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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARCO GONZALEZ, Plaintiff and Appellant, v. CITY OF BURBANK, Defendant and Respondent.	B263112 (Los Angeles County Super. Ct. No. BC 521464)

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

Marco Gonzalez, in pro. per., for Plaintiff and Appellant.

Amelia Ann Albano, City Attorney, and Charmaine Jackson, Assistant City Attorney, for Defendant and Respondent.

INTRODUCTION

Plaintiff Marco Gonzalez appeals from a judgment entered in favor of defendant City of Burbank based on a jury verdict finding that Burbank did not discriminate against Plaintiff when Burbank declined to hire him. Plaintiff raises many issues on appeal regarding the admission and exclusion of evidence, the special jury verdict form, the removal of his emotional distress cause of action, defense attorney misconduct, judicial bias, the denial of his requests for a continuance, and insufficient evidence supporting the jury verdict. We affirm on all grounds.

FACTS AND PROCEDURAL BACKGROUND

In the fall of 2010, when Plaintiff was 47 years old, he applied for an electrician apprentice position with the City of Burbank. He completed and submitted an employment application, passed a written test, passed a physical performance test, and was interviewed for the position. Burbank did not select Plaintiff for one of the three available electrician apprentice positions; Burbank instead selected the three candidates who performed best in the oral interviews.

Acting in propria persona, Plaintiff filed this lawsuit against Burbank, asserting that Burbank discriminated against him based on his age when he was not chosen for the electrician apprentice position. After the court sustained a demurrer by Burbank and denied Plaintiff's motion for summary judgment, Plaintiff proceeded to trial on his second amended complaint, which alleged age discrimination in violation of the Fair Employment and Housing Act (FEHA) under both disparate impact and disparate treatment theories and requested damages for emotional distress and lost wages. On the date of trial, Plaintiff asserted that he was not ready to proceed because he

had no witnesses to produce. The court denied his request for a continuance, noting the many times the parties and the court convened and discussed preparations for trial, and that Plaintiff had ample opportunity to prepare for trial and in fact had three witnesses to examine at trial.

At trial, Plaintiff presented testimony from himself and two Burbank employees. After testifying that he had a bachelor's degree in mathematics from California State University, an associate's degree from Glendale College, a General Construction B license, a California Certified General Electrician's license, and over 10 years of relevant construction experience, Plaintiff stated he was more qualified for the job than the other applicants and thus he should have been hired. Plaintiff explained that the applicants who were hired were ages 26, 27, and 31, and lacked comparable credentials and college degrees. He testified that among the electrician apprentices hired since 2009, "the average age, which is the mean, is 27. The mode, which is the most common age, is 27. And the median age, which is the age in the middle of the data . . . is also 27." During his testimony, Plaintiff argued that two of the three hired candidates had flawed applications. He asserted one application was missing a date and the other applicant was hired because his family members, who were Burbank employees, influenced the hiring decision. Plaintiff then testified he had applied and been rejected at least 15 times to positions with the City of Burbank. He opined that the "injustice" affected him and, as a result, he had to take "antibiotics."

Plaintiff agreed that 1400 applicants took the written test, which he took and passed. He also passed the physical agility test, although he claimed it was "rigged."

Burbank's hiring manager, Michael Kelley, testified he oversaw the hiring process and reviewed the job applications of the three electrician apprentices hired in 2010. Kelley explained that the minimum job requirements were that the applicant be at least 18 years old, have a high school diploma or GED, and possess a Class C driver's license. After satisfying those qualifications on their applications, the applicants must pass both a written and a physical agility test to make it to the pool of applicants considered for an interview. At the interview, photos were taken of the interviewees to associate a name with a face and help the hiring panel remember the individual for hiring decisions that occurred months after the interview. Candidates were ranked based on their interview. Kelley explained the applicant pool tended to be younger because the electrician apprentice job was an entry-level position, with lower pay than a journey-level electrician position.

