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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

RICHARD GORDON, Plaintiff and Appellant, v. THE BOARD OF TRUSTEES OF CALIFORNIA STATE UNIVERSITY, Defendant and Respondent.	B281323 (Los Angeles County Super. Ct. No. BC604866)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gail Ruderman Feuer, Judge. Reversed.

Adept Employment Law and Gregory P. Wong for Plaintiff and Appellant.

Cota Cole & Huber, Dennis M. Cota and Sean D. De Burgh for Defendant and Respondent.

Plaintiff Richard Gordon (Gordon) appeals the trial court's grant of summary judgment on his claim of retaliation under the California Fair Employment and Housing Act, Government Code section 12940, subdivision (h), in favor of defendant and respondent The Board of Trustees of California State University (defendant). Gordon's lawsuit grew out of his 2012 claim filed with the Department of Fair Employment and Housing, alleging discrimination based on age, race and disability. Gordon and defendant reached a settlement in 2013. Two years later, Gordon brought this action, alleging that defendant retaliated against him for his earlier complaint by failing to honor the terms of the parties' settlement agreement, impeding his research, and rendering him *persona non grata* among longtime colleagues.

Employing the *McDonnell Douglas* framework for employment discrimination claims, the trial court found that Gordon had presented sufficient evidence to raise material questions of fact as to whether he suffered constructive discharge and/or adverse employment actions. It additionally found that defendant offered legitimate, nonretaliatory reasons for the alleged actions but that Gordon failed to offer substantial evidence that defendant's stated justifications were pretextual—entitling defendant to summary judgment.

We reverse. We conclude that certain of defendant's proffered reasons for its actions suffer from sufficient contradictions and inconsistencies to raise a triable question as to whether the defendant's justifications were merely pretextual. Accordingly, the trial court should not have granted summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

From 1991 until he retired on May 25, 2016, Gordon was

employed by defendant as a professor in the Department of Education at the California State University, Dominguez Hills (the University). He specialized in educational psychology, multicultural education, and teacher development and training. During the events at issue here, Gordon was tenured.

Under a federal grant administered through the United States Department of Education, the University established the Urban Teacher Residency (UTR) program, which recruited, prepared, placed, and sought to retain highly qualified new math and science teachers in high-need middle schools and high schools within the Los Angeles Unified School District. Gordon initially became involved in the UTR program as a member of the grant proposal writing team. He went on to teach UTR courses, advise students, and become the Coordinator of the Professional Learning Center.

A. Gordon's Complaint with the Department of Fair Employment and Housing

In 2011 and 2012, Gordon "perceived that [he] was being excluded from UTR meetings, was not being informed of meetings, and was not receiving communications related to [his] function as Coordinator of the Professional Learning Center." He also believed he did not get equal access to UTR program data that could have supported research projects in which he was engaged. Gordon asserted these actions resulted from unlawful race, age, and disability discrimination. He filed a faculty grievance and, on December 18, 2012, a charge of discrimination with the Department of Fair Employment and Housing (DFEH).

Gordon's DFEH complaint named three individuals at the University: James Cantor, who served as Department of Education chair and codirector of the UTR program; Kamal

Hamdan, who was named the principal investigator (PI) for the UTR program after the original UTR director left; and Dr. Grutzik, who served as the Associate Dean of the School of Education and had administrative oversight of the UTR grant.

The complaint cited numerous acts that Gordon regarded as hostile. Gordon alleged that he discussed his role working on the UTR grant with Hamdan and Cantor in April 2011 and all agreed his role would not change, but from May through June 2011, Hamdan refused to communicate with Gordon about "upcoming UTR activities." A class that Gordon had designed and previously taught was assigned to a white faculty member. In August 2011, Grutzik, Hamdan, and Gordon decided Gordon's role in UTR would "experience an impermanent change for one semester." Gordon allegedly experienced further cancellations of his classes without notification.

Gordon alleged that in May 2012, he was "indirectly made aware that [he would] not perform any of [his] administrative duties related to the UTR grant," and he received no response when he inquired about this reduction of his role. In June 2012, at an administrative hearing about Gordon's role in the UTR program, Grutzik, Hamdan, and Cantor allegedly "advocated" that Gordon discontinue his research agenda. In the fall of 2012, Cantor and Hamdan told Gordon he could not "teach another UTR class."

B. The 2013 Settlement Agreement

Rather than proceed to litigation on Gordon's DFEH complaint, Gordon and defendant entered a settlement agreement on May 17, 2013 (settlement agreement). In addition to providing Gordon with $13,000 in monetary compensation, the settlement agreement provided: (1) "James Cantor will

be provided a written letter by the Administration stating the procedures for visiting a fellow instructor's classroom"; (2) "Gordon will receive all communications, have opportunity for travel related to UTR training opportunities and travel and have the same research opportunities as all other UTR faculty members;" and (3) "Gordon will be offered two classes per semester for the 2013-2014" academic year. Two particular classes were specified for the 2013 fall semester. One class was specified for the spring semester with another course to be determined later by the University. The settlement agreement further provided: "The University agrees to make a sincere effort to provide Gordon with a course in the UTR program if available, and provided that he is qualified to teach the desired course. If a UTR course is not available, the university will work with Gordon to identify a mutually agreeable course assignment."

C. Gordon's Participation in the Faculty Early Retirement Program

In 2011, in the midst of his alleged difficulties with the UTR program, Gordon submitted an application to participate in the University's Faculty Early Retirement Program (FERP). According to Gordon, he enrolled in FERP because he perceived that his grievances and complaint might not "remedy" his "predicament." He stated in his declaration, "[i]n the event that my complaints could be resolved, it was my hope that I could withdraw my participation in the FERP and continue with my employment until the age of 70."

FERP participants begin receiving retirement benefits but may continue to work part-time for up to five years. Under Government Code section 21227 and Article 29.8 of the Collective Bargaining Agreement (CBA) between defendant and the

California Faculty Association, FERP participants are limited to working one semester, not to exceed 90 working days, or 50% of the "time base" the faculty member worked during the year prior to entering FERP. The University's Volunteer Policy prohibits University employees from taking "additional duties related to their primary job for which he/she could be paid." The parties dispute whether a faculty member in FERP may continue his or her research, in addition to a half-time teaching load, and whether any such research or participation in University service would constitute prohibited "volunteer" work. There is no specific provision in the CBA regarding volunteer work by FERP participants.

