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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LAMARK FERGUSON,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES,

Defendant and Respondent.

B286463

(Los Angeles County
Super. Ct. No. BC598926)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Michael J. Raphael, Judge. Affirmed.

Esner, Chang & Boyer, Stuart B. Esner, Andrew N. Chang;
McNicholas & McNicholas, Matthew S. McNicholas and Douglas D.
Winter for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant
City Attorney, and Shaun Dabby Jacobs, Deputy City Attorney, for
Defendant and Respondent.

Plaintiff and appellant Lamark Ferguson (Ferguson), a police officer with the Los Angeles Police Department (LAPD or the department) appeals from the lower court's grant of summary judgment in favor of defendant and respondent City of Los Angeles (the City) in Ferguson's employment race discrimination and retaliation lawsuit against the City. Ferguson filed an internal complaint with the department alleging that a fellow LAPD officer racially profiled Ferguson when, while Ferguson was off-duty and driving in his private vehicle, the fellow officer pulled Ferguson over and suggested Ferguson was a gang member impersonating a police officer. An audio recording of this traffic stop established that several aspects of Ferguson's account were demonstrably false. The department initiated an internal complaint against Ferguson based on these false statements. Ferguson argues that the department initiated this complaint and engaged in related adverse employment actions against him as retaliation for Ferguson having filed an internal complaint alleging biased policing during the traffic stop. Because Ferguson offers no basis on which a jury could reasonably conclude that the department was indeed motivated by something other than the false statements Ferguson undisputedly made, summary judgment in favor of the City was proper. Accordingly, we affirm.

BACKGROUND

A. Plaintiff's Background and Employment with LAPD

Plaintiff has been an LAPD officer since 2009. After working as an undercover police officer in the Special Operations Division, plaintiff was assigned to the Hollywood Division and was promoted to the rank of Police Officer II in 2012. Ferguson

is African-American and comes from a long family history of law enforcement.

B. *The August 18, 2014 Traffic Stops*

Around midnight on the evening of August 18, 2014, while Ferguson was off-duty and returning home from a family function, he decided to drive to a rental property in South Los Angeles that he owns and was renovating. Ferguson was driving his black 1999 Chevy Tahoe with tinted windows, 22-inch chrome rims, and low-profile tires. He was wearing a short-sleeved shirt, making the tattoos on both of his arms visible.

As Ferguson turned onto his street, he was pulled over by LAPD Officers Scott Vostad and Mary Stebbins. As Vostad, who is a white officer, approached Ferguson's window, Ferguson handed Vostad Ferguson's California state identification card, his LAPD identification card, and his driver license. Plaintiff's driver license had been expired for roughly three weeks. Ferguson's police uniform was draped over the passenger seat of the vehicle.

Although Ferguson was not aware of it at the time, his interaction with Vostad was being recorded via a personal audio recorder Vostad was wearing. In the recording, Ferguson and Vostad frequently speak over each other, but the transcript of the recording does not reflect that any portion of the two officers' exchange was unintelligible. This recording reflects that Vostad identified himself to Ferguson and almost immediately thereafter noted, "oh, you're a cop." Vostad indicated he was stopping Ferguson because Ferguson had not used his turn signal, to which Ferguson responded, "Yeah. [¶] . . . [¶] . . . It's the circuit, been trying to get that fixed."

Vostad then noted that "[e]very now and then you see[] [¶] . . . [¶] . . . officers with like suspended licenses and stuff." He

asked Ferguson, “Where you heading right now, you just get off or something?” Ferguson explained that he was checking on his rental property. Vostad asked how long Ferguson had been on the force, and the remainder of the exchange proceeded as follows:

“Q. How long have you been on the force?

“A. Ah—

“Q. Still on probation?

“A. —Going—no.

“Q. About a year ago?

“A. Five years.

“Q. Five years?

“A. Yeah.

“Q. 402? [A reference to an LAPD identification number.]

“A. Uh-huh, 9/09.

“Q. What?

“A. Yup.

“Q. Five years with a 40?

“A. Uh-huh.

“Q. Really?

“A. Yup.

“Q. Huh. All right. There you go.

“A. Thank you, brother.

“Q. Take it easy.

“A. You, too.”

The entire exchange between Ferguson and Vostad during this stop lasted approximately two minutes.

Although Vostad noticed Ferguson’s driver license was expired during the first stop, he did not issue a citation for this or Ferguson’s failure to signal. Vostad later testified that he initially believed Ferguson had inadvertently handed Vostad an

expired driver license, based on Vostad's experience that it is unusual for a patrol officer to have an expired driver license.

A few minutes after the initial stop, Vostad's police car sped down the street after Ferguson and illuminated its red and blue forward-facing lights, just as Ferguson pulled into the driveway of his rental property. Vostad exited the police car and approached Ferguson in his car, asking again for Ferguson's LAPD identification card. Vostad later testified that he stopped Ferguson the second time because Vostad was concerned, after confirming that Ferguson's driver license was indeed expired, that Ferguson may not be a police officer.