Kelley testified that in the fall of 2010, Burbank interviewed 33 people for the electrician apprentice position, selected from a pool of 60 to 80 applicants who passed both written and physical tests. Plaintiff was not hired because he performed poorly on his interview in comparison to the other applicants. Kelley stated that Plaintiff's "interview was relatively flat. . . . [Plaintiff] didn't make the top 15." Instead, the top three interviewees (based on ratings provided by the interviewers) were hired. Kelley testified that the decision not to hire Plaintiff "had nothing to do with his age."

Plaintiff also examined Evan Ayers, a Burbank employee and the brother of one of the three 2010 electrician apprentice hires. Ayers testified that to his knowledge, 1400 people took the electrician apprentice written exam. He could not estimate the

percentage of test takers over 30 years old. Ayers also denied that family members and friends who worked for Burbank had any influence over his hiring, and denied influencing Burbank's decision to hire his brother.

Burbank's only witness, Cynthia Kasten, testified as an expert in the field of human resources and reviewed the selection process for the electrician apprentice position as it existed in 2010. Kasten had 22 years of experience managing the City of Napa's human resources and personnel hiring. She also teaches human resources related courses to MBA students at Chapman University. Although Plaintiff pointed out that Kasten did not have a Ph.D. or some other certification, Plaintiff did not argue further about Kasten's qualifications.

Kasten testified she reviewed the advertisement for the electrician apprentice position, test materials, the interview questions, and as much statistical information as Burbank could provide. Kasten was asked to determine whether there had been an adverse impact on applicants over 40 years old. Kasten testified: "I specifically was looking for the job relatedness of the testing processes to make sure that they were valid and also see if there was any impact against any protected group. [¶] And my opinion was that there was not." In sum, Kasten found that the testing and interview questions were related to the electrician apprentice job, and that there was no adverse impact on people over 40 years old.

When both sides rested their case, Burbank moved for nonsuit on the grounds that Plaintiff presented insufficient evidence to show that age was the substantial motivating reason that he was not hired as an electrician apprentice in 2010 and no evidence that he suffered emotional distress. As to his emotional

distress claim, Plaintiff responded that he had to take antibiotics and that the evidence of his distress was in the exhibits. The court pointed out that Plaintiff never placed any exhibits before the jury showing emotional distress, never testified that he went to a psychologist, psychiatrist, or psychotherapist of any kind, never stated to the jury any physical manifestations of his emotional distress, and never presented testimony from an expert on the issue. The court granted the motion for nonsuit as to Plaintiff's claim for emotional distress and denied it as to the age discrimination claim.

After closing arguments, the parties further discussed jury instructions and verdict forms. Despite Plaintiff's complaint alleging two different theories of discrimination (disparate impact and disparate treatment), the court issued only the disparate treatment verdict form to the jury. The jury found that Plaintiff's age was not a substantial motivating reason for Burbank's decision not to hire Plaintiff. The trial court entered judgment in favor of Burbank. Plaintiff filed motions for a new trial and for judgment notwithstanding the verdict, which the court denied. Plaintiff appeals.

DISCUSSION

Plaintiff's briefs are challenging to understand and raise many issues on appeal.[1] Insofar as we can discern, Plaintiff challenges: evidentiary issues, the special jury verdict form, the removal of his emotional distress cause of action, defense attorney misconduct, judicial misconduct, the denial of his request for a continuance, and insufficient evidence supporting the jury verdict. We address each in turn.

1. The Court Did Not Abuse Its Discretion When Ruling on Evidentiary Issues

Plaintiff asserts that the court erred in admitting and excluding various evidence. We review a court's decision to exclude evidence for abuse of discretion and will reverse only if

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[1] On September 12, 2016, Plaintiff moved for this court to take judicial notice of the ages of the hired electrician apprentices, a histogram of their ages, and a graph reflecting their ages. This information is not judicially noticeable and thus we deny this motion. (Cal. Rules of Court, rule 8.252.)

