated only, "Yes, I had the discretion not to terminate Mr. Cutler." However, nowhere does Reynolds state he was responsible for Cutler's termination. Moreover, Williams forfeited this issue by failing to state in his separate statement of undisputed facts or argue below that Reynolds terminated Cutler. (*Venice Coalition to Preserve Unique Community Character v. City of Los Angeles* (2019) 31 Cal.App.5th 42, 54 [party forfeited issue by failing to "include the underlying facts to support [the] allegation in their separate statement of facts opposing summary judgment"]; accord, *LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 Cal.App.4th 977, 983 [Concluding in affirming grant of summary judgment, "Appellant is not entitled to raise for the first time on appeal a theory that involves a controverted factual situation not put in issue below."].)

discrimination by showing (1) the employee was a member of a protected class; (2) he or she was qualified for and performing competently in the position he or she held; (3) he or she suffered an adverse employment action, such as termination, demotion, or denial of an available job; and (4) circumstances suggesting a discriminatory motive. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 214 (*Harris*); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*); *Husman, supra*, 12 Cal.App.5th 1168, 1181 [reversing trial court's grant of employer's motion for summary judgment, finding triable issue of material fact as to whether impermissible bias based on the employee's sexual orientation was a substantial motivating factor for his termination]; *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 591 (*Soria*) [reversing trial court's grant of employer's motion for summary judgment, finding triable issues of material fact as to whether the employer's stated reason for plaintiff's termination was a pretext for disability discrimination].)

If the plaintiff establishes a prima facie case, the burden shifts to the employer to rebut the presumption of discrimination by offering a legitimate, nondiscriminatory reason for the adverse employment action. (*Harris, supra*, 56 Cal.4th at p. 214; *Guz, supra*, 24 Cal.4th at p. 355.) If the employer meets its burden, the presumption of discrimination disappears, and the burden shifts back to the plaintiff to produce evidence the employer's reasons for the adverse employment action were a mere pretext for discrimination; the ultimate burden of persuasion on the issue of discrimination remains with the plaintiff. (*Harris*, at pp. 214-215; *Guz*, at p. 356.)

An employer may meet its initial burden in moving for summary judgment or adjudication of an employment discrimination cause of action by presenting evidence that one or more elements of a prima facie case is lacking, or the employer acted for a legitimate, nondiscriminatory reason. (*Husman, supra*, 12 Cal.App.5th at p. 1181; *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1158 (*Featherstone*) [trial court properly granted employer's motion for summary judgment on FEHA claims because the employer's refusal to allow the plaintiff to rescind her resignation was not an adverse employment action]; *Soria, supra*, 5 Cal.App.5th at p. 591.) A legitimate, nondiscriminatory reason is one that is unrelated to the prohibited bias and, if true, would preclude a finding of discrimination. (*Guz, supra*, 24 Cal.4th at p. 358.) "[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. [Citations.] While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*." (*Ibid*.)

If the employer satisfies its initial burden, the burden shifts to the plaintiff to present evidence creating a triable issue of fact showing the employer's stated reason was a pretext for discriminatory animus in order to avoid summary judgment or adjudication. (*Husman, supra*, 12 Cal.App.5th at p. 1182; *Featherstone, supra*, 10 Cal.App.5th at pp. 1158-1159; *Soria, supra*, 5 Cal.App.5th at p. 591.) "The plaintiff's evidence must be sufficient to support a reasonable inference that discrimination was a substantial motivating factor in the decision. [Citations.] The stronger the employer's showing of a legitimate,

nondiscriminatory reason, the stronger the plaintiff's evidence must be in order to create a reasonable inference of a discriminatory motive." (*Featherstone*, at p. 1159; see *Soria*, at p. 591 [plaintiff must produce "'"substantial responsive evidence" that the employer's showing was untrue or pretextual"'].)

To meet this burden, the plaintiff may present evidence showing the stated reason by the employer was "unworthy of credence" as circumstantial evidence of pretext. (*Guz, supra*, 24 Cal.4th at p. 361; see *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 147 ["In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."].) However, in order to prevail, a plaintiff must present "evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." (*Guz*, at p. 361; *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 863 ["'"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"'"].)

In *Guz*, the Supreme Court considered an employer's motion for summary judgment in which the employer presented undisputed evidence it terminated the plaintiff due to downsizing of the company, as part of which the division for which the plaintiff worked was eliminated and replaced by another entity owned by the employer. (*Guz, supra*, 24 Cal.4th at p. 364.) The plaintiff argued the employer's stated reason for his termination was a pretext for age discrimination, noting the employer had

failed to follow its own guidelines in the layoff, had failed to help him find a new job at the company, and did not fairly consider him for vacant positions in the replacement entity. (*Id*. at pp. 364-365.) The plaintiff also presented evidence that most of the employees who filled the positions at the new entity were somewhat younger than the plaintiff. (*Id*. at p. 366.) The Supreme Court concluded the trial court properly granted the employer's motion for summary judgment, finding the plaintiff's "evidence raised, at best, only a weak suspicion that discrimination was a likely basis for his release. Against that evidence, [the employer] has presented a plausible, and largely uncontradicted, explanation that it eliminated [the unit where the plaintiff worked], and chose others over [plaintiff], for reasons unrelated to age." (*Id*. at pp. 369-370.)

