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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

BARRY N. LIPSITZ, Plaintiff and Appellant, v. WALT DISNEY PICTURES et al., Defendants and Respondents.	B276482 (Los Angeles County Super. Ct. No. BC582284)

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

Cwiklo Law Firm and David Peter Cwiklo for Plaintiff and Appellant.

Paul Hastings, Paul Grossman, Paul W. Cane, Jr. and Felicia A. Davis for Defendants and Respondents.

I. INTRODUCTION

Plaintiff Barry N. Lipsitz appeals from a May 31, 2016 judgment entered after the trial court granted summary judgment in favor of defendants Walt Disney Pictures, The Walt Disney Company, Disney Worldwide Services, Inc. (Disney Worldwide) and Matthew Deuel. Plaintiff contends it was error to grant summary judgment on his claims for age discrimination, medical condition and age discrimination, defamation, and punitive damages. In addition, plaintiff challenges the trial court's evidentiary rulings. He asserts the trial court's rejection of his excessive publication evidence on hearsay grounds is erroneous. Further, plaintiff challenges a December 1, 2015 order quashing his subpoenas, which sought deposition testimony and documents in an unrelated case to impeach Deuel. We affirm the judgment and orders.

II. FACTUAL BACKGROUND

In September 2002, Disney Worldwide hired plaintiff, who was 52 years old at that time, as a senior program analyst in its corporate information services division. In August 2011, plaintiff was diagnosed with colon cancer. Plaintiff requested and received a one month leave of absence for colon cancer treatment. Two months after his return to work, plaintiff, who was then 61, was promoted to senior manager, which included a pay increase.

In November 2012, Deuel began reporting directly to plaintiff. In October 2013, he gave Deuel a positive rating of "right on track." On June 11, 2014, Deuel contacted Human Resources representative Nick Martucci to lodge a harassment

complaint against plaintiff. According to plaintiff, Deuel brought the harassment complaint one day after he received a "falling behind" rating from plaintiff.

Employee relations director Tracy Healy, an in-house employment counsel, investigated Deuel's harassment complaint. Besides Deuel and plaintiff, Healy interviewed three other individuals: contractor Tristana Webster; Deuel's coworker Anthony Leung; and employee Carlos Velasco. During Healy's first interview with Deuel, he reported plaintiff: mimicked an African-American security guard in front of Duel and Leung by making gestures and saying words to the effect of, "Hey, whatcha doin' here white boy," then instructed Duel and Leung to "forget" what he had just done; referred to women as bitches; teased Velasco that he was "Mexican"; referred to a female employee as "thunder thighs"; touched Deuel in a way that made him feel uncomfortable, including sitting very closely to Deuel on a two-seat sofa and placing his hand on Deuel's while Deuel used a computer mouse; made fun of a contractor with a prosthetic eye by squinting his eye when he talked about her; and told Duel and Leung that a senior female employee got her job by "sleeping around." At the end of the first interview with Healy, Deuel gave her a three-page document listing each of the alleged incidents in chronological order. Plaintiff asserts Deuel made false accusations against him.

But plaintiff does not dispute that during his first interview with Healy, plaintiff admitted he made off-color jokes and used profanity in front of other employees during work time. Plaintiff claimed he made these comments only in his office. Plaintiff also acknowledged he teased Velasco about being Mexican even though he was not Mexican. Leung confirmed with Healey that

plaintiff jokingly referred to Velasco as "Mexican" when Velasco was from El Salvador. In addition, plaintiff admitted he told Deuel that a female director was referred to as "thunder thighs," but he claimed he was simply repeating another female employee's description of that director.

Regarding the incident with the African-American security guard, plaintiff told Healy he did like how Deuel used a "hip-hop" way to talk to the guard and was making fun of Deuel, not the guard. Plaintiff admitted he told Leung to "forget you heard that" immediately afterward. During Leung's first interview with Healy, he recalled plaintiff saying, "Anthony, I didn't make these gestures, forget I did it."

Plaintiff recalled sitting on a two-seat couch with Deuel while waiting to meet their supervisor Terrie Dean, but he denied being inappropriately close or that Deuel was uncomfortable. Plaintiff also told Healy he accidently grabbed Deuel's hand while Deuel was using his computer mouse. According to Healy, plaintiff said he "might have" put his hand on Deuel's hand as a "joke."

Plaintiff challenged Deuel's remaining allegations in his first interview with Healy. He denied that while talking to Deuel about a contractor with a prosthetic eye, he squinted one eye to make fun of her. However at his deposition, plaintiff admitted he "can't say I did" or "didn't" make fun of the contractor's eye. Moreover, during his interview with Healy, plaintiff stated he never said a female executive got her job by "sleeping around." But his deposition testimony shows he made the following remarks in response to Deuel's question about how the employee got her job: "What do you mean how did she get her job? I don't

know how she got her job. Sleeping around? I don't know. I don't know."

Furthermore, plaintiff denied he ever used the term "bitch" to describe a woman during his two interviews with Healy and at deposition. But during Healy's interview with Velasco, he stated plaintiff had used the term "bitch" behind closed doors. In addition, Webster told Healy that plaintiff may have said, "What, like there are bitches over there[?]" When asked if she was surprised by plaintiff's statement, Webster responded, "Honestly, I've heard him say it before."