We also deny Plaintiff's two requests (dated October 13, and October 16, 2015) to lodge exhibit booklets (most of which the jury never saw) and Plaintiff's motion to request jury information with this court. These documents are irrelevant to our resolution of this appeal. (*Steele v. International Air Race Assn.* (1941) 47 Cal.App.2d 61, 63 ["the reviewing court will not order them to be added to the record except on a showing that they are material to and will assist in a determination of the appeal on its merits"]; *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120, 1144, fn. 10 [" 'Augmentation does not function to supplement the record with materials not before the trial court[,]' and a reviewing court considers only matters which were part of the record at the time the judgment was entered."].)

there is a clear showing of an abuse of discretion. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.) We likewise review an order quashing a subpoena for abuse of discretion. (*Grannis v. Board of Medical Examiners* (1971) 19 Cal.App.3d 551, 566.) A trial court abuses its discretion if it exceeds the bounds of reason (*ibid.*); however, even where evidence has been erroneously excluded, the judgment or decision shall not be reversed unless the reviewing court believes the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, §§ 353, 354.)

a. Defense Expert Testimony

Plaintiff argues that the court abused its discretion when it admitted testimony from Burbank's expert, Cynthia Kasten. Kasten gave an opinion as a human resources expert about how Burbank's hiring process and testing did not have an adverse impact on individuals over the age of 40 years old. As part of voir dire, Burbank asked about and Kasten described her extensive background managing human resources and overseeing employee recruiting and hiring processes.

On cross, Plaintiff asked Kasten if she had a Ph.D., and she said she did not. He asked her if she was familiar with the Society of Human Resource Management (S.H.R.M.) Certification. Kasten confirmed that she knew what it was but had not pursued it. The court told Plaintiff that the S.H.R.M. certification was "beyond her qualifications. We're only talking about her qualifications to testify as an expert witness on the Defendant's behalf." At this point in time, Plaintiff stated he had no further questions, and the trial court instructed Burbank to proceed with Kasten as a qualified expert.

On appeal, Plaintiff asserts that Kasten was not an expert because she lacked a Ph.D. and a S.H.R.M. certification. Plaintiff never made this argument to the trial court, never objected to Kasten's testimony, and never asked the witness further questions to establish that she needed a Ph.D. and S.H.R.M. certification to be an expert in the field of human resources and hiring practices. Plaintiff has waived any objection as to Kasten's qualifications to testify as a human resources expert witness. (*People v. Bolin* (1998) 18 Cal.4th 297, 321 ["Since [the party] failed to make these objections [to the expert witness's qualifications] at trial, the issue is waived."].)

Plaintiff also argues that the court erred when it instructed Kasten not to respond to one of Plaintiff's questions. Plaintiff engaged in the following question-answer dialogue with Kasten:

> "Q [By Plaintiff] . . . Are you familiar with the measures of central tendency, the mode, the mean, and the median?
>
> "A [By Kasten] Yes.
>
> "Q I can ask you a hypothetical because you're an expert witness; is that correct?
>
> The Court: Fire away.
>
> "Q By Mr. Gonzalez: Okay.
>
> Suppose the city hired 20 electrician apprentices, all 27 years of age, would that, to you, be considered discriminatory?
>
> "A It depends on who all was applying and what the age range was.
>
> You said they were all 27?
>
> "Q They were all 27.

"A It's highly unlikely, but that would be the statistical average, and the mean and the mode.

"Q So it would be discriminatory to you, or not?

"The Court: That calls for a legal conclusion that she doesn't have the expertise to respond, Mr. Gonzalez. That's for the jury to decide."

Plaintiff asserts that by preventing Kasten from answering the last quoted question, the trial court "demonstrated a prejudicial response against [Plaintiff] and was obviously helping [Burbank] and at the same time adversely affecting the jurors." We disagree. Plaintiff's question (whether hiring ten 27-year-old applicants was discriminatory) impermissibly asked the expert to decide the ultimate legal question of the case.[2] It is well established that "the expert must not usurp the function of the jury and reach the ultimate question" of the case. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1099; *WRI Opportunity Loans II LLC, v. Cooper* (2007) 154 Cal.App.4th 525, 532, fn. 3 [Although Evidence Code section 805 permits expert testimony on the ultimate issue to be decided by the factfinder, an expert may not testify to legal conclusions in the guise of expert opinion. Legal conclusions are not substantial evidence.].) Plaintiff's question whether the hiring practice was discriminatory directly