By contrast, in *Reeves*, the United States Supreme Court concluded there was substantial evidence to support the jury's finding the employer's stated reason for terminating the plaintiff, alleged falsification of records, was a pretext for age-based animus, as shown by age-related comments made by a decision maker in the plaintiff's firing. (*Reeves v. Sanderson Plumbing Products, Inc., supra*, 530 U.S. at pp. 152-153.)

(b) Williams failed to raise a triable issue of fact as to whether Ralphs's proffered reason for his termination was a pretext for racial animus

Ralphs presented evidence it terminated Williams's employment because of Williams's failure to pay for six bottles of lemonade, after Ralphs concluded in its investigation that Williams intentionally stole the lemonade. By presenting evidence it acted for a legitimate, nondiscriminatory reason,

Ralphs satisfied its initial burden as the party moving for summary adjudication. Williams does not dispute Ralphs presented evidence of a legitimate, nondiscriminatory reason for his termination. Thus, the burden shifted to Williams to present evidence Ralphs's stated reason was a pretext for Ralphs's discriminatory intent. (*Harris, supra*, 56 Cal.4th at pp. 214-215; *Guz, supra*, 24 Cal.4th at p. 355.)

(c) There is no evidence Wong's racial animus influenced any Ralphs decision maker

Williams has not presented any evidence Reynolds or any other Ralphs decision maker harbored any discriminatory racial animus against him. Williams testified at his deposition he had no reason to believe Reynolds, Bouchard, Fisher, Brown, or Connor had discriminatory feelings toward African-Americans. Instead, Williams bases his argument on the "cat's paw" theory that Wong, who harbored racial animus against Williams, influenced the decision makers. But there was no evidence Wong had any involvement in or influence over the decision to terminate Williams.

"[A] plaintiff 'need not demonstrate that every individual who participated in the failure to hire him [or her] shared discriminatory animus.' [Citation.] Rather, 'showing that a significant participant in an employment decision exhibited discriminatory animus is enough to raise an inference that the employment decision itself was discriminatory, even absent evidence that others in the process harbored such animus.'" (*Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 743 [supervisor's discriminatory animus could be imputed to employer where supervisor falsely told plaintiff that employer

had no job openings, and supervisor was involved in hiring process, although she had no hiring authority]; accord, *Reid v. Google, Inc.*, *supra*, 50 Cal.4th at p. 542 ["'If [the formal decision maker] acted as the conduit of [an employee's] prejudice—his cat's paw—the innocence of [the decision maker] would not spare the company from liability.'"]; *Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 937 [animus of private club's general manager toward plaintiff properly imputed to employer where manager discussed events precipitating termination with decision makers and was present at plaintiff's termination]; *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 100, 113 [reversing summary judgment for employer where evidence raised triable issues of fact as to whether decision maker's action was induced by retaliatory motives of intermediate managers].)

Here, Williams's "cat's paw" theory fails because Williams presented no evidence from which a trier of fact reasonably could infer Wong influenced Ralphs's decision to terminate Williams. It was Brown, not Wong, who initiated the investigation of Williams by reporting she had seen Williams leave the store without paying for all 12 bottles of lemonade.[24] Wong's sole role

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[24] Williams also suggests Brown harbored animus that compromised the investigation and decisionmaking process. However, Williams only points to Brown requiring him to fill out forms incorrectly showing he took his lunch breaks and Brown's friendship with Wong. But Williams's complaint about the time records (and his complaint that Brown was behind in her KAS duties) do not implicate Williams's race or any other protected classification. The fact Brown was friends with Wong similarly does not mean Brown herself held a racial animus against Williams. Williams also argues that Brown lied about what she

in Bouchard's investigation of Williams was her presence during Bouchard's interview of Connor, but it is undisputed Wong did not actively participate or ask any questions. And there is no evidence Wong had any involvement in Reynold's ultimate decision to terminate Williams. Thus, Wong's discriminatory animus cannot be imputed to Ralphs at any stage of the decisionmaking process.

(d) Williams failed to show Ralphs's investigation was inadequate

Williams also contends Ralphs's proffered reason for his termination was pretextual by identifying purported shortcomings in Ralphs's investigation and decisionmaking process. Williams contends he has raised a triable issue of fact whether the investigation overlooked exculpatory evidence and improperly relied on the "racial stereotype that African-Americans steal." This contention lacks merit.

Williams is correct that an inadequate investigation can support an inference of pretext. (See *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 280 ["An employer's failure to interview witnesses for potentially exculpatory information evidences pretext."]; *Reeves v. Safeway Stores, Inc., supra*, 121 Cal.App.4th at p. 117 [reversing summary judgment where investigator failed to speak to plaintiff about the underlying incident and instead relied solely on accounts from individuals with motive "to portray plaintiff's conduct 'in the worst possible light'"].)

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saw as reflected in the video, but as discussed, the video does not reflect what Brown was able to observe about the subject transaction.