Plaintiff asserts Healy mischaracterized Webster's comments, relying on employee Loretta Wong's deposition testimony. Wong testified Webster said she felt the investigator was being a bully and putting words in her mouth, and that they were trying to find a way to fire plaintiff. Defendants proffered a declaration from Webster concerning her two interviews with Healy. During the first interview, Webster told Healy that plaintiff was a good guy but engaged in "sexual banter" in the workplace. Webster heard plaintiff make inappropriate comments but could not recall any specific remarks. At the second interview, Healy asked Webster if plaintiff had made the statement, "What, like those bitches over there?" Webster confirmed she did hear plaintiff make that specific comment. Webster told Healy she was not surprised by plaintiff's remark because she had heard him use inappropriate language before at work. In her declaration, Webster states: "I felt that [Healy] treated me fairly during the interviews, however, I did feel some pressure to participate in the investigation, which I reluctantly did. I did not feel that [Healy] tried to bully me. I did not feel that she was trying to find a reason to fire [plaintiff]."

During the first interview with Healy, Deuel told her that he recently received negative performance feedback from plaintiff and Dean, his former supervisor. In addition, plaintiff told Healy that he believed his negative feedback of Deuel's work motivated Deuel to fabricate allegations against him. After Deuel came back from a one-month leave of absence in May 2014, plaintiff told Deuel that he would be "unofficially" reporting to Leung. Leung told Healy that Deuel's work was good so far.

Before Deuel took a leave of absence in April 2014, he had worked on the "Lenel" project for about 15 months. After Deuel's return, plaintiff assigned the project to Leung but Deuel still assisted on it. Deuel, Leung and project manager Sheba Daniel worked together to prepare for meetings with clients scheduled for July 15 and 17, 2014. They spent a week preparing an agenda that originally listed Deuel and Leung as the facilitators/presenters for 12 of 17 meeting topics. A day before the meeting, Leung told Deuel that plaintiff had eliminated Deuel as a facilitator/presenter with Leung. Daniel became the facilitator/presenter with Leung while plaintiff assigned Deuel to be the note-taker.

On July 14, 2014, Deuel sent an email to Healy alleging plaintiff had retaliated against him. Healy interviewed Deuel, Daniel, and plaintiff concerning the retaliation complaint. Deuel told Healy that when he tried to talk during the Lenel meeting, plaintiff looked at Deuel with "disdain" and Leung skipped over him. Deuel felt his demotion from facilitator/presenter to note-taker and his treatment during the Lenel meeting was retaliation for his previous harassment complaint.

Daniel told Healy that Deuel had been scheduled to be the facilitator/presenter for most of the sessions, either by himself or with Leung. But plaintiff changed the agenda shortly before the first day meeting. Deuel was reassigned to take notes while Daniel was elevated to facilitator/presenter. Daniel was surprised by the change because Deuel had more knowledge than she did about the project. Daniel said she did not feel she had enough time to prepare because the change happened so close to the Lenel meeting date. When Healy asked about Deuel's work, Daniel stated she did not have any complaints about Deuel's performance. Daniel's comment was contrary to plaintiff's prior statement to Healy that Daniel had complained about Deuel's performance. Plaintiff denied Duel's role had changed, telling Healey that Deuel was always designated as the note-taker.

On July 21, 2014, Healy recommended termination of plaintiff's employment in her findings and recommendations report. She found plaintiff had: mimicked an African-American security guard and told Deuel and Leung to forget what they had seen him do; referred to females in the office as "bitches"; teased Velasco about being Mexican; referred to a female colleague as "thunder thighs"; made Deuel uncomfortable through behavior directed at him; retaliated against Deuel by lying that a project manager had complained about Deuel's performance; lied during the course of investigation (by denying he referred to female employees as "bitches" and claiming a project manager complained about Deuel's performance); and demonstrated poor judgment and leadership during the course of the investigation. Healy shared the investigation report with plaintiff's manager, Chris Lawson. On July 22, 2014, Lawson met with plaintiff and Martucci and informed plaintiff he was discharged, effective

immediately. Lawson assigned plaintiff's job duties to Dan Romine, who was 50 years old at the time.

III. PROCEDURAL HISTORY

A. Complaint

On May 19, 2015, plaintiff filed a complaint against Disney alleging eight causes of action: medical condition discrimination; age discrimination; medical condition and age discrimination; failure to conduct an unbiased and thorough investigation[1]; retaliation for participating in protected activity; intentional infliction of emotional distress; defamation; and breach of implied contract. Against Deuel, the complaint alleged causes of action for infliction of emotional distress and defamation. The complaint sought punitive damages against defendants.

B. Defendants' Motion to Quash Subpoenas

On October 22, 2015, defendants moved to quash plaintiff's subpoenas to the City of Pasadena and a court reporting company, Ron Fernicola & Associates. Plaintiff sought documents and deposition testimony in Deuel's lawsuit against the City of Pasadena. Deuel sued the city alleging he was assaulted by two police officers after a soccer match at the Rose Bowl. Plaintiff's subpoena to the City of Pasadena sought:

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[1] Plaintiff dismissed his claim for "failure to conduct unbiased, neutral, objective and thorough investigation" on April 6, 2016.

written communications between Deuel and the city; Deuel's settlement and Code of Civil Procedure section 998 demands; documents identifying the amount of the settlement; and the city's settlement draft. The subpoena to Ron Fernicola & Associates sought production of deposition transcripts in *Deuel v. City of Pasadena*. On November 17, 2015, plaintiff filed an opposition to the motion to quash. On December 1, 2015, the trial court granted defendants' motion to quash plaintiff's subpoena to the City of Pasadena and Ron Fernicola & Associates.

