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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOHN MILLER, Plaintiff and Respondent, v. CITY OF LOS ANGELES, Defendant and Appellant.	B245514 (Los Angeles County Super. Ct. No. BC416479)

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

Michael N. Feurer, Los Angeles City Attorney, and Paul L. Winnemore, Deputy City Attorney for Defendant and Appellant.

Law Offices of Gregory W. Smith and Gregory W. Smith; Christopher Brizzolara; Benedon & Serlin, Douglas G. Benedon, and Gerald M. Serlin for Plaintiff and Respondent.

Appellant City of Los Angeles appeals from the judgment entered in favor of respondent John Miller following a jury trial on Miller's cause of action for retaliation in violation of Labor Code section 1102.5. The City argues the evidence was insufficient to support the jury's special verdict findings that the City retaliated against Miller for disclosing alleged violations of law by his subordinate employees. We conclude that the jury's verdict was supported by substantial evidence, and accordingly, affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Complaint

John Miller and Michael Rueda are employees of the Los Angeles City Fire Department.[1] On July 1, 2009, they filed this action against the City, alleging causes of action for whistleblower retaliation under Labor Code section 1102.5,[2] violations of the Firefighters Procedural Bill of Rights Act (FBRA, Gov. Code, § 3250 et seq.), and violations of the Public Safety Officers Procedural Bill of Rights Act (POBRA, Gov. Code, § 3300 et seq.). The case was tried to a jury in February 2011.

II. The Evidence at Trial

A. Miller Is Appointed to Command the Arson Counter-Terrorism Section

Miller joined the Fire Department in 1978. After serving as a firefighter for six years, he was promoted to the rank of apparatus operator in 1984, Captain I in 1985, and Captain II in 1989. In 1995, he was promoted to the rank of Battalion Chief. Miller's supervisors consistently rated his performance as a Battalion Chief as "Outstanding"–the highest possible performance rating.

In 2005, Miller was selected to head the Fire Department's Arson Counter-Terrorism Section (ACTS). ACTS is responsible for investigating suspected cases of arson, and where appropriate, presenting its investigative findings to the district attorney

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1 Michael Rueda is not a party to this appeal.

2 Unless otherwise stated, all further statutory references are to the Labor Code.

for criminal prosecution. The section is comprised of three commanding officers and 18 arson investigators. Because timely and thorough response to crimes of arson is critical, the investigators are expected to respond to arson-related calls 24-hours a day, seven days a week. The ACTS command staff and investigators are peace officers while assigned to the section and are the only members of the Fire Department authorized to carry firearms. In addition to a department-issued firearm, ACTS members are issued certain peace officer equipment, including handcuffs, pepper spray, a hand-held radio, and a level three ballistic vest. Due to the section's unique function, the Battalion Chief of ACTS is considered a coveted position. It is one of the highest profile positions in the Fire Department and is viewed as a solid platform for advancement within the organization. Additionally, an ACTS command staff position is a special duty assignment, which requires a two-year minimum commitment and carries a 5 ½ percent salary bonus.

Miller took over command of ACTS in January 2005. Second in command was plaintiff Michael Rueda, a Captain II, and third in command was Jamie Moore, a Captain I. As the ACTS Battalion Chief, Miller reported directly to Assistant Chief Tony Varela, commander of the Special Operations Division. Assistant Chief Varela in turn reported to Deputy Chief Mario Rueda, commander of the Bureau of Emergency Services and Michael Rueda's brother.[3] Deputy Chief Rueda was one of five Deputy Chiefs who reported to Chief Douglas Barry, the Fire Department's top official and policy maker. Appointed by the mayor, Chief Barry served as the Fire Chief from January 2007 to September 2009, and was thereafter succeeded by Chief Millage Peaks.

B. Miller Reports Incidents of Misconduct by the Arson Investigators

Miller was selected to lead ACTS based on his reputation for being a "no nonsense individual" with a "very solid command" and "well-respected in terms of his operations." At the time of Miller's selection, ACTS was under scrutiny within the Fire Department

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[3] Because Michael Rueda and Mario Rueda share the same last name, we shall refer to Michael Rueda as Rueda and to Mario Rueda as Deputy Chief Rueda.

for its lack of accountability and responsiveness to the requests of field personnel. When Miller and his command staff began supervising ACTS, they noticed a number of operational issues. Among other problems, the section did not have any written policies for training standards, firearm qualification, or evidence collection and booking. In addition, arson investigators routinely failed to respond to and properly collect evidence at suspected arson scenes. Instead, the investigators would rely on the on-scene firefighters to collect the evidence and bring it to the fire station for pick-up at a later date. Because the investigators did not document their location during their shifts, it made it difficult for the command staff to know their whereabouts, and it appeared that some investigators were submitting false requests for overtime pay. There also had been numerous thefts within the section, with the missing property ranging from small personal items to entire case files in pending arson investigations.

After assessing the situation, Miller and his command staff sought to address these issues by implementing structural changes within ACTS. They created a sign-out board to monitor the location of the arson investigators; this new procedure was met with heavy resistance from the investigators. The command staff also updated existing policies and established new written policies for the arson investigators to follow in the performance of their duties, including policies on firearm qualification, training standards, evidence collection and booking, and arson unit response. The February 2007 Arson Unit (A-Unit) Response Policy, in particular, clarified the Fire Department's expectations of an arson unit when responding to a scene, collecting evidence, and conducting an investigation. Its purpose was to ensure that arson investigators responded to all arson-related calls and collected all evidence. The ACTS command staff held three briefings with the arson investigators about the policy and the investigators' duty to respond to arson incidents. However, notwithstanding these written and oral directives, there continued to be times where the investigators did not timely respond to arson calls or properly collect evidence. Between May 2007 and May 2008, Miller reported a number of these incidents to his superiors in the chain of command.