But here, Ralphs presented substantial evidence demonstrating its honest belief that Williams intentionally took the bottles of lemonade without paying. Reynolds made his termination decision based on his own review of the evidence, including the security video footage, transaction receipt, and statements from Williams, Connor, and Brown. Reynolds considered Williams's placement of flattened cardboard atop his cart, which he adjusted at the start of his transaction in Connor's checkout lane; Connor's statements she could not see inside the cart because the cardboard obstructed her view; and Connor's statement that Williams told her to charge him for six bottles of lemonade.

Notably, Williams said in his written statement he could not remember the quantity of lemonade bottles he had in his cart or the quantity he told Connor to ring up. Because Williams could not recall what he asked Connor, his statement did not conflict with Connor's written statement, relating Williams told her to ring him up for six lemonades. Williams later took the position he told Connor he had 12 bottles of lemonade in his cart. Then, after Ralphs terminated him, Williams took the position in opposing Ralphs's motion he had told Connor he had "two cases" in his cart.

Given these unusual circumstances, Williams's shifting explanations, and Reynolds's observations during his in-person meeting with Williams, Reynolds concluded Williams had intentionally taken the lemonades without paying.

Williams argues Bouchard and Reynolds overlooked Connor's motive to lie due to her disciplinary status and the likelihood she made an error, instead believing without skepticism her statement Williams told her to ring him up for six

bottles of lemonade instead of 12. However, Williams did not initially contradict Connor's version of events, and Connor's mistake in ringing up the wrong number of lemonades does not bear on whether Williams intended to steal. Williams also argues Connor's deposition testimony shows her memory is poor, but there is no evidence Bouchard or Reynolds had any reason to doubt Connor's memory at the time Reynolds made the decision to terminate Williams.[25] Further, Reynolds noted Connor's statement included the detail she told Williams "not to forget to put his receipt in the prize box," which reflected an accurate recollection of the incident.

Williams also argues Wong's presence and Bouchard's statements to Connor during her interview tainted Connor's version of events. As to Wong, Williams does not dispute Ralphs's policy required Wong's presence at the interview, and Williams provides no evidence Wong spoke at Connor's interview, let alone that she influenced Connor's statements. Similarly, there is no basis for Williams's argument Bouchard improperly informed Connor that Williams had 12 bottles of lemonade in his cart before she provided her written statement. To the contrary, Bouchard testified Connor "immediately" told him Williams said he had six lemonades, and Connor testified that only after preparing her written statement did she ask Bouchard how many bottles of lemonade Williams actually had in his cart.

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[25] Williams also points out Bouchard prevented him from reviewing the security footage during his initial interview, but Bouchard testified it was Ralphs's policy that an employee only review security footage as part of the grievance process. Williams has not presented evidence that he was denied the ability to review the footage as part of the grievance process.

Even accepting Williams's later account in opposing Ralphs's motion that he told Connor he had "two cases" of lemonade in his cart at checkout, it is undisputed at the time of his suspension he told Bouchard the quantity was "unknown," but later changed his story to say he had told Connor he had 12 bottles of lemonade in his cart.

Williams asserts Bouchard lied to Reynolds about Williams's "agitated" demeanor during the initial investigative interview, thus showing Bouchard's bias against Williams. Although Fisher testified he did not see Williams become agitated, Williams himself admitted in his deposition that he "became very agitated" during his interview.

Williams also contends the security video shows Brown's statements to Bouchard relating her observations of the transaction were untruthful because she was not paying attention during the lemonade transaction. But the video does not reveal the focus of Brown's attention, and the version of events Brown reported to Bouchard is consistent with Williams's admission he paid for six bottles of lemonade but left the store with 12, in a cart covered by flattened cardboard.

At most, the issues raised by Williams show another decision maker might have looked at the evidence differently. But "if nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct." (*Guz, supra*, 24 Cal.4th at p. 358.) The undisputed facts support a finding as a matter of law that "'the factual basis on which the employer concluded a dischargeable act had been committed [was] reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual.'" (*Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 107 [reversing verdict where trial court

instructed jury it was defendant's burden to prove plaintiff committed the acts that led to his dismissal].)

Finally, Williams argues Ralphs's July 19, 2013 reinstatement offer demonstrates "Ralphs knew all along that Williams was not a thief." But the reinstatement offer by its own terms maintains there was an adequate basis for Williams's termination, stating "the evidence is clear that Mr. Williams left Ralphs'[s] premises with 6 lemonades in his cart that he did not pay for . . . ." The letter then added that Ralphs believed Williams now understood the "severity of his actions" and would "not repeat them again." Although Reynolds testified Ralphs's usual policy was not to offer reinstatement to an employee fired for dishonesty, the 2013 reinstatement offer, made in the context of ongoing litigation, does not create a triable issue of fact that at the time of Williams's termination three years earlier that Ralphs did not honestly believe Williams had stolen the lemonade. (See *Ronda-Perez v. Banco Bilbao Vizcaya Argentaria-Puerto Rico* (1st Cir. 2005) 404 F.3d 42, 46 [evidence showing information employer relied on in finding plaintiff violated employer's confidentiality rules was false did not support his age discrimination claim because new evidence was not communicated to investigator and therefore could not "reflect on [investigator's] honest belief at the time he made his report"].)[26]