C. Defendants' Summary Judgment Motion

On February 5, 2016, defendants filed a motion for summary judgment. In support of the motion, defendants proffered declarations from Deuel, Healy, Lawson, Romine and Webster. In addition, defendant submitted exhibits and transcript excerpts from plaintiff's deposition.

In his declaration, Deuel stated he began reporting directly to plaintiff on November 6, 2012. At first, plaintiff's comments and jokes were innocent and Deuel even found some to be funny. But after some time passed, Deuel found plaintiff's comments based on employees' ethnicities or sexual orientation to be offensive. He also observed plaintiff started using profanity in the workplace more often and referred to women as "bitches." Deuel stated he was not sure if he should report plaintiff's conduct because he did not want plaintiff to get into trouble or retaliate against him. From February to June 2014, Deuel took notes of plaintiff's conduct and comments. On June 11, 2014, Deuel contacted Martucci to lodge a harassment complaint

against plaintiff. Deuel denied he was concerned plaintiff was going to terminate his employment because plaintiff had repeatedly told Deuel that plaintiff was not going to fire him.

Deuel did not share his observations about plaintiff's conduct with anyone except Martucci, Healy, intern Julia Parker, his wife, and his doctor. He averred his complaints about plaintiff were not motivated by plaintiff's age or medical condition. Deuel was not aware plaintiff suffered any medical conditions\ until he read the complaint.

In her declaration, Healy estimated she has conducted hundreds of investigations relating to allegations of workplace misconduct throughout her career. In June 2014, Healy investigated Deuel's complaint after Martucci notified her of it. Healy conducted most of the interviews with Parker, who took notes to document the conversations. She considered Deuel to be a credible witness based on her observations of Deuel, plaintiff and other witnesses during multiple interviews, and the corroborating statements of other witnesses. After her investigation, Healy recommended termination of plaintiff's employment.

Healy declared she only shared the contents of Deuel's allegations and her findings with Lawson, human resource and employee relations employees, and the legal department. She denied her investigation, findings and recommendations were motivated by plaintiff's medical condition, age, or retaliation for his participation in any protected activity. Healy had no knowledge plaintiff suffered any medical condition until he filed his lawsuit. After plaintiff was discharged, Healy learned he had sent an email to Martucci in which he asked whether the

investigation was related to his age. Healy did not see or know about the email until after plaintiff was fired.

In his declaration, Lawson stated plaintiff reported directly to him from May 2014 until his discharge on July 22, 2014. Lawson reviewed Healy's findings and recommendations report and had a conversation with Healy about the investigation. Afterwards, Lawson decided to terminate plaintiff's employment on July 21, 2014. The next day, Lawson terminated plaintiff's employment during a meeting with plaintiff and Martucci. Lawson did not share the contents of Deuel's allegations, his conclusions or the reason for plaintiff's discharge with anyone other than human resource and employee relations employees involved in the investigation. Lawson denied his decision to terminate plaintiff's employment was motivated by plaintiff's medical condition, age, or retaliation for participation in any protected activity. Lawson had no knowledge plaintiff suffered any medical condition until he filed his lawsuit. After plaintiff was discharged, Lawson learned plaintiff had sent an email to Martucci in which he asked whether the investigation was related to his age. Lawson did not see or know about the email until after plaintiff was fired.

D. Plaintiff's Opposition to Summary Judgment

On April 7, 2016, plaintiff filed an opposition to defendants' summary judgment motion. Plaintiff argued the investigation was a pretext because Healy did not consider Deuel's motive to lie and failed to interview Dean and Wong. In addition, plaintiff asserted Healy bullied Leung who gave statements favorable to him. Plaintiff also challenged Healy's statements concerning her

interview with Daniel because no notes were made of the conversation. Plaintiff further argued he engaged in protected activity when he lodged an age discrimination complaint against the investigators. As to the defamation claim, plaintiff argued malice was established by the failure to thoroughly investigate and verify the facts of the defamatory statements made by Deuel against him. Plaintiff contended publication was established by Dean's and Romine's statements to him that Lawson had told them plaintiff had been fired for sexual harassment of Deuel.[2]

Plaintiff submitted his declaration in support of the summary judgment opposition. From 1998 to 2002, plaintiff worked as a consultant with The Walt Disney Company. Beginning in 2002, he was employed by Disney Worldwide Services, Inc. From October 2012 to June 2014, he reported to Dean, the director of Business Technology Partners (BTP). As a senior manager, he supervised mangers Wong, Leung and Deuel. In addition, four contractors including Webster reported to plaintiff.

In August 2011, plaintiff was diagnosed with colon cancer. He notified his supervisor Dean of his diagnosis and cancer treatment. Dean notified her immediate supervisor, Data Una Fox, of plaintiff's cancer diagnosis and treatment.