Vostad was still wearing a personal audio recorder, which recorded the second exchange between Vostad and Ferguson. The transcript from this recording reflects that Vostad asked for Ferguson's identification card again, and asked him a series of questions related to his employment, including what division Ferguson worked in and what Ferguson's LAPD serial number is. Vostad then told Ferguson, "I just called to verify this, 'cause I've seen guys on security jobs that don't have—that have an ID that aren't actually employed any more. And it—it seems fine to me. I just called just to—just to verify employment and they want to send a sergeant to verify employment, which is—doesn't make any sense at all to me."

Ferguson asked whether he could simply call his watch commander, Lieutenant Alex Baez, to verify employment. Vostad indicated he had just spoken with Baez, who had already verified Ferguson's employment, but that Baez also wanted to send a sergeant to the scene "just to make sure." Vostad apologized for the additional time this would apparently take, as the sergeant being sent was not close by. Specifically, Vostad stated, "Sorry about that. I didn't think this would be that big of a thing. [¶] . . . [¶] I'm

surprised they're sending him. [¶] . . . [¶] Sorry about that. I—like I said, I had no idea that they would have to send someone over.” Vostad told Ferguson that the sergeant would arrive in 10 minutes, and again apologized and indicated he had not anticipated that the Hollywood Division would “want to send someone over here” to verify employment, and that he “d[id]n’t know what they’re gonna . . . do that they can’t do on the phone.”

Baez contacted Sergeant John Valdez of the Hollywood Division and instructed Valdez to “go out there, [and] make sure that Hollywood personnel was being treated well.” Ferguson was told to stay in his car, with Vostad and Stebbins’s patrol car directly behind him in the driveway, while the officers waited for Valdez. After 20-25 minutes, Vostad allowed Ferguson to exit his vehicle and go into his residence to wait.

When Valdez arrived, he first spoke with Vostad and Stebbins. Valdez later testified that, when he asked Vostad and Stebbins about “PC, why they stopped [Ferguson],” they told him that “they saw a vehicle going slow looking at . . . houses” and “kind of peering between houses.” Valdez did not recall either Vostad or Stebbins mentioning Ferguson’s turn signal or his tinted windows. Vostad and Stebbins both testified that they stopped Ferguson because he did not use his turn signal and his vehicle had tinted windows. Vostad also told Valdez that Vostad believed there appeared to be something wrong with Ferguson’s LAPD identification card, and that it appeared to have been tampered with.

After speaking with Vostad and Stebbins, Valdez went inside the rental property to speak with Ferguson. Valdez explained to Ferguson Vostad’s concerns about Ferguson’s identification card, and examined Ferguson’s LAPD identification card and driver license. He concluded that the identification card did not look

tampered with, just “typically worn.” Ferguson told Valdez that Ferguson felt he had been racially profiled. Valdez asked Ferguson how he wanted the situation to be handled, and Ferguson—unaware of Vostad’s claims that Ferguson had been peering into houses while driving—responded that he did not want to make a big deal out of it, and just wanted the officers to leave. With respect to Ferguson’s expired driver license, Valdez told Ferguson just to “take care of [it (the expired driver license)] before you come back to work.”

C. *The Department’s Internal Complaint Regarding Ferguson’s Expired Driver License*

The next day, August 20, 2014, Ferguson corrected the expired driver license and showed proof to Sergeant Mark Cohan at the Hollywood Division. The same day, Ferguson learned that the department had issued an internal complaint against him for the expired driver license (the expired driver license complaint). LAPD sustained this complaint and Ferguson received a penalty of an admonishment.

D. *Ferguson’s Internal Complaint for Biased Policing*

Later that day, Ferguson completed a formal administrative complaint against Vostad for biased policing (the biased policing complaint). Ferguson did so through Sergeant Andrew Chao of the Hollywood Division’s complaint unit, in connection with which Chao interviewed Ferguson about the incident.

The audio recording reflects that several aspects of Ferguson’s description of the traffic stops in the complaint and Ferguson’s statements to Chao were incorrect. First, although Volstad identified himself twice, Ferguson told Chao that Vostad had never done so; the complaint alleges an “unknown officer” pulled Ferguson over.

The complaint also alleges that, when Ferguson showed the unknown officer his LAPD identification card, the unknown officer “told him that his serial number did not equate to” the amount of time Ferguson stated he had been on the force, and that the officer needed to verify Ferguson’s employment, because “Hoover Street gang members ha[d] recently been attempting to pass off counterfeit LAPD identifications as legitimate when they are pulled over by police.” The recording reflects that Vostad never mentioned gangs at all during either stop, nor did he second guess Ferguson’s serial number.

The complaint further states that “Ferguson offered to show [the unknown officer] his police uniform, equipment bag, and several carbon copies of [o]vertime [r]eports he had recently submitted . . . as additional proof” he was a police officer. This, too, was not in the recording of the conversation during either stop. The complaint stated the unknown officer allowed Ferguson to leave at that point, but that the same officer pulled Ferguson over a second time in the driveway of Ferguson’s residence.