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[26] California courts often look to federal decisions interpreting federal antidiscrimination laws in interpreting FEHA. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812 [""Because the antidiscrimination objectives and relevant wording of title VII of the Civil Rights Act of 1964 (Title VII) [(42 U.S.C. § 2000e et seq.)] [and other federal antidiscrimination statutes] are similar to those of the FEHA, California courts often look to federal

(e) Williams's harassment-based discrimination theory does not warrant reversal because any error was harmless

Williams alternatively contends his discrimination claim should have survived summary adjudication because the trial court concluded there were triable issues of fact as to his claim for harassment. According to Williams, the same facts supporting his harassment claim—Wong's racially charged comments to him and others—also support his discrimination claim, regardless of whether Wong participated in or influenced Ralphs's termination decision.

"FEHA treats discrimination and harassment as distinct categories," although the underlying facts often overlap. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 710; see *id.* at p. 708 ["[H]arassment is generally concerned with the *message* conveyed to an employee, and therefore with the social environment of the workplace, whereas discrimination is concerned with explicit changes in the terms or conditions of employment."].) However, according to regulations interpreting and implementing FEHA, "[d]iscrimination is established if a preponderance of the evidence demonstrates that an enumerated basis was a substantial motivating factor in the denial of an *employment benefit* to that individual by the employer or other covered entity, and the denial is not justified by a permissible defense." (Cal. Code Regs., tit. 2, § 11009, subd. (c), italics added.) For purposes of FEHA, an "employment benefit" includes "provision of a discrimination-free

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decisions interpreting these statutes for assistance in interpreting the FEHA."""]; *Estrada v. City of Los Angeles* (2013) 218 Cal.App.4th 143, 150 [same].)

workplace" (*id.*, § 11008, subd. (g)), which in turn is defined as "provision of a workplace free of harassment" (*id.*, § 11008, subd. (g)(3)).

On this basis, Williams argues Wong's alleged racial harassment supports his discrimination claim because the harassment resulted in the denial of an employment benefit, loss of a discrimination-free workplace. However, the principal case relied on by Williams, our opinion in *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, only addressed whether the allegations were sufficient to support the plaintiff's sexual harassment claim, not a discrimination claim. Although the claim was styled as a claim for discrimination, the question on appeal was whether the plaintiff could maintain her cause of action for harassment under FEHA. (*Fisher*, at pp. 603, 609-614.) Williams has not cited to any other authority for basing a discrimination claim on a viable harassment claim where there is no adverse employment action based on the harassment other than the existence of a hostile workplace.

We need not decide whether the trial court should have denied Ralphs's motion for summary adjudication of Williams's race discrimination claim on this basis because at trial the jury found Williams was not "subjected to unwanted harassing conduct because of his race." "As a general rule, the denial of summary judgment is harmless error after a full trial covering the same issues." (*Legendary Investors Group No. 1, LLC v. Niemann* (2014) 224 Cal.App.4th 1407, 1410 [any error in ruling on the admissibility of evidence at the summary judgment stage was harmless because the same evidence the trial court rejected was admitted at trial]; accord, *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 343 ["In general, an order

denying a motion for summary judgment or summary adjudication does not constitute prejudicial error if the *same question* was subsequently decided adversely to the moving party after a trial on the merits."].) In light of the jury's finding Williams was not subjected to workplace harassment, any error in granting summary adjudication of Williams's race discrimination claim based on the asserted harassing conduct would be harmless error.

(f) Williams failed to raise a triable issue of fact as to his age discrimination claim

Williams makes the same arguments regarding bias and false statements by Connor, Brown, Bouchard, and Reynolds to support his age discrimination claim. As discussed, Ralphs carried its burden to show it had a legitimate, nondiscriminatory reason to terminate Williams. Williams has not presented evidence sufficient to raise a triable issue of fact that any Ralphs decision maker harbored discriminatory animus against him because of his age or was influenced by anyone with ageist animus, or that Ralphs's reason for terminating him was pretextual.

(g) Williams failed to raise a triable issue of fact as to his disability discrimination claim

For the same reasons, Williams has not presented evidence sufficient to raise a triable issue of fact that any Ralphs decision maker harbored discriminatory animus against him on the basis of a disability or that Ralphs's reason for terminating him was pretextual.

5. *Williams raised triable issues of fact as to whether Ralphs failed to engage in the interactive process and to accommodate his disability*

Williams contends the trial court erred in granting Ralphs's motion for summary adjudication as to Williams's sixth and seventh causes of action for failure to engage in a good faith interactive process and failure to accommodate his disability. We agree.