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[2] We note that although the hypothetical posed by Plaintiff did not accurately reflect the facts of the case, it is clear Plaintiff wanted the jury to perceive his hypothetical to summarize the case. Throughout the trial, Plaintiff repeatedly argued the mean, mode, and median of 27, and asserts on appeal that hiring ten 27-year-old individuals was equivalent to what Burbank actually did in this case.

asked the expert to testify to a legal conclusion. The court properly intervened in Plaintiff's cross-examination.

b. Exclusion of Plaintiff's DFEH Fact Sheet

Plaintiff asserts that the trial court abused its discretion when it excluded his exhibit, a California Department of Fair Employment and Housing (DFEH) fact sheet. Plaintiff intended to use the fact sheet for its statement that employers should not photograph job applicants prior to hire. Plaintiff sought to argue that by photographing the applicants at the interview stage, Burbank discriminated against him due to his age.

Burbank brought a motion in limine to exclude the fact sheet, arguing that it was not evidence of discrimination. During the hearing on the motion in limine, the court asked Plaintiff how the act of photographing each of the interviewees showed age discrimination. Plaintiff responded: "So what they did is, they looked at my photo, saw an old guy and crushed it up and tossed it in the waste basket." Plaintiff had no evidence indicating that this actually had happened, only his supposition. The court excluded the fact sheet stating that there could be many reasons Burbank took his photo and that Plaintiff lacked evidence showing that Burbank's practice of photographing the applicants demonstrated discrimination. The court indicated that Plaintiff could not rely on his supposition to support his use of the exhibit.

We conclude that the exclusion of the fact sheet was not an abuse of discretion as Plaintiff offered no evidence to link the fact sheet's advisory statement to a discriminatory intent by Burbank. In fact, Plaintiff failed to provide any evidence of discriminatory intent by Burbank. Plaintiff solely provided his own guesses and beliefs as to why Burbank took the applicants' photos. Thus, the fact sheet was not relevant to the case as it did

not tend to establish a material fact of the case. (*Coffey v. Shiomoto* (2015) 60 Cal.4th 1198, 1213 [relevant evidence tends logically, naturally, and by reasonable inference to establish material facts].) As it was not relevant, it was not admissible. (Evid. Code, § 350 ["No evidence is admissible except relevant evidence."].) The court properly excluded the fact sheet.

c. Exclusion of Plaintiff's graphs

On appeal, Plaintiff argues the court erred when it excluded the histograms and charts he created regarding the mean, medium, and mode of the ages of the electrician apprentices hired by Burbank. As noted by the trial court, these charts as well as Plaintiff's calculations regarding the mean, median, and mode solely analyzed the ages of 10 hired individuals, and failed to account for the ages of the 1,000-plus applicants. The graphs and diagrams depicting the mean, median, and mode age of the hired employees was thus confusing, misleading, and properly excluded. (See Evid. Code, § 352 ["The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger . . . of confusing the issues, or of misleading the jury."].)

d. Quashed Subpoena of Federal Investigator Kissamitakis

Plaintiff asserts that the court erred when it quashed his subpoena of Michael Kissamitakis, the Equal Employment Opportunity Commission (EEOC) investigator who investigated the discrimination charges filed by Plaintiff with the EEOC. Plaintiff asserts that he intended to question Kissamitakis about the EEOC report and Kissamitakis's written statement that Plaintiff "did well" in his interview with Burbank. Plaintiff

wanted to use this statement to refute a Burbank interview panelist's statement that Plaintiff did poorly on the interview.[3]

Prior to trial, the EEOC applied ex parte to quash the subpoena requiring Kissamitakis to appear personally at trial. The EEOC asserted, among other grounds, that the court lacked jurisdiction to require testimony from a federal employee who has been instructed not to testify pursuant to regulations promulgated under *United States ex rel. Touhy v. Ragen* (1951) 340 U.S. 462 (*Touhy*). The court subsequently granted the motion to quash. We have no record of the arguments made at the hearing or of any response from Plaintiff on the matter.