1. May 2007 Sepulveda Boulevard Incident

In May 2007, arson investigators Robert Hernandez and Rosa Tufts failed to respond to a call from field personnel concerning gasoline spills found in front of two doorways in an occupied apartment building on Sepulveda Boulevard. Investigator Hernandez advised the captain of the apparatus unit that they would not be responding to the call because there were no containers, witnesses, or suspects related to the incident. With Investigator Hernandez's consent, the firefighters on the scene diluted the spills with a surfactant, thereby contaminating the evidence. Miller believed the investigators' conduct in the matter constituted an obstruction of justice, and he reported the incident to his superiors. Investigators Hernandez and Tufts were issued reprimands for failing to perform their duties pursuant to the A-Unit Response Policy; however, the reprimand for Investigator Tufts was later rescinded by Deputy Chief of Operations Emile Mack, the second in command to Chief Barry.[4]

2. July 2007 East 62nd Street Incident

In July 2007, arson investigators Mario Newte and Leslie Wilkerson failed to respond to an incident on East 62nd Street where a burning mattress had been placed at the door of an apartment occupied by a woman and her children. Although Investigator Newte told the captain on the scene that they would follow up the next day, they did not do so, and the mattress was later discarded by the victim's relatives. Miller reported the incident to his superiors, but no investigation was conducted. Miller testified that he believed the investigators' failure to respond in this instance was also an obstruction of justice.

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[4] Investigator Tufts is married to Steven Tufts, who served as the president of the firefighters' union, the United Firefighters of Los Angeles City (UFLAC). During his tenure as the UFLAC president, Steven Tufts had several meetings with Chief Barry in which he complained about the ACTS supervisors and specifically demanded that Miller and Rueda be removed from the section. In late 2007, after Miller had reported various instances of misconduct by the arson investigators, he received a telephone call from the UFLAC vice-president, who told Miller, "Nothing personal, but we're coming after you."

3. October 2007 South San Pedro Place Incident

In October 2007, arson investigator Bill Zlendick, a trainee, retrieved evidence of a Molotov cocktail from a fire station where it had been brought by the fire company that responded to an arson scene. Rather than book the device into evidence, Investigator Zlendick placed it inside a locker in the arson unit. In addition, Investigator Zlendick was advised by Investigators Newte and Wilkerson that the device had no evidentiary value because it had been contaminated and that it should be discarded. The Molotov cocktail was later determined to be evidence in a murder investigation, and Miller reported the incident to his superiors. Miller testified that he believed the instruction given by Investigators Newte and Wilkerson to dispose of the device constituted the crime of destruction of evidence.

4. March 2008 Louvre Street Incident

In March 2008, arson investigators Michael Camello and Timothy Crass failed to collect evidence of a Molotov cocktail from an attempted arson on Louvre Street, and failed to arrest the suspects who had been detained by police at the scene. Miller initiated a misconduct investigation against the investigators. Battalion Chief John Potter, who was assigned to conduct the investigation, concluded that Investigators Camello and Crass violated department policy and provisions of the Penal Code by failing to perform their duties. Battalion Chief Potter submitted his investigative findings to Assistant Chief Ralph Terrazas, commander of the Fire Department's Professional Standards Division (PSD), the agency responsible for investigating misconduct complaints filed against members. Assistant Chief Terrazas determined that the actions of Investigators Camello and Crass were appropriate and that no further action would be taken. At trial, Battalion Chief Potter testified that, during his investigation, Miller shared his belief that the conduct of Investigators Camello and Crass was criminal. Battalion Chief Potter also testified that he likewise believed the investigators' failure to collect evidence was a violation of the Penal Code, but he did not report this belief to anyone in the Fire

Department because his role was limited to investigating whether there had been a violation of department policy.

5. May 2008 Belmont Avenue Incident

In May 2008, arson investigators Derek Chew and William Thost received a call from field personnel regarding an automobile fire on Belmont Avenue. The vehicle had been reported stolen, and witnesses observed two suspects exit the vehicle and flee the area shortly before it exploded. Investigators Chew and Thost decided not to respond to the scene based on a lack of evidence and the witnesses' inability to identify the suspects. Miller believed that the actions of the investigators constituted an obstruction of justice, and instigated a misconduct investigation against them. Following the investigation, Assistant Chief Terrazas decided that no disciplinary action would be taken with respect to this incident.

6. May 2008 Tape-Recording Incident

The ACTS command staff held daily briefings known as lineups with the arson investigators during which they would discuss personnel matters as well as ongoing arson investigations. Because details of the arson investigations were discussed during the lineups, the ACTS command staff considered such briefings to be confidential. Assistant Chief Varela, commander of the Special Operations Division, previously had instructed the arson investigators that ACTS lineups were not to be recorded. On May 22, 2008, Investigator Chew was scheduled to be interviewed by Miller and Rueda regarding his failure to respond to the vehicle fire on Belmont Avenue. At the morning lineup held prior to that meeting, Chew surreptitiously tape recorded the lineup during which the arson investigators asked the command staff a number of pointed questions about responding to vehicle fires. After learning of the tape recording, Rueda, who was present at the lineup, reported the matter to Miller. Later that day, Miller and Rueda had their scheduled meeting with Chew and his union representative, Steven Tufts, the president of the UFLAC. During the meeting, Miller asked Chew whether he covertly recorded the lineup without the consent of his superiors and Chew admitted that he did.