The parties also dispute whether a FERP participant may unilaterally rescind his or her FERP participation and return to fulltime employment. Margaret Merryfield, the Assistant Vice Chancellor for Academic Human Resources at the University, stated in a declaration that reinstatement "requires that (1) CSU actually extend an offer of employment with a firm start or hire date; and (2) the California Public Employees' Retirement System (CALPERS) approves the person's petition for reinstatement." Merryfield also testified at her deposition that if a FERP participant exceeds a 50% workload, CALPERS could demand that the individual be reinstated from retirement. Such involuntary reinstatement would carry financial consequences, such as repayment of retirement benefits received. Very few FERP participants have been reinstated to fulltime employment.

According to Gordon, in the academic year preceding his entry into FERP, he taught four courses per semester, engaged in UTR activities such as advising students and participating in UTR meetings, and pursued research, including research based

on the UTR program, work with the Japan-United States Teacher Consortium, a keynote address to an international conference of teacher educators in the Philippines, and a presentation on teacher education at the California Council on Teacher Education.[1] Gordon remained in FERP for five years, until he retired in May 2016.

D. Gordon's Experiences Following the Settlement Agreement

In August 2013, as the fall term began after the settlement agreement was executed, Gordon sent an e-mail to several University colleagues, including Hamdan and Ann Chlebicki, Dean of the College of Education. The e-mail stated in part: "I am looking forward to continuing my work with you and UTR students. To that end I will need to receive notification of all meetings as soon as possible. . . . I would expect notifications regarding [Los Angeles Unified School District] as well as meetings and correspondence with the evaluation team. [¶] I will also need to know where UTR students are doing their placements. This student information allows me to continue research in new teacher effectiveness."

Gordon engaged in further discussions with Dean Chlebicki regarding implementation of the settlement agreement. In a September 25, 2013 e-mail, Chlebicki wrote to Gordon about a range of issues, including concern about his "interpretation" of

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[1] Gordon included these facts in plaintiff 's separate statement of undisputed facts. The record on appeal does not include a response from defendant to Gordon's separate statement. The case summary does not list either plaintiff 's separate statement or any response to it.

his UTR role: "I want to reiterate that the settlement agreement does not include a return to your previous role in the program. Nonetheless, as we discussed, your participation will include access to all written communication to all UTR faculty, opportunities for travel related to UTR training opportunities, and research opportunities as would all other UTR faculty members."

1. UTR Communications

In her September 25, 2013 e-mail, Chlebicki instructed Gordon to "direct all UTR communication to the Associate Dean or Dean's office." She specifically asked Gordon "to have no further communication or interaction with the UTR PI." Chlebicki also directed Hamdan, who served as the UTR primary investigator, "not to communicate with Dr. Gordon," but she provided no explanation for this directive.

According to Chlebicki, she told Hamdan that Gordon was to receive all e-mails that were sent to *all* UTR faculty members and Gordon was sent all such communications. No formal meetings of the entire UTR faculty were held in 2013 or later, but informal meetings of subgroups of two or more faculty took place approximately twice per month. Gordon was not provided notice of the informal meetings, some of which involved only two parties.

2. Travel Funds

In September 2013, Gordon contacted Chlebicki to request UTR funds for travel to two academic conferences: the California Council on Teacher Education (CCTE) and the National Alliance of Black School Educators (NABSE). Federal guidelines provided that UTR funds could be used only for travel to conferences that

advanced the stated goals of the UTR program. Travel requests could not be approved at the University level unless they were included in the UTR Annual Performance Reports or were first approved by the U.S. Department of Education Program Manager. In her September 25, 2013 e-mail, Chlebicki stated that Gordon's requests were "within the budget allocation" and that once she received from Gordon a "write up explaining how [his] attendance will support the UTR goals," she would forward the requests to federal regulators for approval.

Gordon did not provide the requested information until October 4, 2013. The same day, Chlebicki forwarded the information to the Department of Education Program Manager for the UTR grant, Beatriz Ceja-Williams. On October 13, 2013, Chlebicki informed Gordon that due to a government shutdown, it was unlikely that they would get a response from Ceja-Williams prior to the start of the CCTE conference, which was scheduled for October 23, 2013, and that without such approval, she could not approve his use of the funds.

Ceja-Williams responded to the request for travel funds on October 17 and again on October 21, 2013, requesting information about how the proposed travel related to the implementation of the UTR grant. In her deposition, Chlebicki testified that she regarded Ceja-Williams' questions as "her tactful way of saying no," but Chlebicki admitted that ultimately the denial of Gordon's request for the CCTE conference came from her, not the Department of Education, "because of the timeline."

On October 23, 2013, Chlebicki informed Gordon that, because they were not able to get a timely response from the Department of Education, she would approve his use of

University (rather than UTR) funds to attend the NABSE conference. She conditioned use of the funds on Gordon producing a write-up of the conference for other faculty members. Gordon declined use of the funds on November 7, 2013.

3. Research Opportunities

In the fall of 2013, Gordon was working on a research paper for which he intended to employ observational and survey data from the UTR program. For the project, he requested from Dean Chlebicki raw UTR survey data and access to UTR students in a class taught by Dr. Jeff Sapp. Chlebicki delivered to Gordon two UTR Annual Performance Reports on October 7, 2013. Gordon did not receive the requested raw data. Chlebicki initially approved Gordon's request for access to Dr. Sapp's students, but she raised concerns about getting the project cleared through the University's Institutional Review Board (IRB). Ultimately, Gordon was not able to survey the students.

4. Teaching Opportunities

Gordon was not offered a second UTR course for spring 2014. On January 14, 2014, Chlebicki e-mailed Gordon: "As agreed, the University has made a sincere effort to provide you with a course in the UTR program. For your information, the only UTR courses scheduled for Spring are outside of your area of expertise and are being taught by the same instructor who taught these courses for the past 3 years and is qualified to teach these courses. . . . [¶] Since a UTR course is not available, your chairs will work with you to identify a mutually agreeable course assignment."