In November 2012, Deuel was reassigned within Dean's group to report to plaintiff. Dean had hired Deuel in January 2011 based upon their prior work relationship. In January 2014, plaintiff discussed Deuel's chronic lack of job performance with Dean. On February 12, 2014, Dean informed plaintiff she had a

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[2] The trial court excluded this evidence from plaintiff's declaration on hearsay grounds. Plaintiff challenges this evidentiary ruling on appeal.

candid meeting with Deuel where she told Deuel that he needed to turn around his performance or "search for a new job." Deuel took a one month leave of absence in April 2014. During Deuel's absence, Leung took over most of Deuel's tasks. According to plaintiff, the clients made positive comments about Leung's abilities and work ethic compared to Deuel's poor work performance. Plaintiff had several conversations with Dean about switching the job responsibilities of Leung and Deuel. On May 14, 2014, the human resource department approved Dean's request to switch Leung's and Deuel's roles. Two weeks later, Dean was transferred from BTP to another group. Lawson, a recently-hired 34-year-old vice president, became plaintiff's new supervisor.

On June 10, 2014, plaintiff told Deuel that he intended to give Deuel a "falling behind" rating. One day later, Deuel submitted a complaint against plaintiff with the human resource department. Plaintiff questions the timing of Deuel's complaint, made one day after Deuel learned of his "falling behind" rating. In addition, plaintiff notes Deuel never complained to plaintiff or Dean about plaintiff's alleged misconduct or anonymously reported the misconduct to the company's hotline. Plaintiff asserts Deuel made false accusations, pointing to some discrepancies between two chronological lists created by Deuel that detail plaintiff's conduct from February 14 to June 9, 2014. In addition, plaintiff claims Deuel falsely accused him of retaliation on July 15, 2014. Plaintiff explained he made the decision to designate Deuel as the note-taker at the Lenel meeting because Deuel was no longer needed as a presenter after technical issues were removed from the agenda.

During the meetings with Healy and 20-year-old Parker, plaintiff felt he was "ridiculed as the man who brought a pad and pen to the meeting when all the younger employees brought their laptops." Plaintiff declared, "I felt that I was looked down upon as 'old school' from the Dinosaur age because I did not walk around with a laptop." Plaintiff believed Healy and Parker were biased against him based on their demeanor and tone, and the manner in which they conducted the investigation. Healy and Martucci both accused plaintiff of lying during the investigation. In addition, plaintiff noted Healy took detailed notes when she spoke to numerous witnesses but did not do so when she spoke with Daniel for 30-45 minutes.

During plaintiff's last three years of employment with Disney Worldwide, various employees made age-related comments directed at him. Plaintiff's former supervisor Brian Wood referred to him as the "old-time programmer." In 2012, project manager Jay Bradshaw told plaintiff he was going to "get a colonoscopy" and added "Barry you know what that's like," and "[y]ou obviously know what that's like." Further, when plaintiff was out of the office sending work-related emails, Bradshaw stated people like plaintiff "need their rest." Dean, plaintiff's supervisor, referenced plaintiff's age when she commented "back to the days of the covered wagons." From 2013 to 2014, Velasco made fun of plaintiff's age at least 15-20 times. Likewise, Romine referenced plaintiff's age at least 20-30 times from 2013-2014.

On July 22, 2014, plaintiff sent Martucci an email to express his concerns about the investigation. He wrote: "Is this an age discrimination thing? Would I be treated the same way if I was closer in age to [Matthew Deuel]? I ask that because of the way I was treated by T. Healy during my 'interviews.' Given how salacious many [of] the allegations were, I felt as if I was treated like the stereotypical 'dirty old man' based on her facial expressions and reactions to my answers." A few hours after plaintiff sent the email, he was summoned to Martucci's office for a meeting with Lawson and Martucci. Lawson told plaintiff he was fired, effective immediately, for lying, retaliation, and harassment. Plaintiff observed, "It appeared to me Mr. Lawson read off a prepared piece of paper and had no idea about the facts [or] my denial of each one of Mr. Deuel's false accusations during Ms. Healy's Employee Relation's investigation." After plaintiff's discharge, Lawson replaced plaintiff with 50-year-old Romine, who took over plaintiff's job responsibilities.

E. Summary Judgment Ruling

The trial court held the summary judgment hearing on April 26 and May 3, 2016 and took the matter under submission. On May 12, 2016, the trial court granted defendants' motion for summary judgment. Walt Disney Pictures and The Walt Disney Company were granted summary judgment because plaintiff failed to present any evidence that they were his employers. Disney Worldwide was granted summary adjudication on the claims for age discrimination, medical condition discrimination, and the combination claim of age and medical condition discrimination.

In addition, the trial court granted summary adjudication on the causes of action for retaliation, intentional infliction of emotional distress and breach of implied contract. Concerning the defamation claim, the trial court found defendants presented evidence the alleged defamatory statements were privileged because they were only made to those who need to know. The trial court ruled: "Plaintiff's responsive evidence in opposition is hearsay and inadmissible. Beyond this inadmissible evidence, plaintiff presents no evidence or an inference of malice or oppression." As for punitive damages, the trial court concluded: "Plaintiff fails to present evidence that rises to the threshold level of clear and convincing evidence of punitive conduct that could be presented to a trier of fact to enable him to obtain punitive damages."