Ferguson also estimated that the first stop lasted 25-30 minutes, and that the second stop lasted 20 minutes, although it is unclear with respect to the second stop whether he was referring to his second exchange with Vostad or the entire second stop. Ferguson’s time estimates did not even approximately match the durations of the two audio recordings. The remainder of the complaint’s account of the interaction is generally consistent with the audio recording. Finally, the complaint states that “Ferguson said he feels the unknown officers engaged in biased policing because the male officer’s explanation of his possible fictitious work identification made no sense to him, especially since Ferguson offered to show him his police uniform, equipment bag,

and copies of overtime slips as additional proof he was [an LAPD officer].”

Ferguson was interviewed again in September 2014 and November 2014 in connection with the investigation of the biased policing complaint. He repeated these same statements during each interview.

E. *Ferguson’s Assignment to the West Traffic Division*

Beginning in September 2014, Ferguson was assigned to the West Traffic Division “on a rotating basis for a minimum of six months.” Ferguson was informed of this temporary change in assignment via a memorandum he received on August 5, 2014—two weeks before the encounter with Vostad. The memorandum also explained that the change was intended to combat “an increase in traffic related incidents within specific bureaus in certain categories.” Approximately 14 other Hollywood Division officers were also loaned to the West Traffic Division during a similar time frame.

Around September 24, 2014, Captain Rolando Solano of the West Traffic Division advised Ferguson he was to be placed on “no public contact” duty “due to a pending . . . open investigation.” It later became clear that this investigation was what led to the department’s false statements complaint, discussed below.

F. *The Department’s Internal Complaint Alleging Ferguson Made False Statements*

On November 12, 2014, the department initiated an internal complaint against Ferguson that alleged Ferguson had made false statements in all three of the interviews conducted to investigate Ferguson’s biased policing complaint (the false statements complaint).

Commander Stuart Maislin ordered the false statements complaint against Ferguson filed, based on an oral briefing he received. Maislin could not recall specifically who had briefed him, but identified two potential people in the Administrative Investigation Division. Maislin was confident, however, that he had not reviewed any documents or recordings in considering whether to initiate the complaint, because this would have been unusual and noteworthy to Maislin, given his typical practice of making decisions based on oral presentations from colleagues.

G. *Investigation of False Statements Complaint*

The internal affairs team investigating the false statements complaint considered Ferguson's statements in his interviews and the audio recordings from Vostad's audio recorder. The team did not interview anyone other than Ferguson. Maislin explained that additional interviews or investigations were unnecessary, given how plainly Ferguson's repeated statements were directly contradicted or completely unsupported by the audio recordings. He noted, for example, that he did not feel it was necessary to interview Vostad because the recording "kind of speaks for itself." Maislin acknowledged that the investigation was "pretty quick," but noted that it also did not "appear to be that complicated [of an] investigation."

Finally, Ferguson explained in his interviews that he had a home security video system set up at his rental property that covered the front area of his property where the second stop occurred, and that the system had a time stamp function. He suggested to the investigation team that the footage from this system could constitute additional evidence regarding the duration of the second stop, and provided a link to the video. The investigation documents do not reference the video.

H. *The February 2015 Department Adjudication of False Statements Complaint*

In February 2015, internal affairs recommended that all charges in the false statements complaint be sustained, that the matter proceed to a Board of Rights (BOR) hearing, and that Ferguson be placed on administrative leave pending that investigation.

The “rationale” provided for this recommendation in a “letter of transmittal” attaching the complaint adjudication form focuses on Ferguson’s statements being demonstrably untrue in material respects, and their having potentially severe consequences for Vostad. For example, the letter transmitting this recommendation notes that “[d]uring . . . three separate interviews . . . Ferguson insisted that the duration of the initial traffic stop lasted approximately 25 to 30 minutes and close to 20 minutes in the second traffic stop. Furthermore, Ferguson alleged that Vostad had to verify his employment because, according to Ferguson, Vostad said there was a problem with ‘Crip’ gang members using fake LAPD identification cards. Ferguson felt that he was being accused of being a ‘Hoover Street’ gang member and added that if he was a white officer, Vostad would not have made these assumptions. According to Ferguson, the prolonged traffic stop and verification of his employment was due to him being a young black male with sleeve tattoos and driving a Code-37 type vehicle.” The letter notes that the audio recording “totally contradicted” these statements, in that, for example, “[a]t no time[] did Vostad make reference of ‘Crips’ gang members possessing falsified LAPD identification cards and or make an accusation of Ferguson resembling a gang member. Furthermore, the initial traffic stop lasted only one minute 27 seconds and the second traffic stop lasted five minutes and 38 seconds, all of which contradicted Ferguson’s

statements.” The letter further “noted that Ferguson greatly exaggerated his account of the events with Vostad, so much so that he falsely accused Vostad of being racially biased during their encounter. Had it not been for Vostad’s audio recording, these allegations by Ferguson would have been detrimental to Vostad’s career. Additionally, it would have been extremely difficult to differentiate the true accounts of the traffic stop and, due to the seriousness of the accusations, Vostad could have been severely disciplined for his alleged discriminatory conduct if the allegations were true.”