In a May 27, 2008 memorandum addressed to Chief Barry, Miller requested that administrative charges be brought against Investigator Chew regarding the tape-recording incident. Miller specifically alleged in the memorandum that Chew had committed misconduct by violating Assistant Chief Varela's oral directive to not record lineups, and had committed a crime by covertly recording the lineup in violation of Penal Code section 632. In response, Chief Barry authorized Assistant Chief Terrazas, commander of the PSD, to conduct an administrative investigation of the incident, and Assistant Chief Terrazas assigned the investigation to Battalion Chief Raymundo Gomez and Captain Dean Zipperman.

On July 24, 2008, following a two-month investigation, Battalion Chief Gomez and Captain Zipperman submitted a report of their investigative findings to Assistant Chief Terrazas. In the report, they found that Investigator Chew had admitted to tape recording the lineup without the knowledge of his superiors, and that such conduct was a violation of the Fire Department's rules and regulations. Although not included in the report, Battalion Chief Gomez also formed the opinion that Chew committed a criminal offense, and he orally communicated this belief to Assistant Chief Terrazas during the course of the investigation. Assistant Chief Terrazas recommended that Chew be given a 7-day suspension for violating department policy, but decided not to pursue criminal charges after consulting with representatives from the Los Angeles Police Department (LAPD) and the district attorney's office. Following a pre-disciplinary *Skelly* hearing, Chew was issued notice of the 7-day suspension and requested a hearing before a Board of Rights. Shortly after the Board of Rights was convened, Steven Tufts, in his capacity as Chew's union representative, reached an agreement with Assistant Chief Terrazas to reduce the suspension to a simple reprimand. The reduction in discipline was then approved by Chief Peaks.

C. Miller Is Removed from His Command of ACTS Pending a Workplace Violence Threat Assessment

The Fire Department has a zero tolerance policy against violence in the workplace. Prince & Phelps Consultants, a consulting firm owned by Patrick Prince and Ann Phelps, provides services to the City on workplace violence prevention and threat assessment. In July 2008, at the City's request, Prince and Phelps conducted a preliminary threat assessment of ACTS. They first met with Assistant Chief Terrazas and then interviewed the ACTS command staff. Miller and Rueda described passive-aggressive behavior by a number of arson investigators, but did not state that they were in fear for their safety.

On August 11, 2008, Prince and Phelps met with Chief Barry to discuss what they had learned from the ACTS supervisors. They informed Chief Barry that they had received information regarding potential issues with workplace violence and misconduct by the arson investigators. They also said that, based on the initial interviews, there was a low to moderate risk of violence within ACTS, although they could not identify any specific person posing a threat and would need to conduct a further assessment. Prince and Phelps did not recommend to Chief Barry that either Miller or Rueda be removed from ACTS. The following day, Prince and Phelps met with Assistant Chief Terrazas and others to review the information provided to Chief Barry and to develop a plan to assess the actual risk of violence within the section. At some point, Prince and Phelps also recommended an audit of ACTS to address the issues of misconduct by the arson investigators, and Chief Barry chose the LAPD to conduct the audit.

On August 27, 2008, Prince and Phelps held another meeting with Assistant Chief Terrazas, Battalion Chief Fred Mathis, and Assistant Chief Timothy Manning, to further discuss the threat assessment. As of that date, Prince and Phelps still had not interviewed any of the arson investigators or observed their interactions with their supervisors. Prince and Phelps explained that there was a low risk of imminent physical danger within ACTS, but the fact that the arson investigators carried firearms raised the risk to a moderate level. They also said that the situation could escalate quickly given the pending audit, and provided examples of prior acts of workplace violence by City employees

where seemingly minor incidents had escalated to homicides. Prince and Phelps further reported that Rueda had said he was uncomfortable coming to work, but they did not state that either Miller or Rueda was being threatened nor did they identify a particular threat made by any member of ACTS. During the meeting, there was discussion about whether Miller and Rueda should be removed from ACTS based on the risk level. Prince and Phelps specifically recommended that Miller and Rueda not be removed, and stated that their removal would not reduce the risk of workplace violence. Prince and Phelps also noted that the removal of Miller and Rueda would undermine their ability to establish accountability and integrity within ACTS, and that observing the interactions between the command staff and the arson investigators would allow for a more complete assessment.

On August 28, 2008, Assistant Chief Terrazas sent Chief Barry a memorandum summarizing the meeting with Prince and Phelps and attaching a proposed action plan for ACTS. In the memorandum, Assistant Chief Terrazas described Prince and Phelps's assessment of a moderate risk of workplace violence within ACTS, but noted that their training materials referred to a high risk of violence whenever a member of the Fire Department brought a weapon to work. Assistant Chief Terrazas also reported that Rueda had told Prince and Phelps that he "feared" coming to work, and that a clerical staff member in ACTS had expressed being afraid of potential workplace violence. While acknowledging that Prince and Phelps recommended against the removal of the ACTS command staff, Assistant Chief Terrazas recommended that they be removed as soon as possible "due to concern for [their] safety."