(a) FEHA's requirements for reasonable accommodation and an interactive process

Under FEHA, it is an unlawful employment practice for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an . . . employee" unless the accommodation would cause "undue hardship" to the employer. (Gov. Code, § 12940, subd. (m)); see *Green v. State of California* (2007) 42 Cal.4th 254, 262; *Featherstone, supra*, 10 Cal.App.5th at p. 1166.) FEHA defines a physical disability to include a physiological condition that affects the "neurological" or "musculoskeletal" bodily systems (Gov. Code, § 12926, subd. (m)(1)(A)) and "[l]imits a major life activity" (*id.*, subd. (m)(1)(B)). A physiological condition "limits a major life activity if it makes the achievement of the major life activity difficult." (*Id.*, subd. (m)(1)(B)(ii).) Working is a major life activity. (*Id.*, subd. (m)(1)(B)(iii).)

The elements of a failure to accommodate claim are "'(1) the plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff's disability.'" (*Swanson v. Morongo Unified School Dist.* (2014)

232 Cal.App.4th 954, 969; accord, *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 971.) The plaintiff employee bears the burden of showing he or she was able to do the job with a reasonable accommodation. (*Green v. State of California, supra*, 42 Cal.4th at p. 262; *Lui*, at p. 971.)

"An employer's duty to reasonably accommodate an employee's disability is not triggered until the employer knows of the disability." (*Featherstone, supra*, 10 Cal.App.5th at pp. 1166-1167; accord, *Cornell v. Berkeley Tennis Club, supra*, 18 Cal.App.5th at p. 938 ["'[t]he employee bears the burden of giving the employer notice of his or her disability'"].) "'[A]n employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. The employer need only know the underlying facts, not the legal significance of those facts.'" [Citation.] 'While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations . . . ."'" (*Soria, supra*, 5 Cal.App.5th at p. 592; accord, *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 887; *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 237.)

FEHA also requires the employer to participate in a good faith interactive process with the disabled employee in order "to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee," to identify or formulate a reasonable accommodation

crafted for that employee. (Gov. Code, § 12940, subd. (n).) The employer must engage in this process "to explore the alternatives to accommodate the disability. . . . Failure to engage in this process is a separate FEHA violation independent from an employer's failure to provide a reasonable disability accommodation, which is also a FEHA violation." (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424, citations omitted; accord, *Soria, supra*, 5 Cal.App.5th at p. 600.)

(b) Williams raised triable issues of fact as to whether Ralphs knew of his disability

Ralphs contends it had no knowledge of Williams's disability because Williams never told Wong his injury limited his ability to do his job, and Williams never requested an accommodation. The record shows, however, that Williams informed Wong on approximately 20 occasions his shoulder pain "was becoming a problem" for him, specifically in the context of Wong assigning Williams tasks that involved heavy lifting or that needed to be done immediately. While Williams testified he could "work[] through the pain," he also stated he needed "to slow down a little bit and be more efficient" to address the pain. Williams's also relied on coworker Mario to complete certain duties, but Mario was not always available to assist him. Wong's response when Williams complained—that Wong told him to "quit complaining," "get it done," and "stop acting like a baby"—support an inference Wong understood Williams's injury was making his job difficult, but still expected Williams to carry out his duties. Viewing this evidence in the light most favorable to Williams, as we must, we conclude Williams raised a triable issue

of fact as to whether Wong knew he had a disability and that his shoulder pain was making his work difficult. (*Regents, supra*, 4 Cal.5th at p. 618, *Husman, supra*, 12 Cal.App.5th at p. 1180.)

Ralphs relies on *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 348, for the proposition that "[p]ain alone does not always constitute or establish a disability." *Arteaga* is distinguishable. There, the employee experienced pain and numbness in his hands, which the court concluded "did not make the performance of his job duties difficult as compared to his unimpaired state or to a normal or average baseline." (163 Cal.App.4th at p. 346.) But there was no evidence the pain and numbness in the employee's hands interfered with the employee's ability to work. (*Id.* at pp. 347-348.) When the employee reported the issue to the employer, a supervisor took the employee to a physician, who "found nothing wrong . . . and sent him back to work without any restrictions." (*Id.* at p. 347.)

B. *The Trial Court Erred by Not Correcting the Defective Special Verdict Form That Omitted Ralphs's Affirmative Defense of the Common Interest Privilege to Williams's Defamation Claim (Ralphs's Appeal)*

Ralphs contends the special verdict form was fatally defective because it failed to include questions resolving Ralphs's affirmative defense of the common interest privilege. Ralphs is correct.

1. *Special verdict forms and standard of review*

"[A] special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and

not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." (§ 624; accord, *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1240 (*Taylor*) [special verdict form erroneously failed to require jury to resolve essential elements of hostile work environment claim].) """A special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted issue."""" (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 136 (*Trejo*) [reversing verdict for plaintiff on failure to warn claim where special verdict form failed to include a question resolving whether a reasonable manufacturer would have warned of danger under the circumstances]; *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325 (*Saxena*) [reversing verdict for plaintiff on battery claim where special verdict form did not require jury to make a finding of the absence of consent].)

"'We analyze the special verdict form de novo' as a matter of law." (*Taylor, supra*, 222 Cal.App.4th at p. 1242; accord, *Saxena, supra*, 159 Cal.App.4th at p. 325.) "'A court reviewing a special verdict does not infer findings in favor of the prevailing party . . . .'" (*Trejo, supra*, 13 Cal.App.5th at p. 124; accord, *Taylor*, at p. 1242.)