The letter further notes the department had sustained a personnel complaint against Ferguson in the past regarding Ferguson making statements he knew or should have known were false.¹ This history, the letter notes, suggested Ferguson “ha[d] displayed a pattern of behavior which involved poor judgment and personal conduct.”

I. Ferguson’s Status Pending BOR Hearing

In April 2015, Ferguson received notice that internal affairs had recommended the false statements complaint be sustained and ordered a BOR hearing. Ferguson was “ordered not to act in the capacity of a police officer” pending the investigation and further ordered to relinquish his weapon, identification card, and badge. Ferguson was assigned to his residence during business

¹ Specifically, a sustained neglect of duty complaint reflected that Ferguson had made a domestic battery report Ferguson knew or should have known contained false information. Ferguson’s personnel record further reflected that, in 2013, he failed to present an arrestee to a supervisor for an intake interview upon arrest, resulting in a sustained complaint for neglect of duty and seven days suspension.

hours as well pending the outcome of the BOR hearing, meaning he was required to obtain permission to leave his residence during those hours.

On May 13, 2015, the chief of police served Ferguson with a complaint for relief from duty with the recommendation that Ferguson be terminated. On or about June 28, 2015, the department stopped paying Ferguson.

J. *Ferguson's Employment Retaliation and Discrimination Complaint*

In October 2015, Ferguson filed a complaint against the City in Los Angeles Superior Court, asserting causes of action for employment discrimination and retaliation in violation of the California Fair Employment and Housing Act (FEHA). The complaint alleged Ferguson had opposed practices forbidden by FEHA and engaged in protected activity by filing an internal complaint alleging he had been subject to biased policing during the traffic stops. Ferguson further alleged that the department retaliated against him for engaging in this protected activity by subjecting him to multiple adverse employment actions, including suspending him and launching a meritless and biased internal affairs investigation into false statements the department claimed Ferguson had made. In his discrimination cause of action, Ferguson alleged that the department engaged in these same adverse employment actions based on his race.

K. *BOR Hearing and Decision*

Over the course of several days in January and February 2016, a three-member BOR panel considered the false statement complaint, in connection with which it heard testimony from multiple witnesses, including Maislin, Valdez, Ferguson, Vostad, and Stebbins.

On February 8, 2016, the BOR adjudicated the complaint in Ferguson's favor. The BOR concluded that Ferguson had indeed made statements during his interviews that were demonstrably untrue, but that he had not violated LAPD policy. This is because the LAPD policy Ferguson was alleged to have violated provides that it is misconduct for an officer to make "[f]alse and misleading statements," defined as a written or oral statement an LAPD employee makes "when he or she knew or should have known the statement was false at the time it was made *or the employee fails to correct the statement upon learning of its falsity.*" (Italics added.) In his testimony before the BOR, as well as in a written statement provided by his attorney before the hearing, Ferguson acknowledged the inaccuracy of several aspects of his statements and corrected them. Ferguson further explained that his misstatements were driven by emotion and misperception, and apologized.

The BOR concluded that Ferguson had not intentionally misrepresented the events of the traffic stops, but rather allowed his personal experiences and emotions to color his perception of events, resulting in inaccurate statements that Ferguson believed to be true at the time, and later corrected when presented with contrary evidence. The BOR noted that Ferguson had offered "a reasonable rationale that consisted with his personal experience and upbringing" which was "critical in this case as it pertains to allegations of racial profiling and bias[ed] policing."

Following the BOR's decision, LAPD reinstated Ferguson to full duty at the Hollywood Division and paid him his back pay and benefits.

L. Summary Judgment of Employment Complaint

The City moved for summary judgment and summary adjudication as to each cause of action in Ferguson’s civil suit. The City argued that, as a matter of law, Ferguson could not show that he suffered an adverse employment action or that the department engaged in any such action for a retaliatory or discriminatory reason. Ferguson opposed the motions based on, inter alia, the arguments he raises on appeal.

After a hearing, the trial court granted the City’s motion for summary judgment. The court based its decision primarily on its conclusion that, as a matter of law, the department had established—and Ferguson had not identified any evidence to undermine—a legitimate nondiscriminatory reason for initiating disciplinary proceedings against Ferguson; namely, that some of the statements he made to investigators were indeed “incorrect.” The trial court entered judgment of dismissal after its order granting summary judgment, and this appeal followed.

DISCUSSION

I. Relevant Law Governing Employment Discrimination and Retaliation Claims

A plaintiff alleging employment discrimination or retaliation bears the burden of offering “evidence that, taken as a whole, permits a rational inference that intentional discrimination [or retaliation] was a substantial motivating factor in the employer’s actions toward the plaintiff.” (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 377 (*Horsford*) [discrimination claims]; see *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 155–156 (*Sada*) [retaliation claims].) In *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*), the United States Supreme

Court developed a burden-shifting framework as a tool to assist with the inherently difficult task of proving an employer's motivation. (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 255, fn. 8 (*Texas Dept.*)). California courts have adopted this framework (see *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*)) and apply it in both discrimination and retaliation cases. (See *Sada, supra*, 56 Cal.App.4th at pp. 155–156.)