Federal agencies, including the EEOC, are authorized under section 301 of title 5 of the United States Code to promulgate regulations governing the conditions and procedures under which its employees may testify. These federal regulatory requirements are valid and control over a state subpoena. (*Touhy, supra,* 340 U.S. at pp. 463, 468 [upholding the validity of federal regulations prohibiting release of United States Department of Justice documents pursuant to a subpoena duces tecum absent compliance with procedural prerequisites for obtaining authorization].) The EEOC has such a requirement codified in 28 Code of Federal Regulations part 1610.32, which provides that "[n]o employee or former employee of the [EEOC] shall, in response to a demand of a court or other authority, produce any material contained in the files of the Commission or *disclose any information* or produce any material acquired as part of the performance of his official duties or because of his official

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[3] We note that Plaintiff questioned none of the panelists at trial.

status without the prior approval of the Legal Counsel." (Italics added.)

Based on the record before us, it appears that legal counsel for the EEOC had not approved Kissamitakis to testify on this issue. Plaintiff also failed to provide the trial court with a reason that this *Touhy* regulation should not apply. Therefore, we conclude the court did not abuse its discretion in granting the motion to quash.

2. The Court Did Not Err in Refusing to Issue a Jury Verdict Form on Disparate Impact

Plaintiff asserts that the court erred in providing the jury with a disparate treatment special verdict form (CACI No. VF-2500) rather than a disparate impact special verdict form (CACI No. VF-2502). We review the court's decision de novo. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1242.)

At issue is whether a disparate impact special verdict form was appropriate, given the evidence of discrimination Plaintiff presented to the jury. "It is well settled that valid statistical evidence is required to prove disparate impact discrimination, that is, that a facially neutral policy has caused a protected group to suffer adverse effects. ' "Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. . . . [S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation." ' " (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1405.)

Plaintiff failed to produce any evidence at trial showing that people over the age of 40 were disparately impacted, in comparison to applicants under 40, by Burbank's facially neutral hiring policy and practice. Plaintiff never produced admissible statistical evidence and thus could not prove a disparate impact claim. Issuing the disparate impact special verdict form to the jury therefore would have been improper.

On appeal, Plaintiff cites excluded histograms and charts he created as well as the mean, medium, and mode of the ages of the electrician apprentices hired by Burbank. As stated above, these charts as well as Plaintiff's calculations regarding the mean, median, and mode were misleading because they failed to account for the thousands of people who applied for the job. This evidence was not admissible, and to the extent that it came in through Plaintiff's testimony, it cannot support a claim of disparate impact due to its inaccuracy.

Since Plaintiff failed to produce the minimum evidence needed to prove a disparate impact claim, the court did not err in refusing to provide the disparate impact verdict form to the jury.

3. The Court Properly Granted the Nonsuit Motion as to Emotional Distress

Plaintiff argues that the court erred when it granted Burbank's motion for nonsuit as to Plaintiff's prayer for damages for emotional distress, concluding that Plaintiff failed to present evidence that he suffered emotional distress. " 'The granting of a motion for nonsuit is warranted when, disregarding conflicting evidence, giving plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference that may be drawn from the evidence, the trial court determines that there is no evidence of sufficient substantiality to support a

verdict in favor of plaintiff.' [Citations.] [¶] Plaintiff cannot prevail unless he can demonstrate substantial evidence in the record to support each claim asserted." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580, italics omitted.) We review judgment of nonsuit de novo. (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 669.) In reviewing a judgment of nonsuit, the appellate court "must view the evidence in the light most favorable to the appellant, must disregard all inconsistencies and draw only inferences from the evidence which can reasonably be drawn which are favorable to the appellant." (*Van Zyl v. Spiegelberg* (1969) 2 Cal.App.3d 367, 372.)