2. *Ralphs has not forfeited its objection to the special verdict form*

Williams contends Ralphs forfeited its argument the special verdict form was defective by failing timely to object in the trial court. "'Failure to object to a verdict before the discharge of a jury and to request clarification or further deliberation precludes a party from later questioning the validity of that verdict if the

alleged defect was apparent at the time the verdict was rendered and could have been corrected.'" (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 263-264, italics omitted; accord, *Taylor, supra*, 222 Cal.App.4th at p. 1242.) "'The obvious purpose for requiring an objection to a defective verdict before a jury is discharged is to provide it an opportunity to cure the defect by further deliberation. [Citation.]' [Citation.] 'The rule is designed to advance efficiency and deter gamesmanship.'" (*Taylor*, at p. 1242; accord, *Keener*, at p. 264.)

Here, Ralphs submitted multiple versions of its proposed special verdict form, each containing questions relating to the common interest privilege. Further, Ralphs objected to the special verdict form twice during jury deliberations, asserting it "might be . . . reversible error" not to "try to cure [the special verdict form]." Then, after the jury returned its verdict, Ralphs's counsel "strenuously object[ed]" to discharging the jury without resolving the privilege. Although Ralphs's counsel should have caught the error and raised an objection before the jury began its deliberations on January 31, or at least by the next day, its objections were timely because they were made before the jury was discharged. (See *Saxena, supra*, 159 Cal.App.4th at p. 328 [no waiver of defective verdict form because defendant raised legal defect before discharge of jury]; cf. *Taylor*, *supra*, 222 Cal.App.4th at p. 1243 [forfeiture of issue where "appellant did not raise the defective verdict issue until after the jury had been discharged"].) "Moreover, courts have declined to apply the waiver rule 'where the record indicates that the failure to object was not the result of a desire to reap a "technical advantage" or engage in a "litigious strategy."'" (*Saxena*, at pp. 327-328, quoting *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968)

69 Cal.2d 452, 456, fn. 2.) Ralphs's multiple objections before the discharge of the jury, including before the jury returned a verdict, show the failure to object before deliberations began was not driven by an improper motive. Further, Williams's counsel bears significant responsibility for the delay by clandestinely removing the common interest privilege instructions the night before closing arguments, failing to provide Ralphs's counsel with a redlined verdict form, and not referencing the deletion of the common interest privilege questions in Nguyen's January 30 e-mail noting the "additional changes" in the attached revised verdict form. This conduct was troubling, especially in light of the continued refusal by Williams's counsel to correct the error. Accordingly, Ralphs did not forfeit its challenge to the special verdict.

3. *The special verdict form was defective because it did not address Ralphs's affirmative defense of the common interest privilege*

"The tort of defamation 'involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.'" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720; accord, *Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1007; *Cornell v. Berkeley Tennis Club, supra*, 18 Cal.App.5th at p. 946.) To prove defamation, a plaintiff who is a private figure must also prove negligence. (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 398 ["[P]ublic figures may prevail in a libel action only if they prove that the defendant's defamatory statements were made with actual malice, . . . whereas private figures need prove only negligence."]; *Khawar v. Globe Internat.,*

Inc. (1998) 19 Cal.4th 254, 274 ["[T]his court has adopted a negligence standard for private figure plaintiffs seeking compensatory damages in defamation actions."]; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747 ["private-figure plaintiff must prove at least negligence to recover any damages"].)

The common interest privilege provides a defense to defamation, protecting "communication[s], without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." (Civ. Code, § 47, subd. (c).) This privilege is qualified, in that it applies only to communications made without malice. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 360; *Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1337.) """"The malice necessary to defeat a qualified privilege is "actual malice" which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights."""" (*Cornell v. Berkeley Tennis Club, supra*, 18 Cal.App.5th at p. 951, quoting *Taus v. Loftus, supra*, 40 Cal.4th at p. 721; accord, *Schep*, at p. 1337.) "'The defendant has the initial burden of showing the . . . statement was made on a privileged occasion, whereupon the burden shifts to the plaintiff to show the defendant made the statement with malice.'" (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 617; accord, *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 915.)

Williams does not contend Ralphs failed to meet its burden to show the statements at issue fell within the common interest privilege. (See *Cornell v. Berkeley Tennis Club, supra*, 18 Cal.App.5th at p. 949 ["'Communications made in a commercial setting relating to the conduct of an employee have been held to fall squarely within the qualified privilege for communications to interested persons.'"].) Instead, Williams argues the special verdict form addressed the common interest privilege defense by asking in question No. 16 whether Ralphs "or any of its employees fail[ed] to use reasonable care to determine the truth or falsity of the statements." The jury responded, "Yes." Williams argues the jury's finding Ralphs failed to use reasonable care is equivalent to a finding of malice sufficient to defeat the privilege. It is not.[27]

Mere negligence does not constitute malice necessary to overcome the common interest privilege. (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 354; *Kashian v. Harriman, supra*, 98 Cal.App.4th at p. 931 [""It is only when the negligence amounts to a reckless or wanton disregard for the truth, so as to reasonably imply a wilful disregard for or avoidance of accuracy, that malice is shown.""].) "Actual malice "'is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.