In late August 2008, after reviewing the matter with his staff, Chief Barry made the decision to remove Miller and Rueda from ACTS in a process known as a "detail." A detail in the Fire Department is a temporary reassignment of a member to another section. The detailed member generally receives the same salary and departmental records will show that the member is still assigned to the section from which he or she was moved. Chief Barry testified that he decided to detail Miller and Rueda from ACTS because he was concerned about their safety based on the information provided by Prince and Phelps and Assistant Chief Terrazas. He further testified that he believed he needed

to take immediate action to protect the supervisors' safety while the workplace violence issues in ACTS were being investigated. Chief Barry acknowledged that, where there is a threat of workplace violence, the Fire Department's normal procedure is to remove the person making the threat rather than the victim. Chief Barry did not follow that procedure with Miller and Rueda because no particular individual posing a threat had been identified.

When a member of the Fire Department is detailed for non-disciplinary reasons, the standard protocol is to allow the member to retain all department-issued equipment from the original assignment. However, when they were detailed, both Miller and Rueda were ordered to surrender all of their ACTS equipment, including their firearms and level three ballistic vests. Miller also had to return his department-issued take-home vehicle, and as a result, he had to purchase a replacement vehicle. After Chief Barry learned that Miller and Rueda had their firearms and vehicles removed, he ordered that these items be returned to them to be consistent with a detail. At trial, Assistant Chief Terrazas acknowledged that, given the threat of workplace violence, it was highly inappropriate to remove the weapons of the ACTS supervisors who were being detailed while allowing the arson investigators to retain their weapons and other safety equipment.

The detail order for Miller and Rueda took effect on September 7, 2008. Miller was assigned to Battalion 9, "B" Platoon, and Rueda was assigned to Fire Station 28, "B" Platoon. The detail order did not specify an end date for either supervisor, and instead stated that their removal from ACTS was "until further notice." Assistant Chief Terrazas told Miller that he was being detailed from ACTS because there was a moderate threat and the LAPD was going to perform an audit, but did not provide any information about the source of the threat. Chief Barry similarly told Miller that he was being detailed due to concerns for his personal safety, but offered no other explanation for the decision. Prior to the detail, neither Assistant Chief Terrazas nor Chief Barry ever asked Miller or Rueda whether they had any concerns about their safety in ACTS, and Miller never expressed any such concerns to anyone in the Fire Department. A few weeks after the detail, both Miller and Rueda met with Chief Barry and specifically told him that they

had no concerns about their safety; however, neither supervisor was returned to ACTS at that time because Chief Barry wanted to further assess the workplace situation. In a subsequent telephone call with Miller about the detail, Prince told Miller, "Terrazas is screwing you" and "this smacks of whistleblower retaliation."

On November 25, 2008, Miller filed an administrative claim against the City. Shortly thereafter, Prince and Phelps completed their assessment on the risk of workplace violence within ACTS. In a December 1, 2008 report summarizing their findings and conclusions, Prince and Phelps stated that Miller and Rueda had tried "to instill higher standards of accountability and improve overall case management and productivity," but were met "with a great deal of resistance and hostility by a number of investigators." They also stated that "[t]he level of resistance (e.g., belligerent attitude, intimidation and loud, angry and aggressive confrontation) by some investigators was such that it was reasonable for the command staff to experience concern for their physical safety." Prince and Phelps then concluded that "[w]hereas the reported investigator behaviors may have been unacceptable . . ., the behavior and the individuals involved did not and currently do not pose a risk of safety," and thus, "[t]here is no risk of physical harm to any member of the command staff . . . were they to return to the Arson Section." Prince and Phelps recommended that any decision regarding the assignments of Miller and Rueda "should be based upon the business needs of the Fire Department," and reiterated that "[t]here is no safety basis for precluding their return to the Arson Section." Based on the report, Chief Barry decided that Miller and Rueda should be returned to their ACTS command positions; however, Chief Barry did not order their return to ACTS until two months later.

In January 2009, the LAPD completed their audit of ACTS. The audit found that there were fundamental weaknesses in the criminal investigations conducted by the arson investigators, and investigative deficiencies in the areas of evidence collection, witness interviews, and follow-up on investigative leads. The audit further found that the training requirements for the ACTS investigators were basic, informal, and reliant on self-training and on-the-job mentoring. It was recommended that the Fire Department establish and

enforce formal training and supervisory oversight requirements to more effectively manage the quality of arson investigations. The audit report did not include any finding that the arson investigators had committed any criminal acts in their investigations.

D. Miller Returns to ACTS Amid Complaints by the Arson Investigators

Miller and Rueda were returned to their command positions in ACTS on February 2, 2009. Upon learning that Miller and Rueda would be returning to ACTS, the arson investigators filed 14 administrative complaints against them alleging various acts of misconduct. Every member of the Fire Department has a right to file a misconduct complaint and can do so anonymously, but members do not have a right to file false complaints. Although a complaint filed more than one year after the alleged misconduct cannot result in discipline, the Fire Department will investigate the matter and attempt to correct any issues with non-disciplinary measures. In his over 30 years of service with the Fire Department, Miller had never before been the subject of a misconduct complaint. While some of the complaints against Miller were filed anonymously, the named complainants included Investigators Hernandez, Wilkerson, Zlendick, Camillo, and Chew, each of whom had been accused of misconduct by Miller prior to his removal from ACTS. Many of the complaints involved allegations of misconduct that occurred a year or more earlier, and several arson investigators openly admitted that they filed their complaints because Miller and Rueda were returning to ACTS. Deputy Chief Rueda testified that he believed the onslaught of complaints against Miller and Rueda was to "get back" at the ACTS supervisors.