Contrary to Plaintiff's assertions on appeal, preliminarily we note that Plaintiff's second amended complaint does not allege a cause of action for infliction of emotional distress. California Rules of Court, rule 2.112 provides that "[e]ach separately stated cause of action, count, or defense must specifically state: [¶] (1) Its number (e.g., 'first cause of action'); [and ¶] (2) Its nature (e.g., 'for fraud')." Here, the caption page does not state a cause of action for emotional distress. Rather, it states, in all capitals, "second amended complaint for damages and injunctive relief for violations of the California Fair Housing and Employment Act and refusal to hire; age, ethnic/color/racial discrimination employment discrimination." The 40-page, 135-paragraph document contains two counts: count one for disparate treatment and count two for disparate impact. Infliction of emotional distress was never identified as a separate count or cause of action.

Rather, Plaintiff used "emotional distress" several times in the second amended complaint when alleging his injuries and damages. The complaint stated in the general allegations section, "[b]ecause of Defendant's continued denial to hire Plaintiff, he has suffered from Emotional Distress and humiliation," and in the prayer for relief, "[a]s a further proximate result of defendant's discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered humiliation, mental anguish, and emotional and physical distress, and has been injured in mind (and body) because of defendants [*sic*] discriminatory actions based on Age, Race, and Ethnicity." The prayer for relief pegs the "Emotional Distress" at $5 million. Based on these statements, it appears that Plaintiff sought noneconomic damages for emotional distress but did not allege a cause of action for infliction of emotional distress.

We agree with the court that Plaintiff never placed any exhibits before the jury showing emotional distress, never testified that he went to a psychologist, psychiatrist, or psychotherapist of any kind, never testified as to physical manifestations of his emotional distress, and never presented testimony from an expert on the issue. Thus, even had Plaintiff alleged a cause of action for infliction of emotional distress, he did not provide any evidence supporting the essential element of suffering severe emotional distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 [suffering by the plaintiff of severe or extreme emotional distress is an element of intentional infliction of emotional distress].)

Plaintiff argues that he presented evidence of his emotional distress, when he testified: "And because of all this, what I

consider injustice, unfairness in the hiring process, it has affected me. I have to take antibiotics. Think about being qualified and not being selected because of family relations or whatever reasons the city will say." We conclude this is insufficient to establish severe emotional distress. "Severe emotional distress means . . . emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397.) At minimum, "the requisite emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry." (*Ibid.*) Plaintiff's testimony did not communicate the minimum highly unpleasant mental reaction. Being "affected" by a hiring decision and taking antibiotics without any further explanation was insufficient to create an inference of emotional distress.

Based on the foregoing, we affirm the court's decision to grant nonsuit as to a claim for emotional distress, to the extent one existed.

4. The Allegations of Defense Attorney Misconduct Are Unsupported by Evidence

Plaintiff asserts that Burbank's attorney committed misconduct during the trial, warranting reversal. Plaintiff argues that Burbank's attorney, Charmaine Jackson, planted a "security camera body photograph" with the jury that was not admitted into the evidence. Plaintiff claims that Jackson now will not provide him with a copy of this photo for this appeal. Plaintiff also asserts that "Ms. Jackson intentionally and maliciously lied to the jurors in her closing statement that Appellant did not mitigate damages."

Plaintiff never alerted the court to any of these issues during the trial by objecting. "Attorney misconduct is an irregularity in the proceedings and a ground for a new trial. . . . [T]o preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial and the party must also have moved for a mistrial or sought a curative admonition unless the misconduct was so persistent that an admonition would have been inadequate to cure the resulting prejudice. [Citation.] This is so because '[o]ne of the primary purposes of admonition at the beginning of an improper course of argument is to avoid repetition of the remarks and thus obviate the necessity of a new trial.' " (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 148.) The fact that an appellant proceeds in propria persona does not alter these standards, as "[p]ro. per. litigants are held to the same standards as attorneys." (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.) By failing to object at trial and seek some curative measure by the trial court, Plaintiff did not preserve these issues for appeal.