IV. DISCUSSION

A. Evidentiary Rulings

Plaintiff challenges a December 1, 2015 order quashing his two subpoenas, which sought deposition transcripts and documents pertaining to Deuel's lawsuit against the City of Pasadena for police assault. The trial court's discovery ruling is reviewed for an abuse of discretion. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733; *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 772.) A ruling is an abuse of discretion if it is so irrational or arbitrary that no reasonable person could agree with it. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773; *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1369.) A

reviewing court may not substitute its opinion for that of the trial court unless there is no legal justification for the discovery order. (*Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th 640, 649; *Alch v. Superior Court* (2008) 165 Cal.App.4th 1412, 1421.)

According to plaintiff, the above-mentioned subpoenas seek impeachment evidence which is discoverable under the liberal discovery rules. But plaintiff fails to satisfactorily show how evidence from an unrelated police assault case is relevant to his discrimination and defamation action. (Evid. Code, § 350 ["No evidence is admissible except relevant evidence."].) Under Evidence Code section 210, relevant evidence includes "evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Given the legal issues in this litigation and plaintiff's statement that the only reason Deuel may have made up the allegations was to avoid a poor review and keep his bonus, the trial court reasonably concluded evidence from Deuel's lawsuit against the City of Pasadena is not relevant to any disputed facts relating to plaintiff's causes of action. The order quashing plaintiff's subpoenas was not an abuse of discretion.

Plaintiff also challenges the trial court's ruling sustaining defendants' objections to paragraph No. 32 of plaintiff's declaration, which was submitted in opposition to summary judgment. In *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 (*Reid*), our Supreme Court declined to decide whether evidentiary rulings made in summary judgment proceedings are reviewed for an abuse of discretion or de novo. Post-*Reid*, a number of appellate courts have reviewed evidentiary rulings on summary

judgment for an abuse of discretion. (*Ryder v. Lightstorm Entertainment, Inc.* (2016) 246 Cal.App.4th 1064, 1072; *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852 (*Serri*); *Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181; contra, *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451.) We follow the weight of authority and review the trial court's evidentiary ruling for an abuse of discretion.

In connection with the summary judgment proceeding, the trial court sustained defendants' objections to paragraph No. 32 of plaintiff's declaration on hearsay grounds. That paragraph states: "Disney Told Others I Was Fired for Man-on-Man Sexual Harassment. [¶] In the summer of 2014 I was invited to attend a Los Angeles Dodgers baseball game with my former Director Terrie Dean and my replacement Dan Romine. During the game I was told that Disney VP Chris Lawson told them I had been fired because I sexually harassed Mr. Deuel."

Plaintiff asserts publication of defamation may be proven by hearsay where the fact in controversy is whether the defamatory statement was spoken, not whether the statement was true or false. He relies on *Cunningham v. Simpson* (1969) 1 Cal.3d 301, 306-307, *Mercado v. Hoefler* (1961) 190 Cal.App.2d 12, 19 and *People v. Henry* (1948) 86 Cal.App.2d 785, 789, but these cases involve non-hearsay evidence. Here, Dean's and Romine's statements to plaintiff that Lawson told them plaintiff was fired for sexual harassment are being used for the truth of the matter asserted. The trial court correctly ruled Dean's and Romine's statements made to plaintiff are inadmissible hearsay. (*Innovative Business Partnerships, Inc. v. Inland Counties Regional Center, Inc.* (2011) 194 Cal.App.4th 623, 633; *Rochlis v. Walt Disney Co.* (1994) 19 Cal.App.4th 201, 216-217, disapproved

on other grounds by *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251.)

B. Summary Judgment Standard of Review

Summary judgment may be granted only if "there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." (Code Civ., Proc. § 437c, subd. (c); *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347 (*Hampton*).) A defendant moving for summary judgment must show "one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) If defendant meets this burden, the burden shifts to plaintiff to produce admissible evidence showing a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at p. 850.)

We review de novo the trial court's grant of summary judgment. (*Hampton, supra*, 62 Cal.4th at p. 347; *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286.) The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale. (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336; *Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.) We take the facts from the record that was before the trial court and consider all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained. (Code Civ. Proc., § 437c, subd. (c); *Hampton, supra*, 62 Cal.4th at

p. 347.) "We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037; accord, *Hampton, supra*, 62 Cal.4th at p. 347.)

C. Age Discrimination Cause of Action

The Fair Employment and Housing Act (FEHA) prohibits an employer from discriminating against an employee based on age. (Gov. Code, § 12940, subd. (a).) For a disparate treatment discrimination claim, we apply the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Reid, supra*, 50 Cal.4th 512, 520, fn. 2; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) At trial, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. (*Guz, supra*, 24 Cal.4th at p. 354; *Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 964 (*Swanson*).) To establish a prima facie case, the plaintiff must provide evidence that: he was a member of a protected class; he was qualified for the position he sought or was performing competently in the position he held; he suffered an adverse employment action, such as termination; and some other circumstance suggests discriminatory motive. (*Guz*, *supra*, 24 Cal.4th at p. 355; *Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 673.)

A rebuttable presumption of discrimination arises if the plaintiff establishes a prima facie case. (*Guz, supra*, 24 Cal.4th at p. 354; *Swanson, supra*, 232 Cal.App.4th at p. 965.) The burden then shifts to the employer to rebut the presumption by

producing admissible evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason. (*Guz, supra*, 24 Cal.4th at pp. 355-356; *Swanson, supra*, 232 Cal.App.4th at p. 965.) If the employer does so, the burden shifts back to plaintiff to establish the employer's proffered reasons are untrue or pretextual, or to offer other evidence of intentional discrimination. (*Guz, supra*, 24 Cal.4th at p. 356; *Swanson, supra*, 232 Cal.App.4th at p. 965.)