Under the *McDonnell Douglas* framework, how a plaintiff establishes a prima facie case is flexible (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 663; see *McDonnell Douglas, supra*, 411 U.S. at p. 802, fn. 13), although the plaintiff must show the employer has taken actions, “ ‘from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were’ ” based on discrimination or retaliation. (*Ibarbia v. Regents of University of California* (1987) 191 Cal.App.3d 1318, 1327–1328, quoting *Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 576.) In retaliation cases, the employee may establish a prima facie “by showing that (1) [he] engaged in activities protected by . . . FEHA, (2) [his] employer[] subsequently took adverse employment action against [him], and (3) there was a causal connection between the protected activity and the adverse employment action.” (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 472.) In discrimination cases, a plaintiff often satisfies this initial burden by showing (1) the plaintiff was a member of a protected class; (2) the plaintiff “ ‘was qualified for the position he sought or was performing competently in the position he held;’ ” (3) the plaintiff suffered an adverse employment action; and (4) “ ‘some other circumstance suggest[ing] discriminatory [or retaliatory] motive.’ ” (*Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1220 (*Joaquin*); Code

Civ. Proc., § 437c, subds. (a) & (o)(2); *Sada, supra*, 56 Cal.App.4th at pp. 155–156.)

A prima facie showing by the plaintiff shifts the burden to the defendant employer to “articulate some legitimate, nondiscriminatory [and non-retaliatory] reason” for the adverse employment action. (*McDonnell Douglas, supra*, 411 U.S. at pp. 802–803; *Guz, supra*, 24 Cal.4th at p. 358.)

If the employer can articulate such a reason, the burden shifts back to the plaintiff to show “that [the employer’s] stated reason . . . was in fact pretext.” (*McDonnell Douglas, supra*, 411 U.S. at p. 804; *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004–1005 (*Hersant*) [“to avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer’s stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination”].) The employee cannot do this by “ ‘simply show[ing] that the employer’s decision was wrong or mistaken,’ ” however, “ ‘since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.’ ” (*Id.* at p. 1005.) Rather, the employee must show that the proffered explanation is “ ‘ “unworthy of credence” ’ ” (*ibid.*), and was a “mere makeweight[].” (*Horsford, supra*, 132 Cal.App.4th at p. 378.)

The *McDonnell Douglas* framework does not lessen plaintiff’s ultimate burden of establishing retaliation or intentional discrimination. (*Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 824.) A plaintiff may establish this ultimate fact “either directly by persuading the [trier of fact] that a discriminatory reason more likely motivated the employer or

indirectly by showing that the employer's proffered explanation is unworthy of credence." (*Texas Dept., supra*, 450 U.S. at p. 256.) In this respect, the burden of establishing pretext can "merge[] with the ultimate burden of persuading the [trier of fact] that [the plaintiff] has been the victim of intentional discrimination." (*Ibid.*) A plaintiff may rely on various forms of circumstantial evidence to establish discrimination. Thus, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated" or retaliated. (*Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 148 (*Reeves*).)

Under which circumstances such evidence is adequate to permit a reasonable inference of discrimination or retaliation "will depend on a number of factors" including "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case." (*Reeves, supra*, 530 U.S. at pp. 148-149.)

II. Summary Judgment Burdens and Standard of Review

An employer seeking summary judgment of an employment discrimination or retaliation claim "has the initial burden to present admissible evidence showing either that one or more elements of [the employee's] prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory [and non-retaliatory] factors.'" (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 861; see *Sada, supra*, 56 Cal.App.4th at pp. 155–156 [application to retaliation causes of action]); Code Civ. Proc., § 437c, subd. (p)(2).)

If the defendant is able to make such an initial showing, the burden then shifts to plaintiff to produce admissible evidence showing a triable issue of fact, i.e., that the employer's stated reasons for its actions are "pretext" for unlawful discrimination or retaliation. (See Code Civ. Proc., § 437c, subd. (p)(2); *Guz, supra*, 24 Cal.4th at p. 356; *Reeves, supra*, 530 U.S. at pp. 142–143.)

We review a trial court's decision granting summary judgment de novo, " " "considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 (*Yanowitz*).)

III. Evidence of a Legitimate Nondiscriminatory, Non-Retaliatory Intent

Ferguson identifies his personnel complaint alleging biased policing, as well as his informal oral complaint to Valdez the night of the traffic stops, as protected activity and the reason the City retaliated against him. On appeal, Ferguson argues that the trial court erred in concluding that no triable issue of fact exists as to whether the department engaged in such retaliation by taking any or all of the adverse employment actions Ferguson identifies. Specifically, Ferguson points to: (1) the expired driver license complaint, (2) his reassignment to the West Traffic Division, (3) the no public contact directives, (4) the false statements complaint, and (5) stripping him of his police powers and restricting him to his residence pending the adjudication of that complaint.