Battalion Chief Gomez was assigned to conduct an administrative investigation of each of the 14 complaints. At the conclusion of his investigation, Battalion Chief Gomez determined that all of the complaints filed against Miller, except one, were either unfounded (meaning there was absolutely no evidence to prove the allegation) or inconclusive (meaning there was insufficient evidence to determine whether the allegation was founded or unfounded). The only substantiated complaint against Miller was for failing to complete an annual performance evaluation, but no disciplinary action

was taken because this was a common issue in the Fire Department. Battalion Chief Gomez testified that he believed some of the unfounded complaints against Miller were falsely filed. He explained, however, that no disciplinary charges were brought against the arson investigators for filing false complaints because the Fire Department did not want to discourage other members from coming forward with legitimate complaints.

E. Miller Is Permanently Removed from His Command of ACTS Following His Filing of a Civil Lawsuit Against the City

On July 1, 2009, Miller and Rueda filed this action against the City for whistleblower retaliation under section 1102.5 and violations of the FBRA and POBRA. Approximately one month later, Miller learned that the Fire Department planned to permanently remove him from ACTS. On July 31, 2009, the Fire Department circulated a list of anticipated special duty vacancies for chief officers. Miller's position as Battalion Chief of ACTS was included on the list. Miller had been given no prior notice of his planned removal from ACTS and had not requested it. Although there is a two-year minimum commitment for special duty assignments, there is no maximum period, and some Battalion Chiefs had remained in their special duty assignments for longer than Miller had been in ACTS. In addition to Miller's position in ACTS, the special duty vacancy list included 10 other Battalion Chief positions. Of those 10, six of the Battalion Chiefs were not moved, three were moved at their request, and one was moved to facilitate his retirement. Miller testified that he was the only Battalion Chief on the list who was removed from his special duty assignment involuntarily.

On November 8, 2009, Miller was transferred from commander of ACTS to Battalion 17, "A" Platoon. The transfer order was approved by Chief Peaks, who replaced Chief Barry as the Fire Chief in September 2009. Miller's transfer to a platoon Battalion Chief was not a special duty assignment nor was it considered a coveted position. As commander of ACTS, Miller had been in charge of the overall management and supervision of the section. The ACTS assignment afforded Miller the opportunity to interact with different City agencies on arson-related manners, and to network with

individuals in other federal and state agencies involved in counter-terrorism activities. Once Miller was removed from ACTS, he no longer had these opportunities. As commander of ACTS, Miller also had a desirable work schedule with specific days off each week (Friday, Saturday, and Sunday) and days off on holidays. As a platoon Battalion Chief, Miller works alternating 24-hour shifts, which at times requires working on holidays. Miller also lost the 5 ½ percent salary bonus that he received while assigned to ACTS, as well as use of a department-issued vehicle. In addition, Miller testified that his transfer from the commander of ACTS to platoon duty carried a negative connotation and adversely affected his reputation in the Fire Department. Since his transfer, Miller has made repeated requests for assignment back to ACTS, which have all been denied.

III. The Jury Verdict and Award

Following a multi-week trial, the jury found in favor of Miller on his cause of action for retaliation in violation of section 1102.5.[5] With respect to this claim, the jury made the following findings in its special verdict: (1) Miller proved by a preponderance of the evidence that he disclosed information that he had reasonable cause to believe was a violation of state or federal law, rule, or regulation to a government or law enforcement agency; (2) Miller proved by a preponderance of the evidence that, after disclosing this information, the City subjected him to an adverse employment action; (3) Miller proved by a preponderance of the evidence that his disclosure of this information was the contributing factor[6] for the adverse employment action; and (4) the City did not prove by clear and convincing evidence that it had a legitimate, non-retaliatory reason for the

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[5] The jury found in favor of the City on Rueda's cause of action for retaliation in violation of section 1102.5.

[6] Question No. 3 on the special verdict form asked whether Miller's disclosure of information was "the contributing factor" for the City's adverse employment action. The correct legal standard for a retaliation claim under section 1102.5 is whether the plaintiff's protected activity was "a contributing factor" in the alleged adverse action. (§ 1102.6.) However, neither party is claiming any error in the jury instructions or special verdict form on appeal.

adverse employment action. The jury further found that the City's actions caused Miller to sustain a total of $993,491.23 in damages, consisting of $24,044 in past economic loss, $419,447.23 in future economic loss, $275,000 in past non-economic loss, and $275,000 in future non-economic loss.[7] On September 25, 2012, the trial court entered a judgment in favor of Miller on his cause of action for violation of section 1102.5. The City thereafter filed a notice of appeal.