In addition, the appellant bears the burden of presenting a record adequate to demonstrate the trial court's error. (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324 (*Nielsen*).) As there is no evidence in the record to support Plaintiff's allegations regarding a planted photograph, we must reject his claim.

Lastly, we note that Jackson accurately stated in her closing argument that Plaintiff did not mitigate his damages. Based on our review of the record, Plaintiff did not present any evidence that he attempted to find other work following his rejection by Burbank. Plaintiff repeatedly cites evidence that was not admitted at trial to support his contention that he

mitigated damages. As Plaintiff did not present these exhibits to the jury, they cannot be considered on appeal.

5. The Allegations of Judicial Bias and Misconduct Are Unsupported by Evidence

Plaintiff argues that the court showed judicial bias and erred in denying his motion to compel further responses to special interrogatories from Burbank's hiring manager, Michael Kelley. Plaintiff indicates that his request was denied because the defense attorney "intentionally lied to the [c]ourt by stating that the documents were not properly served" and because the court would not examine the proof of service during the hearing. In asserting misconduct, Plaintiff quotes the judge's response, without citation to a reporter's transcript (there is no transcript of these proceedings in the record provided to this Court).

We examined the motion to compel, to which Plaintiff attached the interrogatories at issue. Notably, these interrogatories did not have a proof of service. Based on this fact and the presumption of correctness in favor of the trial court, we find no error. (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718 [An " 'order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.' "].)

Plaintiff also complains a court clerk yelled at him when the court recessed. There is also no record of this alleged event and Plaintiff did not report it to the court until after trial concluded when he filed his motion for a new trial. Plaintiff therefore failed to preserve the issue for appeal, and also failed to meet his burden of providing this court with an adequate record to demonstrate the court's error. (*Nielsen, supra,* 178 Cal.App.4th at p. 324.) Thus, we do not address this issue further.

6. The Court Did Not Abuse Its Discretion When It Denied the Continuances

Plaintiff asserts that the court abused its discretion when it denied Plaintiff's two requests for continuances. "A motion for continuance is addressed to the sound discretion of the trial court." (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395.) "The burden is on appellant to show an abuse of discretion," (*White v. Rurup* (1948) 88 Cal.App.2d 692, 694), i.e. that the trial court exceeded the bounds of reason. (*Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246.) For us to reverse, the appellant must also demonstrate that the abuse of discretion resulted in a miscarriage of justice. (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170.) Parties do not have a right to a continuance as a matter of law. (*Ibid*.)

The trial court's exercise of discretion is guided by California Rules of Court, rule 3.1332, which provides in pertinent part: "To ensure the prompt disposition of civil cases, the dates assigned for a trial are firm." (Cal. Rules of Court, rule 3.1332(a).) "Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits. The court may grant a continuance only on an affirmative showing of good cause requiring the continuance." (Rule 3.1332(c).) "Circumstances that may indicate good cause" include serious events like death or illness of counsel or a party, as well as a "party's excused inability to obtain essential testimony, documents, or other material evidence *despite diligent efforts*." (Rule 3.1332(c)(3), (6), emphasis added.)

At issue are two requests for continuances by Plaintiff. First, on December 29, 2014 (about a month before the trial date), Plaintiff asked to continue trial to April 20, 2015. He stated his grounds for a continuance were that, "[a] dear friend, Esther Espinoza passed on Sunday, December 28 at 1 a.m. in Burbank. Her son is Joe Espinoza and he is the individual who has been serving the city. Esther Espinoza has resided in Burbank since the 1950's." (Underscoring omitted.) Plaintiff stated that her passing "is difficult for Plaintiff to comprehend. . . . It is difficult for Plaintiff to concentrate on the trial. Plaintiff needs time to regroup." The court subsequently denied the continuance without explanation. On appeal, Plaintiff asserts he "was saddened and experienced stress due to her death" and the court "should have considered the human aspect and granted a continuance."

We conclude that denial of Plaintiff's December 2014 request for a continuance was not an abuse of discretion. The basis for the request involved the loss a friend a month before trial. It did not involve the loss of a party, counsel, or someone essential to the dispute prior to trial. Plaintiff simply did not demonstrate good cause for a continuance.