E. Gordon's Lawsuit

On December 23, 2015, Gordon filed the instant lawsuit against defendant, bringing a single cause of action for retaliation in violation of the Fair Employment and Housing Act, Government Code section 12940, subdivision (h). He alleged that defendant's conduct included "delaying, limiting and denying Professor Gordon's access to raw data and research findings that were critical to his ongoing academic endeavors; excluding Professor Gordon from departmental meetings, denying Professor Gordon travel funds for attendance at conferences and seminars that are essential to maintaining his standing and position within the academic community; excluding Professor Gordon from involvement in the UTR program, even though he was part of the UTR grant leadership and was foundational to the program's inception; and ongoing exclusion, marginalization and derogation of Professor Gordon by the University and its administration."

Defendant moved for summary judgment on September 27, 2016 and Gordon opposed the motion on November 28, 2016. In reply, on December 7, 2016 defendant filed evidentiary objections to certain of Gordon's evidence, including a statement in Gordon's declaration offering his understanding of the intent of the settlement agreement and his hope of what it would offer.

On December 13, 2016, the trial court sustained defendant's objections to Gordon's statement about his intentions in entering the settlement agreement. In a detailed ruling, the trial court granted summary judgment to defendant. The trial court first found that there was a material question of fact as to whether the actions by defendant that prompted Gordon to retire,

rather than attempt to rescind his FERP participation, constituted a constructive discharge. Alternatively, the court held there were material questions of fact as to whether the individual actions, asserted as the bases for the constructive discharge, were themselves adverse employment actions. The trial court further found that defendant had met its burden to show that it had a legitimate, nondiscriminatory reason for each of the four actions cited by Gordon as bases for the constructive discharge and that Gordon failed to produce substantial evidence that the reasons were pretextual.

Notice of entry of judgment was served on January 10, 2017 and filed on January 11, 2017. Gordon timely appealed on March 9, 2017.

DISCUSSION

I. LEGAL STANDARDS

A trial court properly grants summary judgment when the moving papers demonstrate that no triable issue of material fact exists, and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, liberally construing the plaintiff 's evidence while strictly scrutinizing the moving defendant's submission. (*Smith v. St. Jude Medical, Inc.* (2013) 217 Cal.App.4th 313, 320.) We consider all evidence offered by the parties in connection with the motion (except that which the court properly excluded) and uncontradicted inferences the evidence reasonably supports. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.)

A defendant meets its burden of showing that a cause of action has no merit if it shows that "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, 849.) Once a defendant has carried that burden, the burden shifts to the plaintiff "to show that a triable issue of one or more material facts exists as to the cause of action." (Code Civ. Proc., § 437c, subd. (p); *Aguilar*, at p. 849.) The plaintiff may not rely upon the allegations in the pleadings, but must set forth specific facts. (Code Civ. Proc., § 437c, subd. (p); *Aguilar*, at p. 849.)

As noted above, Gordon brings a single cause of action for retaliation under Government Code section 12940, subdivision (h), which prohibits employer retaliation against an employee who engages in certain protected conduct. Specifically, section 12940, subdivision (h), makes it unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [the statute] or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Gov. Code, § 12940, subd. (h).)

Because plaintiffs in employment discrimination cases often lack direct evidence of discriminatory intent, California courts have adopted the three-part burden-shifting analysis developed in *McDonnell Douglas Corporation v. Green* (1973) 411 U.S. 792. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*); *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68 (*Morgan*).) Under this test, the plaintiff must first establish a prima facie case of retaliation. (*Yanowitz*, at p. 1042.) To do so under FEHA, "a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse

employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Ibid*.)

If the plaintiff presents a prima facie case, the employer is required to offer "a legitimate, nonretaliatory reason for the adverse employment action." (*Yanowitz*, *supra*, 26 Cal.4th at p. 1042.) If the employer produces a legitimate reason, the burden shifts back to the employee to prove intentional retaliation. (*Ibid*.) A plaintiff must offer "evidence sufficient to allow a trier of fact to find either the . . . stated reasons were pretextual or the circumstances ' "as a whole support[ ] a reasoned inference that the challenged action was the product of . . . retaliatory animus." ' " (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 94.)

When a defendant employer moves for summary judgment, the order of the *McDonnell Douglas* burdens is somewhat reversed. (See *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344 (*Arteaga*); *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 150-151.) " ' "If the employer presents admissible evidence either that one or more of plaintiff 's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment *unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing*." ' " (*Arteaga*, *supra*, 163 Cal.App.4th at p. 344, quoting *Sada*, at p. 150.)

II. THE TRIAL COURT'S SUSTAINING OF DEFENDANT'S EVIDENTIARY OBJECTION.

Gordon first challenges the trial court's sustaining of defendant's objection to a statement in Gordon's declaration. Where, as here, evidentiary objections related to a motion for

summary judgment raise questions of law, we review the trial court's rulings de novo. (See, e.g., *Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226; *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1450-1451.)

The contested passage from Gordon's declaration states: "In light of the fact that I perceived I had received unequal treatment to Dr. Hamdan and Dr. Cantor with respect to the UTR Program, the intent of the May 2013 Settlement Agreement was to provide me with equivalent access to communications, travel, and research to those individuals as well as any other member of the UTR Faculty. In particular, I intended the May 2013 Settlement Agreement to provide me with equal communications to Dr. Hamdan and Dr. Cantor as I perceived they were purposefully refusing to forward pertinent information to me regarding the UTR Program. With respect to travel, there was no requirement under the May 2013 Settlement Agreement that UTR funds would be the exclusive source of funding for such requests. My hope in entering into the May 2013 Settlement Agreement was that it would pave the way for me to withdraw my participation in the FERP and continue my academic career."

Defendant objected on grounds of relevance and extrinsic evidence, arguing that "[t]he document speaks for itself." On appeal, Gordon argues that extrinsic evidence was admissible to support his interpretation of the settlement agreement because the text is ambiguous. Exclusion of his interpretation of the settlement agreement was not harmless, Gordon maintains, in that one of his key arguments on the issue of pretext was that defendant "knowingly and intentionally violated the letter and spirit of the Settlement Agreement."