The parties' briefing on appeal also addresses whether the City met its burden on summary judgment by establishing that neither Ferguson's formal nor informal complaints of racial

profiling constitute protected activity under FEHA. We need not address these arguments, however, because, even assuming Ferguson set forth a prima facie case of discrimination and/or retaliation, the City has identified legitimate nondiscriminatory, non-retaliatory reasons for all adverse employment actions Ferguson identifies, and Ferguson has failed to create a triable issue of fact regarding whether these legitimate reasons were merely pretextual.

A. *Evidence of Legitimate, Nondiscriminatory, Non-Retaliatory Motive*

Even viewing the evidence in the light most favorable to Ferguson’s claims, the City identified a nondiscriminatory and non-retaliatory reason for every alleged adverse action, as we outline below.

1. *Expired driver license complaint*

Under both the Vehicle Code and the terms of his LAPD employment as a patrol officer, Ferguson is obligated to have a valid driver license in order to drive. (Veh. Code, § 12500.) Ferguson is no less subject to these requirements “ ‘simply because [he] [recently] engaged in a protected work activity.’ ” (See *Arteaga v. Brink’s Inc.* (2008) 163 Cal.App.4th 327, 354, quoting *Strong v. University Healthcare System, L.L.C.* (5th Cir. 2007) 482 F.3d 802, 808.) Ferguson does not dispute that his driver license was expired, nor does he claim the adjudication of the expired license complaint against him was incorrect. “ ‘An employee who engages in protected activity is not insulated from adverse action for violating workplace rules, and an employer’s belief that the employee committed misconduct is a legitimate, non-discriminatory reason for adverse action.’ ” (*Joaquin, supra*, 202 Cal.App.4th at p. 1223, quoting *Richey v. City of Independence* (8th Cir. 2008) 540 F.3d 779,

784.) Here, it was undisputed that Ferguson committed the “misconduct” alleged in the expired driver license complaint.

2. *Assignment to the West Traffic Division*

Although Ferguson was transferred to the West Traffic Division approximately two weeks after Ferguson filed the biased policing complaint, the department’s decision to transfer Ferguson was made and communicated to Ferguson in a letter dated two weeks *before* Ferguson initiated that complaint. The record thus does not support that the department’s decision to transfer Ferguson was motivated by anything related to the traffic stop or the biased policing complaint, as neither had yet occurred at the time the department made this decision. Nor does anything in the record call into question the legitimate, nondiscriminatory reason for the temporary transfer set forth in that letter: to address a spike in traffic issues in certain areas.

3. *No public contact directive and relief of duty*

Ferguson testified that he was put under a “no public contact” directive around late September or October 2014, and that the West Traffic Division’s superior communicating this to him explained it was because Ferguson was the subject of a pending internal investigation. The pendency of an investigation into allegations of dishonest behavior is a legitimate reason for restricting an officer’s contact with the public, because permitting “officers who are accused of dishonesty to have interactions with the public . . . could undermine any contacts by that officer.”

Ferguson further contends that the department retaliated against him by assigning him to his residence after the false statements complaint was referred to the BOR. But the record contains uncontested testimony that “[i]t is not unusual to assign

an officer home” pending the outcome of an investigation that, like one in connection with the false statements complaint here, could result in termination. Moreover, the Los Angeles City Charter section 1070, subdivision (b)(1) expressly permits this.² (See L.A. City Charter, § 1070, subd. (b)(1).) The April 22, 2015 letter assigning Ferguson to his residence and temporarily stripping him of his police powers refers to such a practice as well, noting: “A [p]ersonnel [c]omplaint concerning your alleged involvement in serious misconduct is under investigation. The compelling issues associated with this matter dictate that a specific administrative course be taken by this command to protect your best interests, as well as those of the organization.”

4. *False statements complaint*

At the time the department chose to file the false statements complaint, it had before it audio recordings that directly and unmistakably contradicted statements Ferguson made in the biased policing complaint and during three interviews about it. Ferguson’s statements attributed actions and words to Vostad that, based on the recordings, simply did not occur. Thus, at the time the department initiated the complaint, the record was already clear that Ferguson had made statements during an official investigation that are, in point of fact, false. Ferguson does not dispute this, even

² Specifically, it provides that “[a]fter following predisciplinary procedures otherwise required by law, the Chief of Police may: [¶] . . . temporarily relieve from duty any member pending a hearing before and decision by a Board of Rights on any charge or charges pending against the member The Chief of Police in his or her sole discretion shall have the power to cancel temporary relief from duty, or following relief from duty, to restore the member to duty with or without restrictions pending hearing.” (See L.A. Charter, § 1070, subd. (b)(1).)

if he has explained he did not intentionally or maliciously do so. That the BOR later agreed these false statements were neither intentional nor malicious does not change the fact that they were false and thus a legitimate subject of investigation.