An employer may meet its initial burden on summary judgment by presenting evidence that either negates an element of the employee's prima facie case, or establishes a legitimate nondiscriminatory reason for taking an adverse employment action against the employee. (*Swanson, supra*, 232 Cal.App.4th at pp. 965-966; *Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 160.) An employer moving for summary judgment may skip to the second step of the analysis by demonstrating it has a legitimate business reason, unrelated to intentional discrimination. (*Guz, supra*, 24 Cal.4th at p. 357; *Batarse v. Service Employees Internat. Union, Local 1000* (2012) 209 Cal.App.4th 820, 832 (*Batarse*).) Plaintiff then has the burden of rebutting this facially dispositive showing by pointing to evidence which raises a rational inference of intentional discrimination. (*Guz, supra*, 24 Cal.4th at p. 357; *Batarse, supra*, 209 Cal.App.4th at p. 832.)

Plaintiff may show defendants' proffered reason is pretextual through direct or circumstantial evidence. "'[T]he plaintiff may establish pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."' [Citation.] Circumstantial

evidence of "'pretense" must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate' on an improper basis. [Citations.] With direct evidence of pretext, "'a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." [Citation.] The plaintiff is required to produce "very little" direct evidence of the employer's discriminatory intent to move past summary judgment.' [Citation.]" (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68-69 (*Morgan*); accord, *Batarse, supra*, 209 Cal.App.4th at p. 834.) "An employee in this situation can not 'simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee "'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [. . . asserted] non-discriminatory reasons." [Citations.]' [Citations.]" [Citation.]'" (*Morgan, supra*, 88 Cal.App.4th at p. 75; accord, *Batarse, supra*, 209 Cal.App.4th at p. 834.)

Here, defendants presented legitimate business reasons for terminating plaintiff's employment. Defendants offered evidence showing plaintiff was discharged after a thorough investigation of his conduct. Based on the investigation, Healy and Lawson concluded plaintiff did the following: made inappropriate statements about other employees based on race and gender; made Deuel uncomfortable through behavior directed at him; retaliated against Deuel; lied during the course of investigation (by denying he referred to female employees as "bitches" and

claiming a project manager complained about Deuel's performance); and demonstrated poor judgment and leadership during the course of the investigation.

Plaintiff contends Healy's investigation was a pretext to mask age discrimination. Plaintiff argues he was treated less favorably than 37-year-old Deuel during the investigation. Plaintiff claims Healy, Parker and Martucci accepted Deuel's false allegations while disbelieving plaintiff's statements. Further, plaintiff contends the two lists of allegations created by Deuel, which were produced in discovery, are contradictory and show Deuel's allegations are false.

But plaintiff ignores evidence showing Healy conducted multiple witness interviews to investigate Deuel's allegations. During the investigation, plaintiff admitted he made off-color jokes and used profanity in front of other employees during work time. In addition, Leung, Velasco and Webster corroborated many of Deuel's allegations.[3] Plaintiff also contends Healy's

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[3] Plaintiff contends Healy and Lawson retaliated against Leung because he made favorable statements supporting plaintiff during the investigation. In support of this contention, plaintiff submits an August 2, 2014 written warning issued by Lawson to Leung. In the written warning, Lawson criticized Leung for being evasive and making inconsistent statements during the investigation, and creating the appearance of retaliation by participating in the last-minute decision to replace Deuel as a presenter. Whether Lawson should have taken disciplinary action against Leung is a business judgment decision that we do not second-guess. (*Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 24; *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1224-1225.) Moreover, even if the written warning was not warranted, this does not create a rational inference of age discrimination. (*Guz, supra*, 24 Cal.4th at pp.

failure to secure witness statements from Dean and Wong is evidence of pretext. However, there is no evidence Dean or Wong has any relevant information about plaintiff's alleged misconduct, which is the subject of the investigation.

In addition, plaintiff contends he was ambushed because Healy refused to provide him with Deuel's list of accusations during the investigation. While Healy did not provide plaintiff with such a list, it is undisputed she interviewed plaintiff twice to obtain his responses to Deuel's misconduct allegations. Furthermore, Healy interviewed plaintiff a third time after Deuel alleged plaintiff retaliated against him. Plaintiff also asserts Healy suspiciously lost or never took notes of her interview with Daniel. But Healy testified she did not take notes of the interview because she had a limited time to interview Daniel and did not have an available note-taker.

Further, plaintiff argues Healy failed to verify Deuel's accusation that plaintiff made inappropriate comments concerning a Muslim employee. He asserts Deuel's accusation is verifiably false. Plaintiff claims he could not have made such remarks because he does not work on Sundays, and he was out of state attending a seminar on the date Deuel alleged he made these statements. But it is irrelevant whether plaintiff actually made inappropriate comments concerning the Muslim employee because Healy did not consider these allegations in her investigation report.

360-361; *Rosenfeld v. Abraham Joshua Heschel Day School, Inc.* (2014) 226 Cal.App.4th 886, 898-899 (*Rosenfeld*).)