Extrinsic evidence is properly admissible to construe a contract when the language of the contract is ambiguous. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) "The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.' " (*Ibid.*) Here, however, we need not reach the question of whether Gordon's interpretation of the settlement agreement is reasonable to review the trial court's sustaining of defendant's evidentiary objection. The evidence Gordon sought to introduce was a statement about what *he* intended the settlement agreement to achieve. As such, Gordon's statement was not competent extrinsic evidence because "evidence of the undisclosed subjective intent of the parties is irrelevant to determining the meaning of contractual language." (*Id.* at p. 1166, fn. 3; see *G & W Warren's, Inc. v. Dabney* (2017) 11 Cal.App.5th 565, 575 [" '[t]he parties' undisclosed intent or understanding is irrelevant to contract interpretation' "].)

Thus, the trial court properly sustained defendant's objection.

III. GORDON'S PRIMA FACIE CASE

Gordon's complaint alleged a "retaliatory and materially adverse course of action" including, but not limited to "excluding Plaintiff from staff, department and UTR program meetings; excluding Plaintiff from staff, department and UTR program communications; denying and/or deterring Plaintiff from attending professional functions by refusing requests for travel funds; restricting Plaintiff 's access to UTR program data; and subjecting Plaintiff to humiliation, degradation and harassment."

In moving for summary judgment, defendant did not contest that Gordon engaged in protected conduct in filing his DFEH complaint in May 2013. Defendant argued that Gordon could not prove an essential element of his claim—an adverse employment action—because (1) his "allegations [were] not supported by the undisputed facts"; and (2) "the purported actions did not *materially* and *adversely* affect the terms, conditions, or privileges of Plaintiff 's employment and would not have impaired a reasonable employee's job performance or prospects for advancement or promotion."

Gordon responded by arguing that he was alleging he suffered a constructive discharge as a result of "intolerable working conditions" generated by defendant's bad faith refusal to honor the terms of the settlement agreement and its campaign to alienate Gordon and frustrate his attempts to conduct research and "continue as an active member of the UTR team." He maintained that he could have rescinded his FERP status, but defendant "did everything possible to make sure that Plaintiff had no continuing role in the UTR program and the Department as a whole," convincing Gordon that he had "no choice but to retire in 2016." Gordon also contended that defendant trivialized the significance of the individual alleged actions, ignoring the consequences for Gordon's academic career of isolating him at the University and impeding his research. Thus, he argued, even viewed outside a theory of constructive discharge, defendant's conduct constituted adverse employment actions.

The trial court found that there was a question of material fact as to whether Gordon's decision to retire rather than attempt to rescind his FERP participation, constituted a constructive discharge. Gordon thus established a prima facie case of

retaliation. Alternatively, the trial court found there were questions of material fact as to whether defendant's alleged actions were themselves adverse employment actions. We agree with both findings.

A. Constructive Discharge

"Constructive discharge occurs when the employer's conduct effectively forces an employee to resign." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244.) In order to prove a constructive discharge, a plaintiff must prove "that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Id.* at p. 1251.) A "continuous pattern" of actions may amount to intolerability. (*Id.* at p. 1247.) The court must focus on whether the resignation was coerced and not "simply one rational option for the employee." (*Id.* at p. 1246.)

In opposing defendant's motion for summary judgment, Gordon offered evidence of actions that he contended demonstrate that defendant refused to comply with the terms of the settlement agreement and obstructed his research and participation in the UTR program, so as to leave him no choice but to retire. In September 2013, Dean Chlebicki instructed Gordon not to have any communication or interaction with Hamdan, the UTR PI. Gordon was denied funding to travel to one of the two conferences for which he requested support, and funding for the second conference was conditioned on his preparation of a paper about the conference. He did not gain access to raw data from the UTR program although, as the PI for

the grant, Hamdan had such access. Gordon was also denied access to students in a UTR course that he had intended to survey for his research.

Gordon received only those UTR communications that were distributed to *all* UTR faculty members and was not included in informal communications between UTR participants. He was not assigned a second UTR course for the 2014 spring term, despite being qualified to teach courses being offered. In addition, there was no evidence that Professor Cantor ever received a letter regarding appropriate visitation of a colleague's classroom, as required by the settlement agreement. As a result of these actions, Gordon did not seek to rescind his participation in FERP and retired in May 2016.

As discussed more fully below, the parties dispute the reasons for these actions, whether they were all within defendant's control, and whether they violated the settlement agreement. Gordon's evidence suffices, however, to raise a triable question whether he was subjected to a course of conduct so intolerable in his particular circumstances, as to amount to constructive discharge. As courts have previously recognized, whether conditions were sufficiently "intolerable" to coerce resignation is ordinarily a question of fact. (See *Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1022.)

Defendant argued in the trial court that Gordon's participation in FERP precludes his theory of constructive discharge. Gordon elected to enter FERP in 2011, the early retirement program requires full retirement no later than five years after entry into the program, and Gordon retired after the

full five years. Defendant argued that even if Gordon had entered the program in 2011 due to the alleged discriminatory actions on which he based his DFEH complaint, Gordon released any claims arising from those actions in the settlement agreement.

Gordon countered that he could have rescinded his FERP participation and sought reinstatement as a fulltime faculty member. He claimed that this was his purpose in entering the settlement agreement. Vice Chancellor Merryfield, defendant's designated person most knowledgeable, admitted that a faculty member in FERP can seek reinstatement and that CSU has previously reinstated certain individuals. Thus it cannot be concluded that Gordon would necessarily have retired in 2016 regardless of defendant's actions, and Gordon's constructive discharge theory is not foreclosed by the fact that he entered FERP before the alleged retaliation.

B. Adverse Employment Actions

We likewise concur with the trial court that Gordon produced evidence sufficient to raise a triable issue of fact as to whether he suffered adverse employment actions. To constitute an "adverse employment action" within the meaning of FEHA, an action "must materially affect the terms, conditions, or privileges of employment." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1052.) Adverse employment actions include not only hiring, firing, demotion, or failure to promote, but also "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for" career advancement. (*Id.* at p. 1054.) Our determination of whether the acts alleged by Gordon rise to the level of actionable conduct must take into account his "unique circumstances of

the affected employee" as well as the "workplace context." (*Id.* at p. 1052.) We construe "the phrase 'terms, conditions, or privileges' of employment" liberally and "with a reasonable appreciation of the realities of the workplace." (*Id.* at p. 1054.)