B. *Evidence of Pretext*

As noted, that the department identified a legitimate motive for its actions does not end the inquiry. Summary judgment for the City is only appropriate if there exists no triable issue of fact as to whether the motive the City identified is merely pretextual. While circumstantial evidence of pretext may be sufficient for a plaintiff to avoid summary judgment—and may indeed be “quite persuasive”—the evidence must be such that it suggests the “defendant’s explanation is unworthy of credence.” (*Reeves, supra*, 530 U.S. at p. 147.) This is because, although a trier of fact’s disbelief of an explanation may be enough to establish discriminatory intent, that disbelief must have some nonspeculative basis in the record. (See *Hersant, supra*, 57 Cal.App.4th at pp. 1004–1005; *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 225, quoting *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735 [“For this purpose, speculation cannot be regarded as substantial responsive evidence.”].)

Ferguson points to several pieces of evidence he contends support a rational inference of pretext. We consider these individually, as well as collectively, below, and conclude that Ferguson has not established a triable issue of fact as to whether the department’s proffered nondiscriminatory, non-retaliatory motives were merely pretextual. Nor does the totality of the evidence present a triable issue of fact as to whether the department acted with discriminatory and/or retaliatory motives.

Ferguson first points to the BOR decision finding him not guilty of the charges in the false statements complaint, and argues this provides a basis on which a jury could call into question the department's stated motive for initiating the complaint a year prior. Evidence suggesting an “ ‘employer's decision was wrong or mistaken’ ” does not create a triable issue of fact regarding discriminatory intent, “ ‘since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.’ ” (*Hersant, supra*, 57 Cal.App.4th at p. 1005.)

In any event, the BOR's adjudication of the complaint in Ferguson's favor in no way undermines the legitimacy of the department's stated reasons for initiating the complaint—i.e., that the recordings and interviews establish Ferguson made material inaccurate statements during an investigation. Indeed, in connection with these proceedings, Ferguson recanted his biased policing allegations against Vostad, acknowledged the accuracy of the recordings, and admitted that, albeit unintentionally, he had made numerous inaccurate statements in his interviews and his complaint. The BOR decision similarly acknowledges that Ferguson made numerous false statements, and based its decision to exonerate him on the department's policy that an officer will not be guilty of making false statements if, as did Ferguson, the officer acknowledges the inaccuracy of his statements and corrects the record. Thus, the BOR decision does not “ ‘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.” ’ ’ (Hersant, *supra*, 57 Cal.App.4th at p. 1005, italics omitted, quoting *Fuentes v. Perskie* (3d Cir. 1994) 32 F.3d 759, 765.)

Next, Ferguson argues the department’s investigation before bringing its false statement complaint was biased and inadequate, and that such inadequacy provides a basis on which a jury could reasonably infer the resulting complaint was a mere fig leaf for the department’s discriminatory motives. (See *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 283 [inadequate or biased investigation is evidence of pretext].) But the record does not provide a reasonable basis for a trier of fact to conclude the investigation was, in fact, biased or inadequate. Ferguson cites the “pretty quick” duration of the investigation, and that the internal affairs team did not interview any witnesses besides Ferguson or consider the surveillance footage from Ferguson’s property. But Ferguson does not point to any policy or requirement that all witnesses be interviewed in every personnel complaint investigation. Nor does Ferguson identify any evidence that the LAPD conducted its investigation any differently than it did other misconduct investigations where there is a tape recording of the encounter at issue.

Further, Ferguson does not indicate how anything in the security footage³ or additional witness accounts of events possibly could have rehabilitated the false statements established via the audio recordings. Indeed, in light of these recordings, nothing—save evidence suggesting the transcripts of the recordings and/or Ferguson’s interviews were inaccurate or inauthentic—could establish that Ferguson did *not* make false statements during the investigation. The investigation was not, as Ferguson’s opening

³ It bears mention that Ferguson did not offer the surveillance video in his own defense at the BOR hearing.

brief maintains, a “he said, he said” dispute, because one of the two accounts is not a subjective human description of events, but rather a real-time audio recording. Ferguson never claimed that the audio recordings were incomplete—that is, that they did not capture all of Ferguson’s exchanges with Vostad on the night in question. Thus, the security footage could not have rehabilitated any of Ferguson’s inaccurate descriptions of Vostad’s words. Because these inaccurate descriptions alone provide a sufficient basis for the department to initiate a false statements complaint, it is immaterial that the footage may have helped investigators assess the accuracy of Ferguson’s estimate that the entire second stop lasted 25-30 minutes.

Ferguson cites as further evidence of the investigation’s inadequacy and bias that Maislin initiated the complaint based on an oral briefing, rather than review of documents, and criticizes Maislin’s inability to recall the name of the individual who provided the briefing. If these aspects of the investigation reflected deviations from ordinary procedures, they might be enough to establish a question of fact. (See *Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 294, fn. 6 [“evidence showing (or negating) . . . that the employer significantly deviated from its ordinary personnel procedures in the aggrieved employee’s case[] might well be relevant to support (or negate) an inference of retaliation”].) But nothing in the record suggests that this was the case here. To the contrary, Maislin testified that it would have been unusual for him to review documents before initiating an investigation. The mere theoretical possibility that the jury may not have believed him, absent any basis in the record for such disbelief, cannot create a triable issue of fact.