Plaintiff also argues Healy, Martucci, and Lawson failed to consider whether Deuel lied to save his job. Contrary to plaintiff's assertion, both Healy and Lawson considered Deuel's motive.[4] Healy wondered whether Deuel fabricated the allegations after Deuel, without prompting, told her he had recently received negative performance feedback from plaintiff and Dean. She concluded Deuel was a credible witness based on her observations of Deuel, plaintiff and other witnesses during multiple interviews and the corroborating statements of other witnesses. Likewise, Lawson considered whether Deuel was honest about his claims. Based on information he received from Healy, Lawson found Deuel credible because Deuel did not hide his negative performance feedback and other employees and contractors corroborated many of Deuel's allegations.

Even if we accept plaintiff's contention that the investigation is flawed, none of its purported shortcomings support an inference of age discrimination. "Proof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions. [Citation.]" (*Guz, supra*, 24 Cal.4th at pp. 360-361; *Rosenfeld, supra*, 226 Cal.App.4th at pp. 898-899.) "'A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the

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[4] Martucci was not involved in the investigation or a decisionmaker; thus, whether he considered Deuel's motive is irrelevant.

employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason.' [Citation.]" (*Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1011.)

Plaintiff fails to provide evidence sufficient to allow an inference that Healy harbored discriminatory animus towards him during the investigation. Instead, plaintiff relies on his perception of Healy's demeanor as evidence of bias. In a July 22, 2014 e-mail to Martucci, plaintiff wrote: "Is this an age discrimination thing? Would I be treated the same way if I was closer in age to [Matthew Deuel]? I ask that because of the way I was treated by T. Healy during my 'interviews.' Given how salacious many [of] the allegations were, I felt as if I was treated like the stereotypical 'dirty old man' based on her facial expressions and reactions to my answers."[5] At his deposition,

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[5] Plaintiff contends Disney Worldwide condoned age discrimination because Martucci did not investigate his age discrimination complaint against Healy and Parker. Plaintiff asserts he was fired a few hours after making his age discrimination complaint. But Lawson had already decided to discharge plaintiff the day before plaintiff's July 22, 2014 e-mail to Martucci. Moreover, both Healy and Lawson did not learn about plaintiff's e-mail to Martucci until after plaintiff was discharged. Plaintiff argues Martucci's failure to investigate is evidence of Disney Worldwide's adoptive or tacit admission of age discrimination. He relies on Evidence Code section 1221 in support of his contention but the adoptive admission exception to the hearsay rule is inapplicable. Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of

plaintiff testified Healy treated him "like the quintessential dirty old man" based on his perception of Healy's "disgust, her looks, her demeanor." However, plaintiff admitted Healy never made any comment about his age. Moreover, Healy had never met plaintiff prior to her first interview with him. There is no evidence Healy was biased against plaintiff because of his age.

In his declaration, plaintiff stated he was "ridiculed as the man who brought a pad and pen to the meeting when all the younger employees brought their laptops." Plaintiff added, "I felt that I was looked down upon as 'old school' from the Dinosaur age because I did not walk around with a laptop." However, the only reference to plaintiff's use of a "pad and pen" is in Parker's interview notes. Parker observed, "[Plaintiff] brought back the same pad and paper—he is ready to write [¶] . . . He is already agitated—striking the pen hard on the pad." At deposition, plaintiff admitted he had never meet Parker before the first interview and had no reason to think she was biased against him.

Similarly, plaintiff fails to show age bias by Lawson, plaintiff's supervisor who made the decision to terminate his employment. Plaintiff testified he did not yet have any evidence of Lawson's age bias. In his declaration, plaintiff stated, "It appeared to me Mr. Lawson read off a prepared piece of paper and had no idea about the facts [or] my denial of each one of Mr. Deuel's false accusations during Ms. Healy's Employee Relation's investigation." Plaintiff's conjecture is refuted by Lawson's

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which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." There is no evidence Martucci made any age-based statements that were adopted by Disney Worldwide as an admission.

declaration, which shows Lawson based his discharge decision on Healy's investigation report and his conversation with her. Plaintiff argues Lawson's decision to replace him with the 50-year-old Romine demonstrates age discrimination. However, this comparative-age evidence is not enough to defeat summary judgment. (*Guz, supra*, 24 Cal.4th at p. 327 [where employer presents undisputed evidence that personnel decision had nothing to do with plaintiff's age, evidence that substantially younger workers were preferred over plaintiff is insufficient to permit a rational inference of age discrimination].)

To buttress his age discrimination claim, plaintiff submits evidence of age-related remarks made by other employees. Plaintiff's former supervisor Brian Wood referred to him as the "old-time programmer." In 2012, project manager Jay Bradshaw told plaintiff he was going to "get a colonoscopy" and added "Barry you know what that's like," and "you obviously know what that's like." Further, when plaintiff was out of the office sending work-related e-mails, Bradshaw stated people like plaintiff "need their rest." Dean, plaintiff's supervisor, referenced plaintiff's age when she commented "back to the days of the covered wagons." From 2013 to 2014, Velasco made fun of plaintiff's age at least 15-20 times. Likewise, Romine referenced plaintiff's age at least 20-30 times from 2013-2014. But there is no evidence any of these age-based remarks were related to the adverse employment decision. Furthermore, none of these individuals were involved in the investigation or decision to terminate plaintiff's employment. Under the totality of the evidence in the record, the nondecisionmakers' remarks do not create a triable issue of age discrimination. (See *Reid, supra*, 50 Cal.4th at p. 541; *Serri, supra*, 226 Cal.App.4th at pp. 867-868.)