In moving for summary judgment, defendant argued that Gordon's allegations of adverse employment actions were not supported by the undisputed facts. Specifically, defendant argued that Gordon's inability to attend the academic conferences was caused by actions of the federal government, which funded the UTR grant, not by defendant. Defendant also pointed to evidence that, because the UTR grant was in its final stages after the 2013 settlement agreement was reached, there were no formal group faculty meetings. Defendant further maintained that no other UTR faculty member had requested or received UTR's raw research data and the settlement agreement "only called for [Gordon] to have the same access to data as other UTR faculty."

In response, Gordon disputed that the federal regulator, rather than Dean Chlebicki, was the source of denying him travel funds for the CCTE conference. He also identified evidence that Chlebicki's requirement that Gordon produce a report in order to receive travel funds for the NABSE conference was not customary, at least at the University. In addition to the evidence cited above in support of his claim of constructive discharge, Gordon offered evidence that UTR faculty meetings involving less than the entire faculty had taken place and that Dean Chlebicki may not have had cause to bar him from conducting a survey of certain UTR students.

Because Gordon has alleged "a pattern of systemic retaliation" for his complaint of discrimination, we need not

decide whether "each alleged retaliatory act constitutes an adverse employment action in and of itself." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1055.) "[T]here is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries." (*Ibid.*) Instead, we conclude that, taken together, these actions raise a question of fact as to whether defendant's conduct materially affected Gordon's academic performance and career advancement.

As a tenured professor, Gordon's professional obligations included teaching, academic research, University service, and service to the profession and the community, as evidenced by the CBA. In his declaration opposing summary judgment, Gordon explained that in 2013, he was coauthoring a research paper that required observational and survey data from the UTR program. Because Dean Chlebicki did not supply the raw data or authorize the intended survey of students in a colleague's class, he "missed [his] window for publishing the proposed paper."

The CBA also provides that "[t]he professional responsibilities of faculty members are fulfilled by participation in conferences." Gordon explained in his declaration that academic conferences, such as those he sought to attend, "are important opportunities for academics to network, build their reputation, and discover[ ] opportunities for collaboration." Gordon's research and professional agenda, which involved potential research projects related to UTR, was arguably impacted by the mandate that Gordon not communicate with the UTR primary investigator and the lack of a second UTR course in spring 2014.

Defendant's arguments in the trial court that the alleged actions did not materially affect Gordon's job performance

or career prospects do not withstand scrutiny. Defendant attempted to liken Gordon to the plaintiff firefighter in *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, who was found *not* to have suffered an adverse employment action as a result of being limited to "special duty" assignments and denied "platoon duty" following amputation of his leg. (*Id.* at pp. 356-358.) The court found that the plaintiff 's "special duty" assignment had pay and promotion opportunities similar to those associated with "platoon duty" and hence did not constitute an adverse employment action. (*Ibid.*) Here, by contrast, the evidence raises a triable question as to whether the challenged actions affected Gordon's standing as an academic both within and beyond the University.

This impact would not necessarily be diminished by the fact that Gordon was "a long-tenured faculty member in the middle of an early retirement program," as defendant argued. On the contrary, one can infer from the evidence that Gordon's planned research would have assisted his alleged plan to rescind his FERP participation and have garnered him further research projects and publications.

IV. DEFENDANT'S REASONS FOR THE ALLEGED ADVERSE EMPLOYMENT ACTIONS

If a plaintiff presents a prima facie case of adverse employment actions, a defendant moving for summary judgment on a retaliation claim under FEHA must present admissible evidence that the action was taken for a legitimate reason. (*Arteaga*, *supra*, 163 Cal.App.4th at pp. 343-344.) The explanation provided must be legally sufficient to justify a judgment for the employer. (See *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 663-664.)

We conclude that defendant offered legitimate reasons for most of the adverse employment actions alleged by Gordon, as detailed below. There is one exception, however: Dean Chlebicki's prohibition on Gordon communicating directly with Hamdan, the primary investigator of the UTR program.

A. Gordon's FERP Status

In the trial court, defendant's primary argument was that Gordon's decreased role in the UTR program resulted from his FERP status, rather than any retaliatory action. Vice Chancellor Merryfield stated in her declaration that Gordon's teaching load of two courses per semester, "in addition to the associated required responsibilities of advising students and assisting the Teacher Education Department, constituted the maximum workload that [Gordon] could carry while on FERP." She further stated that FERP's limitations on workload could not be circumvented by performing work for CSU on a "volunteer" basis. Specifically, under the University's Volunteer Policy, "a faculty member who conducted research as a CSU faculty member would not be allowed to continue such research on a volunteer basis, if he or she continued to be employed by the University."

B. Defendant's Alleged Reasons for Individual Actions

1. UTR Communications

Regarding Gordon's receipt of UTR communications, defendant argued that the settlement agreement required the University only to provide Gordon with communications and notice of meetings that went to *all* UTR faculty. No formal meetings of UTR faculty were held in 2013 or later, in large part

because the UTR program was in its later years and UTR faculty reported directly to the PI about their areas of responsibility.

While defendant thus offered legitimate reasons for most of the alleged failures of UTR communication, defendant did not provide justification for Dean Chlebicki's directive that Gordon not communicate directly with the primary investigator of the UTR program, Kamal Hamdan. In his declaration, Hamdan stated that Chlebicki requested that he not have any direct communications with Gordon "in an effort to oversee and ensure compliance with the May 2013 Settlement Agreement." Defendant does not explain how any communication between Hamdan and Gordon would have impeded enforcement of the settlement agreement, and in his deposition, Hamdan testified that Chlebicki did not explain why he should not communicate with Gordon and did not limit her instruction to matters related to the settlement.

2. Travel Requests

The parties do not dispute the essential facts surrounding Gordon's effort to get travel funds for conferences of the California Council on Teacher Education (CCTE) and the National Alliance of Black School Educators. Defendant produced evidence that Chlebicki did not approve UTR funds for the first conference because the Department of Education had not approved the funding and time was running out, and evidence that Gordon himself declined use of the University funds offered for the second conference.