Finally, Ferguson cites as evidence of pretext and retaliatory intent the department's lack of response to Vostad engaging in conduct Ferguson characterizes as comparable to the false statements for which Ferguson faced harsh consequences. Specifically, Ferguson notes that the department investigated Ferguson based on inconsistencies between the audio recording and Ferguson's statements, but did not investigate Vostad (who is white), based on the inconsistencies between Vostad's testimony at the BOR hearing and Vostad's statements to Valdez the night of the traffic stop. Specifically, Ferguson notes that, "[d]uring the BOR hearing, . . . Valdez testified that Vostad said the probable cause for stopping [Ferguson] was that [Ferguson] was driving slowly and peering into houses (and not because of tinted windows or failure to activate a turn signal)," and that this, as well as Vostad's statement to Valdez that Ferguson's identification looked "tamper[ed]" with, "should have generated an internal complaint against Vostad for Vostad's false and misleading statements because among other things, Vostad admitted he first saw [Ferguson] driving in an area where there are businesses, not residential homes."

In order for "disparate discipline" to evidence discrimination or discriminatory intent, "it must appear 'that the misconduct [leading to the adverse employment action against] the plaintiff was the same or similar to what a similarly situated employee engaged in.'" (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1535 (*McGrory*), quoting *Lathem v. Department of Children and Youth Serv.* (11th Cir. 1999) 172 F.3d 786, 792.) The record does not support such a characterization here. The inconsistencies between Ferguson's statements are evidenced by an audio recording; the alleged inconsistencies in Vostad's statements are established by Valdez's recollection of an

encounter almost two years prior. Moreover, Vostad may have stopped Ferguson for multiple reasons. There is no similar way in which Ferguson could have provided context that would render his statements accurate.

Finally, although we address each of Ferguson's various arguments and the categories of evidence he identifies individually, we note that we reach the same conclusion by considering "plaintiff's allegations collectively under a totality-of-the circumstances approach" (*Yanowitz, supra*, 36 Cal.4th at p. 1052, fn. 11), and framing our inquiry as whether "[Ferguson's prima facie] showing, while sufficient to invoke the presumption [of discrimination or retaliation], is too weak to sustain a reasoned inference in the employee's favor," given the employer's evidence of legitimate, nondiscriminatory, non-retaliatory motive. (*Joaquin, supra*, 202 Cal.App.4th at 1226, fn. 5, italics omitted ["[t]hat, and not 'pretext,' must be the focus of the judicial inquiry" at summary judgment phase].) The department initiated a complaint against Ferguson alleging conduct that, based on strong evidence available to the department at the time, Ferguson undisputedly engaged in. Pending the outcome of this investigation, pursuant to procedures that nothing in the record suggests were applied in an unusual manner, the department restricted Ferguson's duties and powers. Ferguson was ultimately exonerated on a basis that does not contradict the underlying allegations in the department's complaint, but rather based on Ferguson's personal background and mental state at the time of his alleged misconduct.

That there was a temporal link between Ferguson's biased policing complaint and the department's false allegations complaint does not alone suggest pretext or retaliatory motive. Ferguson made the false statements at issue in the context of his biased policing complaint, providing a logical nondiscriminatory

and non-retaliatory reason why the two are close in time. That the department investigated Ferguson for making false statements in an otherwise protected complaint does not mean the department was investigating Ferguson as retaliation for that protected complaint. (See *McGrory, supra*, 212 Cal.App.4th at p. 1528 [FEHA “does not shield an employee against termination or lesser discipline for either lying or withholding information during an employer’s internal investigation of a discrimination claim. In other words, public policy does not protect deceptive activity during an internal investigation.”] (Fn. omitted).))

We note that Ferguson did not sue based on Vostad stopping him for racially discriminatory reasons. Rather, the misconduct for which Ferguson seeks redress are the various adverse employment actions discussed above, which he argues were retaliatory and/or discriminatory. The department explains that all of these adverse actions were based either on misconduct in which Ferguson undisputedly engaged, or decisions made before Ferguson filed his complaint. Ferguson has not identified any evidence, based on which a jury could reasonably infer that the department’s reasons were “ ‘ “unworthy of credence.” ’ ” (*Hersant, supra*, 57 Cal.App.4th at p. 1005.) Ferguson’s briefing repeatedly stresses that employment discrimination claims are fact intensive, and that the question of discriminatory intent is one of fact for the jury. But the inquiry on summary judgment is not whether something is a question of fact, but rather whether there is evidence creating a triable issue as to that fact. Here, there is not.

DISPOSITION

For the foregoing reasons, the judgment is affirmed.

Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

WEINGART, J.*

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