DISCUSSION

On appeal, the City challenges the sufficiency of the evidence supporting the jury's special verdict in favor of Miller on his claim for whistleblower retaliation under section 1102.5. The City does not dispute the jury's finding that Miller engaged in protected activity under section 1102.5 by disclosing information to the City that he reasonably believed demonstrated a violation of law. The City concedes that Miller engaged in such protected activity when he reported his belief that Investigator Chew violated Penal Code section 632 by covertly tape recording a confidential lineup. While not conceded by the City, there was also substantial evidence before the jury that Miller reported other acts of misconduct by the arson investigators that he reasonably believed constituted a criminal offense.

The City's challenge to the sufficiency of the evidence supporting the verdict is directed at two other elements of Miller's section 1102.5 claim. First, the City contends the evidence was insufficient to support a finding that, after Miller engaged in protected activity, the City subjected him to an adverse employment action. Second, the City claims the evidence was insufficient to support a finding that Miller's protected activity was a contributing factor in the City's challenged employment decisions.

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[7] In an advisory verdict, the jury found that the City committed 12 violations of the FBRA and 12 violations of the POBRA with an intent to injure Miller, and committed nine violations of the FBRA and nine violations of the POBRA with an intent to injure Rueda. Following a bench trial on the plaintiffs' FBRA and POBRA causes of action, the trial court found in favor of the City on those claims.

I. Standard of Review

"When a party contends insufficient evidence supports a jury verdict, we apply the substantial evidence standard of review. [Citation.]" (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) "We must 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. . . .' [Citation.]" (*Ibid*.) "'[N]either conflicts in the evidence nor '"testimony which is subject to justifiable suspicion . . . justif[ies] the reversal of a judgment, for it is the exclusive province of the [jury] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."' [Citations.]' [Citation.]" (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) Therefore, "'when a [verdict] is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the [verdict]. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the [jury].'" (*Western State Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.)

II. Whistleblower Retaliation Under Section 1102.5

Section 1102.5 is California's "whistleblower statute, the purpose of which is to 'encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 287; see also *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548 [section 1102.5 "protects an employee from retaliation by his employer for making a good faith disclosure of a violation of federal or state law"].) Section 1102.5, subdivision (b) provides, in relevant part, that "[a]n employer . . . shall not retaliate against an employee for disclosing information . . . to a government or law enforcement agency . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation." A report of illegal conduct by a public agency employee to his or

her employer constitutes a protected disclosure under the statute. (§ 1102.5, subd. (e); *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 856-857.)

California courts apply a three-step burden-shifting analysis to a cause of action for whistleblower retaliation under section 1102.5. "[T]he plaintiff is required to first establish a prima facie case of retaliation. Once established, the defendant must counter with evidence of a legitimate, nonretaliatory explanation for its acts. If the defendant meets this requirement, the plaintiff must then show the explanation is merely a pretext for retaliation. [Citations.]" (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138; see also *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384; *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453.)[8]

"To establish a prima facie case of retaliation, the a plaintiff 'must show (1) [he or she] engaged in a protected activity, (2) [the] employer subjected [the plaintiff] to an adverse employment action, and (3) there is a causal link between the two.' [Citation.]" (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 468.) "An employee engages in protected activity [under section 1102.5, subdivision (b)] when [he or she]

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8 Miller contends that section 1102.6 replaces the traditional three-step burden-shifting analysis by requiring the employer to prove a legitimate, non-retaliatory reason for its adverse action under a heightened clear-and-convincing standard. Section 1102.6 provides that, in an action under section 1102.5, "once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5." Section 1102.6 describes the employer's burden of proving a same-decision defense. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 239.) It only comes into play once the employee has proven that retaliation was a contributing factor in the adverse action, and the employer asserts it would have made the same decision in the absence of retaliation. The City is not arguing on appeal that there was substantial evidence to support a same-decision defense. Rather, the City is arguing that the evidence was insufficient to support the verdict because Miller did not meet his burden of proving that his protected activity was a contributing factor in the City's adverse actions. The clear-and-convincing standard set forth in Section 1102.6 is therefore not applicable in this appeal.

discloses to a governmental agency '"reasonably based suspicions" of illegal activity.' [Citation.]" (*Mokler v. County of Orange*, *supra*, 157 Cal.App.4th at p. 138.) An adverse employment action for purposes of the statute is an action that "'materially affect[s] the terms and conditions of employment.'" (*Patten v. Grant Joint Union High School Dist.*, *supra*, 134 Cal.App.4th at p. 1387.) "'"The causal link may be established by an inference derived from circumstantial evidence, 'such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision.'" [Citation.]' [Citation.]" (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69-70.)

"Once an employee establishes a prima facie case of retaliation, the burden shifts to the employer 'to offer a legitimate, [non-retaliatory] reason for the adverse employment action.' [Citation.]" (*Mokler v. County of Orange*, *supra*, 157 Cal.App.4th at p. 140.) If the employer produces a legitimate reason for the adverse action, the burden then shifts back to the plaintiff to prove the employer's proffered reason is mere pretext for retaliation. (*Ibid*.) "'[T]he plaintiff may establish pretext "either directly by persuading the court that a [retaliatory] reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."'" (*Morgan v. Regents of University of California*, *supra*, 88 Cal.App.4th at p. 68.) Proof of intentional retaliation often depends on circumstantial evidence because it consists of "subjective matters only the employer can directly know, i.e., his attitude toward the plaintiff and his reasons for taking a particular adverse action." (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713.) Nevertheless, "[t]he central issue is and should remain whether the evidence as a whole supports a reasoned inference that the challenged action was the product of . . . retaliatory animus." (*Id*. at p. 715.)