3. Research Opportunities

In response to Gordon's allegations that he did not receive the UTR data necessary for his research, defendant argued that

it was under no obligation under the settlement agreement to provide the requested UTR raw data. Defendant asserted that the settlement agreement only called for Gordon "to have the same access to data as other UTR faculty." It produced a declaration from Hamdan stating that no other UTR faculty member had ever requested the Annual Performance Reports provided to Hamdan or received any other data regarding the UTR grant. Dean Chlebicki stated in her declaration that Gordon was given "the same access to data regarding the UTR grant as all other faculty members."

Defendant also offered deposition testimony from Hamdan that he had never requested UTR raw data from the outside evaluator because the data was "confidential" and "sensitive." Thus, defendant argued, "the requested raw research data was never in the possession of Mr. Hamdan or any other UTR faculty member." Finally, defendant offered evidence that Chlebicki had "encouraged" Gordon to get approval from the IRB for his survey of Sapp's students, and Gordon had produced no evidence that he made any effort to do so.

4. Teaching Opportunities

Defendant argues that "[t]he undisputed facts show that Gordon was not given an opportunity to teach a Spring 2014 UTR course because a professor that had been teaching the course for the past three years was more qualified to do so and was given the class." In fact, the only evidence submitted by defendant on this subject was the January 14, 2014 e-mail from Chlebicki to Gordon stating that he would not be given a UTR course for the term and that the UTR courses being offered were outside Gordon's area of expertise. Although defendant did not introduce any evidence that Gordon was actually unqualified to teach the

courses (a point Gordon disputes), the e-mail suffices to establish a nonretaliatory reason for defendant's action.

V. GORDON'S SHOWING OF PRETEXT

When a defendant has offered legitimate, nonretaliatory reasons for adverse employment actions, the burden shifts back to the plaintiff to offer evidence that the employer's stated reasons for the adverse action were untrue or pretextual, or evidence the employer acted with a retaliatory intent, or both, such that a reasonable trier of fact could conclude that the employer engaged in retaliatory conduct. (See *Morgan*, *supra*, 88 Cal.App.4th at pp. 69, 75; *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005.) " '[T]he plaintiff may establish pretext "either directly by persuading the court that a [retaliatory] reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." ' " (*Morgan*, at pp. 68-69.) Circumstantial evidence of pretext must be specific and substantial to create a triable issue as to whether an employer acted with retaliatory motive. (*Id.* at p. 69.)

A plaintiff does not carry this burden simply by showing the employer's decision was " 'wrong, mistaken, or unwise.' " (*Morgan*, *supra*, 88 Cal.App.4th at p. 75.) Rather, the plaintiff " ' "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* find them 'unworthy of credence' " ' " and infer on that basis that the employer acted in retaliation. (*Ibid.*) Facts that might not suffice to show retaliatory motive when considered in isolation may demonstrate such an intent when taken

together. (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 758.)

A. Gordon's FERP Status[2]

As noted above, defendant argued in the trial court that Gordon's two-course teaching load constituted the full 50% load he was permitted under FERP and thus "the University could not have assigned him his pre-FERP UTR workload." Gordon does not claim retaliation simply because his UTR role was decreased, however. Insofar as defendant has offered Gordon's FERP status as a nonretaliatory reason for the specific actions Gordon has alleged, we conclude the rationale is sufficiently implausible to constitute evidence of pretext.

Section 29.8 of the CBA, which governs FERP, states that "[t]he permissible 'period of employment' shall refer to one (1) academic term not to exceed a total of ninety (90) workdays *or* fifty percent (50%) of the employee's regular time base in the year preceding retirement." Defendant does not dispute Gordon's declaration that in the academic year preceding his FERP election, he taught four courses per semester, engaged in UTR program activities such as advising students and participating in UTR meetings, pursued research including work with the Japan-United States Teacher Consortium and UTR-based research with Dr. Antoinette Linton, and prepared a keynote address to a

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[2] Although defendant's primary argument in the trial court that it had legitimate reasons for diminishing Gordon's role in the UTR program focused on Gordon's FERP status, neither Gordon nor defendant addresses Gordon's FERP status in their appellate briefing. Reviewing defendant's summary judgment de novo, we consider the issue in evaluating whether Gordon demonstrated a triable issue of material fact regarding pretext.

Philippines teachers' conference and a presentation at the California Council on Teacher Education. In short, his total load included far more than his courses.

Despite Gordon's significant workload *in addition to* his teaching prior to FERP, defendant maintained that as a participant in FERP, Gordon was restricted to teaching two courses and performing associated student advising. In advancing this argument, defendant relied on Vice Chancellor Merryfield's declaration that Gordon's two-course load and associated advising and departmental service constituted the maximum workload he could adopt as a FERP participant. At her deposition, however, Merryfield admitted that she didn't "know what might have been done" with Gordon or "what his assignments were." She acknowledged that a professor's "indirect instructional assignment, . . . is typically not parsed out carefully" and that for FERP participants "the indirect expectations are also reduced commensurately."

Merryfield was also inconsistent regarding what research is permissible for FERP participants. She acknowledged when a nonretired faculty member works on a research article in dependent of a teaching assignment, the research would not be considered as prohibited volunteer work. She claimed that research would be regarded differently for FERP participants, but in attempting to explain the difference, she misstated the CBA provision on which she relied. She maintained that "[t]he PERS rules say 960 hours or—say 960 hours or 50 percent of actual time worked in a year prior to retirement, whichever is less." As noted above, however, section 29.8 of the CBA actually limits a FERP participant's workload to one academic term or 50% of the time base in the year preceding the individual's entry

into FERP. It does *not* limit the workload to the *lesser* of the two or state that a specific number of hours constitutes 50% time for professorial faculty. Section 29.9, which governs the workload for librarian FERP participants, *does* cap the workload at 960 hours. We must therefore assume that if a 960 or 720-hour cap were intended in section 29.8, the provision would state as much.[3]

Although Merryfield stated in her declaration that "a faculty member who conducted research as a CSU faculty member would not be allowed to continue such research on a volunteer basis, if he or she continued to be employed by the University," Merryfield admitted in her deposition that a FERP participant *could* do research without it constituting impermissible volunteer work if the participant's total workload "did not exceed roughly 20 hours a week."