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[27] We do not suggest all affirmative defenses must be addressed in a special verdict form. But here, where Ralphs relied on the common interest privilege as one of its two principal defenses to the defamation claim (along with the statute of limitations), the form was defective for failing to include questions requiring the jury to make findings on whether the privilege applied.

There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" . . . Thus 'mere failure to investigate the truthfulness of a statement, even when a reasonably prudent person would have done so, is insufficient' to demonstrate actual malice." (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 90, citations omitted; accord, *Khawar v. Globe Internat., Inc., supra*, 19 Cal.4th at p. 276 ["'failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient'" to show actual malice]; *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 114 ["[T]o support a finding of actual malice, the failure to investigate must fairly be characterized as demonstrating the speaker purposefully avoided the truth or deliberately decided not to acquire knowledge of facts that might confirm the probable falsity of charges."].)[28]

As Ralphs correctly points out, if proof of a defendant's lack of reasonable care were sufficient to defeat the common interest privilege, the privilege would be superfluous because every defamation plaintiff must show at least negligence to prevail. (*Comedy III Productions, Inc. v. Gary Saderup, Inc., supra*,

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[28] Williams's reliance on *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711 to support his contention actual malice is not necessary to overcome the common interest privilege, is misplaced. In *Brown*, the Supreme Court considered whether the common interest privilege provides a broad "'public-interest privilege'" protecting false statements by the news media about private persons. (*Id.* at p. 719.) The court concluded the privilege did not apply, and therefore the plaintiff only needed to show negligence, not malice. (*Id.* at p. 742.)

25 Cal.4th at p. 398; *Khawar v. Globe Internat., Inc., supra*, 19 Cal.4th at p. 274.)

Williams's contention there was sufficient evidence to support a jury finding of malice also misses the mark. Because the special verdict form omitted any questions relating to malice, the jury never made the necessary findings to overcome the privilege. (See *Trejo, supra*¸ 13 Cal.App.5th at p. 138 ["'Nor does the fact that the evidence might support such a finding constitute a finding.'"].)

4. *The omission of the common interest privilege was not harmless*

Although we may not imply findings to remedy a defective special verdict, "a defective special verdict form is subject to harmless error analysis." (*Taylor*, *supra*, 222 Cal.App.4th at p. 1244; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801 [the harmless error standard under *People v. Watson* (1956) 46 Cal.2d 818 applies to civil cases, "precluding reversal unless the error resulted in a miscarriage of justice"].) Williams contends any error in omitting questions resolving Ralphs's common interest privilege defense was harmless because the jury was properly instructed, and we must presume the jury followed the instructions.

Contrary to Williams's argument, accurate jury instructions cannot cure a defective special verdict form "because a special verdict 'requires the jury to resolve all of the controverted issues in the case.'" (*Fuller-Austin Insulation Co. v. Highlands Ins. Co.* (2006) 135 Cal.App.4th 958, 1005, 1006 [although trial court instructed jury it needed to consider reasonableness of settlement, special verdict form was "fatally

defective" because it did not require the jury to make a finding on reasonableness]; accord, *Trejo, supra*, 13 Cal.App.5th at p. 138 [trial court's instruction of the jury on negligent failure to warn "did not obviate the necessity of including that required element in the special verdict."].)

Further, the special verdict form used by the jury here provided no opportunity for the jury to apply the trial court's instructions on the common interest privilege. The jury answered "Yes" to question No. 17, asking, "Was the conduct of Ralphs . . . or its employees in making these statements a substantial factor in causing . . . Williams actual harm?" Once the jury answered yes, question No. 18 directed the jury to "enter the dollar amount of damages to . . . Williams below, if any . . . ." Although Williams contends the jury should have simply found the damages were zero if it concluded the common interest privilege applied, this would not have been clear to the jury, which was instructed to follow the directions of the special verdict form. The jury may well have assumed that once it found Ralphs's conduct was a substantial factor in causing Williams actual harm, it was supposed to calculate the amount of damages, not make an additional finding the common interest privilege did not apply.

Taylor, *supra*, 222 Cal.App.4th at page 1244, relied on by Williams, is distinguishable. In *Taylor*, the special verdict form contained a typographical error that resulted in the jury failing to answer two questions necessary for the plaintiff's hostile work environment claim: whether the plaintiff subjectively considered the work environment hostile and whether the hostile work environment was a substantial factor in causing the plaintiff harm. (*Id.* at p. 1245.) The Court of Appeal considered the

evidence presented at trial that the plaintiff "was humiliated by the aggravated, continuous, and sustained course of sexual harassment" and the jury's express determination the plaintiff "had mentally suffered from the abuse." (*Id.* at p. 1246.) The court therefore "easily conclude[d] that the judgment [was] 'clearly right,'" and "but for the typographical error, the jury would have answered 'yes' to both questions . . . ." (*Ibid.*) The court explained, "If we had a legitimate doubt concerning prejudice, we would reverse." (*Ibid.*)