III. Jury Finding that Miller Was Subjected to an Adverse Employment Action

In challenging the sufficiency of the evidence supporting the jury's verdict, the City argues that Miller failed to meet his burden of proving by a preponderance of the

evidence that he was subjected to an adverse employment action. In particular, the City asserts that the jury could not reasonably have found that Miller's permanent transfer from ACTS in November 2009 was an adverse action because Miller failed to prove that it resulted in any material change in the terms and conditions of his employment.[9] We conclude, however, that the jury's finding was supported by substantial evidence.

"In California, an employee seeking recovery on a theory of unlawful discrimination or retaliation must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment. . . . [Citation.]" (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 386; see also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036 (*Yanowitz*).) "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz, supra*, at p. 1052, fn. omitted.) While "[m]inor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment[,] . . . adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion" can give rise to an actionable retaliation claim. (*Id.* at pp. 1054-1055.) To effectuate the purpose of section 1102.5, the "terms or conditions of employment 'must be interpreted

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9 The City does not address in its appeal whether the jury reasonably could have found that Miller's temporary removal from ACTS in September 2008 also constituted an adverse employment action, and instead focuses its argument on Miller's permanent removal from the section in November 2009.

liberally and with a reasonable appreciation of the realities of the workplace.'" (*Patten v. Grant Joint Union High School Dist., supra,* 134 Cal.App.4th at p. 1387.)

In this case, the jury reasonably could have found that the City subjected Miller to an adverse employment action when it permanently transferred him from his position as commander of ACTS to platoon duty. Contrary to the City's claim, there was substantial evidence that the transfer resulted in a diminution in salary and benefits. Miller testified that he lost the 5 ½ percent salary bonus that he received while working in ACTS. He also lost use of a department-issued take-home vehicle and had to purchase a private vehicle to travel to and from work. Miller's work and holiday schedule likewise detrimentally changed. Once he was transferred from ACTS to platoon duty, Miller was required to work alternating 24-hour shifts, and as a result, he was no longer eligible for specific days off each week nor was he automatically entitled to be off work on holidays.

There was also substantial evidence that Miller's transfer materially affected his job performance and opportunities for advancement in his career. The Battalion Chief of ACTS is one of the highest profile positions in the Fire Department and is known to be a solid platform for advancement within the organization. Both the ACTS command staff and arson investigators are sworn peace officers and the only members of the Fire Department authorized to carry firearms. As a result of the transfer, Miller went from serving as the head of this specialized unit to a platoon Battalion Chief, which is neither a special duty assignment nor a highly coveted position. Miller also lost his status as a peace officer, including his right to carry a concealed weapon and to make arson arrests.

In addition, Miller's job duties as the commander of ACTS were substantially different from his duties as the commander of a platoon. In ACTS, Miller was responsible for the overall management and supervision of the arson section, interacted with different City agencies on arson matters, and had the opportunity to network with other agencies and individuals involved in counter-terrorism activities. Once Miller was removed from ACTS, he no longer had these opportunities. Moreover, there was testimony from Battalion Chief Potter that a transfer from a special duty assignment back into the field carried a negative connotation in the Fire Department that the person being

transferred had done something wrong. Miller confirmed that his involuntary removal as commander of ACTS had adversely affected his reputation within the Fire Department and impaired his ability to perform his chief officer duties. Based on these facts, the evidence was sufficient to support the jury's special verdict finding that the City subjected Miller to an adverse employment action after he engaged in protected activity.

IV. Jury Finding that the City's Adverse Employment Actions Were Retaliatory

The City also challenges the sufficiency of the evidence supporting the jury's finding that Miller's protected activity was a contributing factor in the City's adverse employment actions. The City contends that it met its burden of demonstrating that it had legitimate, non-retaliatory reasons for its decisions to temporarily remove Miller from ACTS in September 2008 and then permanently transfer him in November 2009. The City further claims that Miller failed to prove by competent evidence that the City's proffered reasons for its adverse actions were mere pretext for retaliation. We conclude that the jury's finding of unlawful retaliation was supported by substantial evidence.

A. Miller's Temporary Removal from ACTS in September 2008

Miller initially was removed from his position as commander of ACTS in September 2008. At trial, the City argued that it had a legitimate, non-retaliatory reason for its decision to "detail" both Miller and Rueda at that time because it was concerned for their safety. In support of this argument, the City presented evidence that, in August 2008, Prince and Phelps informed Chief Barry that their initial workplace violence threat assessment showed a low to moderate risk of violence toward the ACTS supervisors, although they could not identify any specific person posing a threat. The City also produced evidence that the Fire Department has a zero tolerance policy against violence in the workplace and has an obligation to take appropriate action to protect any member who is threatened. Chief Barry testified that, as the head of the Fire Department, he had the ultimate responsibility for the safety its members and that he made the decision to detail Miller and Rueda because of his concern for their safety. Chief Barry also testified that he relied on the information provided by Prince and Phelps about the potential for

workplace violence in ACTS, and that he did not consider Miller's or Rueda's complaints of misconduct by the arson investigators in making the decision to detail them.