Merryfield insisted a FERP participant's hours, including research, would have to be "monitored extremely closely." The CBA, however, states in regard to faculty workload generally, "[t]he composition of professional duties and responsibilities of individual faculty cannot be restricted to a fixed amount of time, and will be determined by the appropriate administrator after consultation with the department and/or the individual faculty member." Merryfield acknowledged that a technical letter stating that " '[d]uring the periods of active employment, FERP participants are to be considered tenured faculty subject to specified provisions of the CBA' " was still in effect. Thus FERP participants would appear to come within the CBA's provisions that professorial workloads are not restricted to a fixed amount of

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[3] Merryfield subsequently revised her position to make the cap 720 hours, but this cap is nowhere mentioned in the CBA's FERP provisions.

time. Moreover, defendant produced no evidence that anyone at the University assessed Gordon's workload in 2013-2014 and informed him that he could not perform research or complete his publications within the FERP parameters or ever discussed the composition of his workload with him.

We also note that in writing to Gordon on September 25, 2013, Chlebicki pointedly referred to his "personal research"—seemingly designating Gordon's project as work *not* assigned by the University. Thus, at the least, it is arguable whether Gordon's research came within the FERP guidelines at all. If not, defendant's argument that Gordon's work was properly curtailed under FERP appears to be misplaced.

In addition, Gordon had already entered FERP when the settlement agreement was executed. If a two-course load with the collateral advising responsibilities necessarily constituted the maximum workload of a FERP participant, as defendant argued on summary judgment, defendant arguably agreed to the settlement agreement provisions guaranteeing Gordon teaching *and* research opportunities in less than good faith.

For all of these reasons, we conclude that insofar as defendant has offered Gordon's FERP status as a reason for the adverse employment actions alleged by Gordon, it raises a triable question of pretext. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 363.)

B. UTR Communications

Gordon produced no evidence that defendant acted out of retaliatory motive in failing to include Gordon on *all* e-mails to UTR faculty and *all* informal meetings of UTR faculty. Gordon argues that an interpretation of the settlement agreement

narrowing its obligation to include Gordon only on communications made universally to UTR faculty would fail to satisfy the objectives of the agreement. As the trial court pointed out, however, that defendant may have acted on the basis of an erroneous interpretation of the settlement agreement does not by itself establish retaliatory animus. We observe that Gordon did not introduce evidence of communications related to his areas of expertise or responsibility from which he was excluded, or evidence of meetings related to his work of which he was not informed. Any such exclusions could suggest retaliation, even if not a violation of the settlement agreement, but there is no evidence in the record to such support such a conclusion.

On the other hand, Chlebicki's directive that Gordon not communicate directly with Hamdan, the primary investigator of the UTR program, *does* suggest retaliation for Gordon's complaint. Gordon's DFEH complaint grew directly out of his sense that he was being marginalized in the UTR program. By mandating that Gordon not communicate with the primary investigator of the program, Chlebicki furthered such marginalization, arguably for no reason other than Gordon's complaint. We do *not* hold that Chlebicki's prohibition breached the provisions of the settlement agreement (that question is not before us), but conclude that the action raises a triable issue of fact regarding pretext.

C. Travel Requests

Gordon does not dispute that the University could not approve UTR funds for conference travel unless the travel was included in the grant's Annual Performance Report or was approved by the Department of Education Program Manager. Instead, he argues that Chlebicki applied these requirements

uniquely to him. In his declaration, he stated that denial of funding for the CCTE conference "came after I met all of the requirements she asked that I submit in my application to attend said conference. No other faculty member attending the CCTE conference had to submit an application for attendance. I had to confer with a UTR federal consultant who concluded that my application was unnecessary. The federal consultant was perplexed as to why Dean Chlebicki required me to submit an application."

Despite these allegations, Gordon did not offer any evidence that the UTR Program Manager at the Department of Education, Beatriz Ceja-Williams, found the application unnecessary. Instead, she twice asked—on October 17 and again on October 21, after reviewing the conference websites—how Gordon's conferences related to UTR goals.

Gordon additionally argues that Chlebicki's requirement that Gordon provide information about the relevance of the CCTE conference to UTR goals was a "sham" because she did not inquire whether other UTR faculty were attending the 2013 conference. Gordon points to evidence that at least one other member of the UTR faculty attended that year and that Gordon himself had presented at the conference the previous year. He argues that "[a] jury could have reasonably credited Appellant's evidence and found that Dean Chlebicki was using bureaucratic maneuvering in a disingenuous fashion to deny Appellant's travel requests—thus suggesting the existence of pretext." Both Chlebicki and Hamdan testified, however, that the faculty who attended the 2013 CCTE conference did not do so as UTR representatives or with UTR funds. We conclude that Gordon

has failed to show that Chlebicki's motives in denying funds for the CCTE conference were pretextual.

Nor does Gordon successfully show that Chlebicki's actions regarding the NABSE conference were retaliatory. He challenged her requirement that he produce a report of the conference in order to receive the funding, a demand he characterized as "unprecedented." He further noted that he ultimately declined to accept the travel funds out of "frustration" and because the delay in Chlebicki's response left him with inadequate time to prepare for the conference. Chlebicki testified that she had requested conference write-ups at other institutions prior to coming to the University and that she made a similar request of one other faculty member while she was dean. She characterized the request as "a matter of transparency, so that people can see that as an administrator I'm not just spending money quietly behind the scenes."[4]

D. Research Opportunities

We conclude that defendant's proffered explanations for its failure to provide Gordon with the requested raw UTR data raise a material issue of fact regarding pretext. As an initial matter, the various individuals involved offered inconsistent accounts of why Gordon did not receive the data he requested. Chlebicki testified in deposition that "there was some additional data that [Gordon] wanted that wasn't available at the time. . . . Dr. Hamdan contacted his evaluation, evaluator

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[4] We note that Chlebicki could identify only one other faculty member on whom she imposed a similar requirement, despite having received numerous requests for travel funds during her year and a half tenure as dean.

or something, and it wasn't available." Hamdan, on the other hand, testified that he never refused a request from Chlebicki to provide raw UTR data so that it could be provided to Gordon.

In justifying its failure to make the requested data available to Gordon, defendant relied primarily upon the fact that no other UTR faculty had ever requested or received the data sought by Gordon. Therefore, defendant argued, there was no violation of the settlement agreement. The settlement agreement does not mandate that Gordon conduct the *same* research as other faculty, however; it requires that he have "the same research *opportunities* as all other UTR faculty." (Italics added.) Both Hamdan and Chlebicki acknowledged, however, that Hamdan, as the UTR primary investigator, *did* have access to the requested information, had he chosen to request it from the outside evaluator.