Here, there is a "legitimate doubt" the error prejudiced Ralphs. Once the jury found the statements about Williams were not substantially true and were a substantial factor in causing Williams actual harm, Ralphs's liability depended on whether the statements were shielded by the common interest privilege. We cannot tell from the record how the jury would have decided whether Ralphs acted with malice. As discussed in the context of whether Ralphs's proffered reason for Williams's termination was pretextual, there was substantial evidence Ralphs's decision makers believed Williams intentionally took the lemonade without paying. Although the jury found Ralphs failed to use reasonable care to determine the truth or falsity of the statements that Williams had stolen the lemonade, this does not mean the decision makers acted with hatred or ill will toward Williams or lacked reasonable grounds for believing the statements were true. Indeed, for purposes of awarding punitive damages, the jury found Ralphs's agents did not act with malice, oppression, or fraud. On this record we cannot conclude the error was harmless.

5. *Remand for retrial of Williams's defamation claim is appropriate*

Ralphs contends we should reverse the trial court's denial of its motion for JNOV under the doctrine of "invited error," instead of remanding for a new trial, because it was Williams's counsel who omitted the common interest privilege questions from the special verdict form and refused to correct the error before the jury was discharged. Ralphs's reliance on *Saxena, supra*, 159 Cal.App.4th 316 and *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949 (*Myers*) for this proposition is misplaced.

In *Myers*, the plaintiff brought multiple claims, including for breach of contract and fraud, arising from a construction dispute. (*Myers, supra,* 13 Cal.App.4th at p. 955.) In response to a special verdict form, the jury found the defendant liable for breach of contract and awarded punitive damages, but the verdict form "failed entirely to elicit findings concerning a fraud cause of action." (*Id.* at pp. 958, 962.) The Court of Appeal found the punitive damages award was not supported because the verdict lacked findings on any tort claim upon which the award could be based. (*Id.* at p. 960.) To remedy the defect, the Court of Appeal struck the punitive damages award. (*Id.* at p. 962.) In doing so, the court noted remand for a new trial would not be appropriate because "the jury's failure to arrive at a verdict on a fraud cause of action was accomplished at [plaintiff's] behest." (*Id.* at p. 960, fn. 8.)

In *Saxena*, the plaintiffs prevailed at trial on causes of action for wrongful death, negligence, and battery against a surgeon whose treatment of decedent had resulted in his death. (*Saxena, supra*, 159 Cal.App.4th at p. 320.) In response to a

special verdict form, the jury found the decedent had not given informed consent to the procedure performed, but the form failed to resolve whether the procedure was performed "with 'no consent' at all" for purposes of the battery claim. (*Id.* at p. 326.) The Court of Appeal concluded the special verdict form therefore did not support the verdict on the battery claim. (*Id.* at p. 327.) Relying on *Myers*, the court concluded "[t]he proper way to remedy the defective verdict was to grant [the defendant's] motion for JNOV on plaintiffs' battery claim, not to order a new trial." (*Id.* at p. 329.)

In both *Saxena* and *Myers* the verdict forms did not ask the jury to resolve all elements of the causes of action at issue. (*Saxena, supra*, 159 Cal.App.4th at p. 327 [no actual verdict on battery claim]; *Myers, supra*, 13 Cal.App.4th at p. 961 [no actual verdict on fraud claim].) Here, the verdict resolved every element of Williams's claim for defamation; the omitted questions pertained only to Ralphs's affirmative defense. Arguably it was Ralphs's obligation to ensure the verdict form contained every element of its affirmative defense, which it did not.

Moreover, Ralphs's failure to object to the omission of the affirmative defense before the jury began its deliberations, despite an opportunity (albeit brief) to review the special verdict form, militates against Ralphs's assertion of unfairness. Although Ralphs has explained its counsel failed to discover the omission because he was busy preparing for closing arguments on the evening of January 30 when he received the e-mail from Williams's counsel, he delayed two more days before first objecting to the special verdict form on February 2. Notwithstanding Ralphs's insinuation Williams acted in bad faith by removing the common interest privilege questions from the

special verdict form the night before closing arguments, Ralphs's counsel conceded below, "[I]t's not important why [the questions] got removed." Further, as the trial court noted, "[T]he reasons why the question was not put in the final verdict are murky . . . ."[29]

DISPOSITION

The judgment is affirmed in part and reversed in part. The trial court is ordered to vacate its order granting Ralphs's motion for summary adjudication as to Williams's sixth and seventh causes of action for failure to engage in the interactive process and failure to accommodate his disability. The order granting Ralphs's motion for summary adjudication is affirmed in all other respects. The portion of the judgment in favor of Williams on his cause of action for defamation is reversed. The matter is remanded for further proceedings not inconsistent with this opinion. The parties are to bear their own costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J. SEGAL, J.

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[29] Because we remand for a new trial on Williams's defamation claim, we do not address Ralphs's argument the jury's award of economic damages was not supported by substantial evidence.