D. Medical Condition and Age Discrimination Cause of Action

FEHA makes it an unlawful employment practice to discharge or discriminate against an employee based on a medical condition or age. (Gov. Code, § 12940, subd. (a).) Under FEHA, the term "medical condition" includes "[a]ny health impairment related to or associated with a diagnosis of cancer or a record or history of cancer." (Gov. Code, § 12926, subd. (i).) The *McDonnell Douglas* test applies to the medical condition and age discrimination claim. (*Guz, supra*, 24 Cal.4th at p. 354; *Swanson, supra*, 232 Cal.App.4th at p. 964.)

It is undisputed plaintiff was diagnosed with colon cancer and received cancer treatment. But there is no evidence plaintiff was discharged because of his cancer or cancer treatment. Deuel, Healy and Lawson all stated that they did not know about plaintiff's medical condition until after plaintiff filed his lawsuit. Plaintiff does not dispute this evidence. Rather, he asserts his former supervisor, Dean, and her immediate supervisor, Fox, knew of his colon cancer diagnosis and treatment. But there is no evidence Dean and Fox were involved in the investigation and employment termination decision. Moreover, plaintiff was promoted by Dean two months after he returned from colon cancer treatment. There is simply no evidence of any medical condition discrimination.

Because plaintiff does not present any evidence of medical condition discrimination, his combination medical condition and age discrimination claim fails as a matter of law. Furthermore, as for the age discrimination part of the combination claim, plaintiff did not present enough evidence to establish his discharge was based on age discrimination. Moreover, to the

extent plaintiff argues the combination claim is unique and different from his separate age and medical condition discrimination claims, he forfeits this issue by failing to raise it before the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293; *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417.)

E. Defamation Cause of Action

"The tort of defamation 'involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a tendency to injure or that causes special damage.' [Citation.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720 (*Taus*); *Lemke v. Sutter Roseville Medical Center* (2017) 8 Cal.App.5th 1292, 1298.) "Civil Code, section 47, subdivision (c) extends a conditional privilege against defamation to communications made *without malice* on subjects of mutual interest." (*Bierbower v. FHP, Inc.* (1999) 70 Cal.App.4th 1, 3 (*Bierbower*).) "[T]his 'mutual interest' privilege covers investigations of . . . harassment complaints by private employers when made without malice." (*Bierbower, supra*, 70 Cal.App.4th at p. 3; accord, *Cruey v. Gannet Co.* (1998) 64 Cal.App.4th 356, 369 ["complaints to employers about workplace harassment [are] privileged"].) Plaintiff can defeat the common-interest privilege by proving malice. (*Taus, supra*, 40 Cal.4th at p. 721; *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1212.) Malice "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." (*Taus, supra*, 40 Cal.4th at p. 721, quoting *Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 413.)

Plaintiff argues defendants' malice defeats the common-interest privilege. He contends Deuel's false accusations made one day after he gave Deuel a negative rating was done to ruin plaintiff's reputation and derail Deuel's imminent termination. At deposition, plaintiff' testified Deuel made up the allegations because Deuel did not want a poor review and was concerned about losing his bonus. Even if true, Deuel's accusations were not motivated by hatred or ill will towards plaintiff, but by a desire to keep his job. Moreover, Deuel denies any malice towards plaintiff: "It was not my intent to get [plaintiff] fired from Disney or to cause him any harm. I simply wanted his comments and harassing conduct to stop."

Plaintiff challenges the veracity of some of Deuel's allegations but presents no evidence that Deuel recklessly made these statements without reasonable belief in their truth. (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1121 ["A party's 'bare assertion' that statements made are false does not make them so, 'much less establish' they were made maliciously. [Citation.]"]; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1541.) Deuel made a chronological list of plaintiff's remarks over four months and provided it to Healy during the investigation. As noted above, many of the allegations were corroborated by other witnesses.

Disney Worldwide discharged plaintiff only for corroborated allegations after an investigation of Deuel's harassment and retaliation complaints. Plaintiff argues malice is established by Disney Worldwide's excessive publication to Dean and Romine of plaintiff's discharge for sexual harassment.

However, we do not consider this argument because Dean and Romine's statements to plaintiff about what Lawson told them are inadmissible hearsay.

F. Punitive Damages

Plaintiff argues defendants are liable for punitive damages for age discrimination and defamation. Under Civil Code section 3294, subdivision (a), plaintiff many recover punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." "'Malice' means conduct which is intended by defendant to cause injury to plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civil Code, § 3294, sub. (c)(1).) "Oppression" is "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of the person's rights." (Civil Code, § 3294, sub. (c)(2).) Here, there is no basis for punitive damages because the trial court properly granted summary adjudication on the age discrimination and defamation claims.

V. DISPOSITION

The judgment and orders are affirmed. Defendants, The Walt Disney Company, Disney Worldwide Services, Inc. and Matthew Deuel, shall recover their costs on appeal from plaintiff Barry N. Lipsitz.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LANDIN, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.