Hamdan testified that he had never received raw data from the external evaluator because the data was sensitive and might reveal the identities of surveyed UTR participants. Defendant produced no evidence, however, that Hamdan, Chlebicki, or anyone else had ever concluded that the particular data sought by Gordon would have compromised anyone's identity, or had refused to provide it to him for that reason. Nor did defendant offer evidence that sensitivity of the data was ever discussed with Gordon, or that steps could not have been taken to provide him with the requested data without revealing confidential information. Indeed, defendant did not argue—either in the trial court or on appeal—that they denied Gordon access to the data because the data were confidential.

The trial court found that it was "reasonable that CSU would interpret [the Settlement Agreement] to mean that while

Hamdan as PI of the UTR could request sensitive, confidential raw data from an outside research company, all other UTR faculty members, such as Gordon, would not" and that such an interpretation of defendant's obligations under the settlement agreement did not constitute evidence of pretext for retaliation. We cannot overlook that Gordon initially brought the complaint that led to the settlement agreement in part because Hamdan allegedly "advocated" that Gordon abandon his research agenda, and defendant's narrow interpretation of the settlement agreement forced Gordon to do just that.

Notably, defendant produced no evidence that it ever informed Gordon that it had concluded he had no right to the raw data or communicated about it with him in any fashion. Like defendant's argument about Gordon's FERP status, the justification for denying Gordon access to the requested data appears to have emerged ex post facto. It thus raises a triable question as to pretext.

The same is not true with respect to Gordon's efforts to survey the students in Dr. Sapp's course. The evidence suggests that Gordon's plans were thwarted by concerns about IRB approval of his survey. Chlebicki raised the issue in her September 25, 2013 e-mail to Gordon: "I am pleased you are able to conduct your personal research thanks to the collaborative efforts of Dr. Kamal Handan [*sic*] and Dr. Jeff Sapp. I hope the continuation of the IRB approval was seamless; was it approved?" Indeed, Gordon himself attributed his inability to follow through with his plans due to Chlebicki's concerns about IRB approval. Chlebicki testified that while Gordon had IRB approval for a previous survey, "[i]t's got to be approved now at the current time of practice."

Gordon disputes Chlebicki's understanding of the IRB requirements: "[T]he IRB had previously approved the same protocols for use and I had been informed previously by the IRB that it was not University policy to require getting redundant approval for subsequent uses of an approved survey." Even if Chlebicki were mistaken in requiring current IRB approval, that mistake would be insufficient to demonstrate retaliatory intent. (See *Morgan*, *supra*, 88 Cal.App.4th at p. 75 [plaintiff does not establish pretext simply by showing the employer's proffered reason for its actions was wrong, mistaken, or unwise].)

E. Teaching Opportunities

We conclude that defendant's actions regarding Gordon's course assignments raises a triable issue of retaliatory bias. As discussed above, Chlebicki informed Gordon in January 2014 that the three UTR courses being offered in spring 2014 were outside his area of expertise. Defendant, however, produced no evidence that Gordon actually was unqualified (except for Chlebicki's assertion in an email that he was not) or that the faculty member assigned to the courses was more qualified than Gordon.

In contrast, Gordon produced evidence that calls the credibility of defendant's explanation into question. Gordon stated in his declaration and in deposition that he was qualified to teach TED 488 (Teaching Event: Secondary), one of the three UTR courses offered in spring 2014, because he had taught the course previously. He also claimed that he was qualified to teach a second UTR course being offered, CUR 516 (Seminar in Curriculum & Development for Math/Science), given that he had taught the previous course in the sequence. Even if Chlebicki were simply mistaken about Gordon's qualifications, her evident

failure to review his record raises a question about whether the University made a "sincere effort" to provide Gordon with an "available" UTR course, as required by the settlement agreement.

So too does the fact that Chlebicki did not inform Gordon that he would not have a UTR course until January 2014, very shortly before the semester began. If the course were not assigned until January, it presumably was "available" up until that point and, if Gordon were qualified to teach it, it could have been assigned to him. As Merryfield noted in her deposition, one of the "principles" the University lives by is that "no one owns specific courses."

F. Dr. Hamdan's Involvement

In the trial court and on appeal, Gordon argues that Hamdan's involvement in decisions about Gordon's receipt of UTR communications and research opportunities itself constitutes evidence of retaliatory motive. Gordon points out that he named Hamdan specifically in his DFEH complaint, and he contends that Hamdan "admitted in deposition that he reacted adversely to being named" and "felt such allegations could threaten his ability to 'provide for his family.' " Subsequently, Gordon maintains, Hamdan became the "gatekeeper for the data and communications" flowing to him. Given these circumstances, Gordon argues, a trier of fact could reasonably infer retaliatory intent from Hamdan's "conspicuous" involvement in the alleged adverse employment actions.

Evidence shows that, in implementing the settlement agreement, Chlebicki did turn to Hamdan for information about the research opportunities made available to UTR faculty and requested that Hamdan provide Gordon the requested UTR data. She also instructed Hamdan to send all group UTR

communications to Gordon. Hamdan, however, testified that he never refused a request to provide raw UTR data to Gordon, and Gordon offered no evidence of UTR e-mails or other communications from Hamdan that excluded him from receiving the data or otherwise obstructing his research. Also, Hamdan's deposition testimony belies Gordon's claim of animus. Hamdan admitted to being "devastated" by Gordon's allegations that Hamdan mishandled the UTR budget and stated that with such a serious matter "it could mean not being able to provide for my family." At the same time, however, Hamdan testified that he "thought the world" of Gordon, who had been a role model, and "never held ill will or hard feelings" toward him.

G. Conclusion

The trial court diligently considered the summary judgment motion before us, as reflected in its multi-page ruling. Although we agree with much of the trial court's analysis, we conclude that when viewed through the lens of the above-described legal standards, there were triable issues of material fact precluding summary judgment.

DISPOSITION

The judgment of the trial court is reversed and the case is remanded for further proceedings. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

CURREY, 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.