While the City provided a legitimate, non-retaliatory reason for its detail decision, Miller presented substantial circumstantial evidence to support a finding that the City's proffered explanation was a mere pretext for retaliation. First, prior to detailing Miller, neither Chief Barry nor Assistant Chief Terrazas spoke to Miller about whether he had any concerns for his safety in ACTS, and Miller never expressed to anyone that he had any such concerns. Second, Prince and Phelps, the threat assessment consultants on whom Chief Barry purportedly relied in making the detail decision, specifically recommended that Miller not be removed as the commander of ACTS, and stated that his removal would not reduce the potential for workplace violence. Prince and Phelps also warned that removing the ACTS supervisors would undermine their ability to establish accountability and integrity within the section. Third, although the Fire Department generally allows its members to keep all of their department-issued equipment while on a detail, Miller was ordered to surrender all of his ACTS equipment, including his firearm and level three ballistic vest. The detail order thus left Miller less protected from a potential threat of violence, whereas the arson investigators who allegedly were posing the threat remained fully armed and protected. Fourth, after Prince and Phelps submitted their final report in which they concluded that there was no risk of harm to Miller if he were to return to ACTS and no safety basis for precluding his return, Chief Barry did not order Miller's return to the section for another two months. Deputy Chief Rueda, who was directed to sign the detail order for Miller, could not recall any prior instance where a member was detailed for an indefinite period of time, and believed that Chief Barry was hoping the matter would go away and the move would become permanent.

The City asserts that, given the jury's finding that the decision to detail Rueda was not unlawful retaliation, the jury could not reasonably have found a retaliatory motive in the decision to detail Miller. This claim lacks merit. Assistant Chief Terrazas testified that, during his August 27, 2008 meeting with Prince and Phelps, he was told that Rueda had reported that he "feared coming to work." Assistant Chief Terrazas then conveyed

that information to Chief Barry in his August 28, 2008 memorandum, and Chief Barry testified that he relied, in part, on the statement about Rueda's fear in deciding to detail him. In contrast, there was no evidence that Miller ever expressed a concern about his safety to Prince and Phelps or anyone in the Fire Department. On this record, the jury reasonably could have found that Chief Barry had a legitimate, non-retaliatory reason for detailing Rueda based on Rueda's own expressed fear for his safety, but did not have a legitimate reason for detailing Miller given that Miller never expressed any similar fear. Moreover, the evidence showed that Rueda, as the second in command in ACTS, reported his suspicions of illegal conduct by the arson investigators to his commanding officer, Miller, and that Miller decided to report the conduct "up the chain of command" to his superiors and to initiate the misconduct investigations. Accordingly, the jury reasonably could have inferred that the Fire Department saw Miller as the true "whistleblower," and sought to remove him from his command of ACTS in retaliation for his protected activity.

B. Miller's Permanent Transfer from ACTS in October 2009

On July 31, 2009, six months after returning to ACTS, Miller received notice that the Fire Department planned to permanently remove him as the commander of ACTS and to transfer him to platoon duty. At trial, the City contended that it had a legitimate, non-retaliatory reason for the transfer decision because it was a part of an "anticipated rotation of personnel" in special duty assignments. To support this claim, the City presented evidence that special duty assignments, such as the Battalion Chief position in ACTS, are normally for a duration of two years, and that Miller had held the position for over four years at the time of his transfer to platoon duty. The City also presented evidence that Miller's transfer order was made by Chief Peaks, who replaced Chief Barry as the Fire Chief in September 2009, more than a year after Miller reported the alleged violations of law by his subordinate employees.

Viewing the evidence in the light most favorable to the verdict, the jury reasonably could have found that the City's proffered explanation for its decision to permanently

transfer Miller from ACTS was pretext for unlawful retaliation. The evidence at trial established that, although there is a two-year minimum commitment for a special duty assignment, there is no maximum period. A number of Battalion Chiefs had been in their special duty assignments for longer than Miller had served in ACTS. At the time of his transfer to platoon duty, Miller's supervisors consistently had rated his performance as the ACTS Battalion Chief as "Outstanding"–the highest possible performance rating. Miller also testified that, of the 11 Battalion Chief positions that were included on the list of anticipated vacancies, six of the Battalion Chiefs were not moved, three were moved at their request, and one was moved to facilitate his retirement from the Fire Department. Miller was the only Battalion Chief on the list who was involuntarily moved from his special duty assignment. The evidence further showed that Miller's position as the ACTS Battalion Chief first appeared on the vacancy list on July 31, 2009, less than a month after Miller filed this lawsuit against the City for whistleblower retaliation.

The City argues that its decision to permanently transfer Miller from ACTS could not have been made in retaliation for his protected activity because there is no evidence that Chief Peaks knew that Miller had engaged in protected activity at the time he signed the transfer order. However, as discussed, Miller's position as the ACTS Battalion Chief was added to the list of anticipated vacancies in July 2009, when Chief Barry, who had knowledge of Miller's protected activity, was still the Fire Chief. Additionally, the evidence showed that Miller's transfer was recommended by Deputy Chiefs Leonard Thompson and Emile Mack, each of whom previously reported to Chief Barry, and the City does not dispute that these individuals were aware of Miller's complaints of illegal conduct within ACTS. Based on the totality of the evidence, the jury reasonably could have found that the City decided to permanently remove Miller from his command of ACTS in retaliation for his protected activity. The jury's verdict in favor of Miller on his claim for retaliation under section 1102.5 was accordingly supported by substantial evidence.

DISPOSITION

The judgment is affirmed. Miller shall recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.