Second, Plaintiff orally requested a continuance in person on the first day of the trial. Plaintiff opined, "[u]nfortunately, I don't have any witnesses." The court responded to Plaintiff by pointing out that the court had met with Plaintiff twice in the last 10 days, talking for hours at final status conferences about "exhibits, witnesses, jury instructions, verdict forms, short statement of the case, motions in limine, voir dire, jury selection procedures, et cetera." The court explained multiple times that it had encouraged Plaintiff to obtain counsel, encouraged Plaintiff

to use the law library, and warned Plaintiff that the court would have to treat him the same as defense counsel. The court noted that it previously had continued the trial date four months to accommodate Plaintiff's motion for summary judgment and motions to compel. Through questioning Plaintiff, the court established that Plaintiff in fact had three witnesses ready to question at trial. Based on these facts, the court denied the continuance and proceeded with trial.

Again, Plaintiff failed to show good cause for a continuance. "A showing of good cause requires that the party seeking a continuance has prepared for trial with due diligence. Particularly, when the party seeks a continuance to secure a witness's testimony, the party must show that he exercised due diligence to secure the witness's attendance, that the witness would be available to testify within a reasonable time, that the testimony was material and not cumulative." (*People v. Henderson* (2004) 115 Cal.App.4th 922, 934, fn. omitted.)

The record indicates that Plaintiff failed to properly serve some of his proposed witnesses prior to trial and Plaintiff then waited until the day of trial to request a continuance. When asking for the continuance, Plaintiff failed to indicate he was making further efforts to obtain witnesses. Plaintiff could not show good cause for a continuance as Plaintiff did not act attentively to secure his witnesses and prepare for trial, despite the court's many efforts to instruct and inform Plaintiff about trial. We cannot say that the trial court's denial of his motion for continuance exceeded the bounds of reason.

7. Substantial Evidence Supports the Jury's Verdict

Lastly, we address Plaintiff's generalized attack on the jury's verdict finding that Burbank did not discriminate against Plaintiff. "When a party contends insufficient evidence supports a jury verdict, we apply the substantial evidence standard of review." (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) Under this standard, "[a]ll conflicts in the evidence are resolved in favor of the prevailing party, and all reasonable inferences are drawn in a manner that upholds the verdict." (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) "[W]e do not evaluate the credibility of the witnesses or otherwise reweigh the evidence. [Citation.] Rather, 'we defer to the trier of fact on issues of credibility. [Citation.]' [Citation.]" (*Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514-515.) "In short, even if the judgment of the trial court is against the weight of the evidence, we are bound to uphold it so long as the record is free from prejudicial error and the judgment is supported by evidence which is 'substantial,' that is, of ' "ponderable legal significance" ' ' "reasonable in nature, credible, and of solid value . . . ." ' [Citations.]" (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) In other words, " '[i]f there is substantial evidence in favor of the respondent, *no matter how slight it may appear* in response with the contradictory evidence, the judgment will be affirmed.' " (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872.) The testimony of one witness may constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

As a plaintiff alleging disparate treatment discrimination, Plaintiff had the burden to establish unlawful discrimination by showing: "(1) he was a member of a protected class, (2) he was qualified for the position he sought . . . , (3) he suffered an adverse employment action, such as . . . denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) Plaintiff sought to prove that he was part of a class of people over the age of 40 and was not hired for the electrician apprentice position due to his age, despite his excellent qualifications.

At trial, there was substantial evidence in the record disproving Plaintiff's theory that Burbank discriminated against him based on his age. Burbank's hiring manager, Kelley, explained the hiring process and testified that Plaintiff was not chosen for the electrician apprentice position because he performed poorly on the oral interview compared to other candidates. Kelley explicitly stated that the hiring decision had nothing to do with Plaintiff's age. Kelley also clarified that Plaintiff's degrees and licenses were not necessary for the job. In addition, human resources expert Kasten testified that Burbank's hiring procedure did not adversely affect applicants over 40 years old. This evidence plainly supports the jury's verdict in favor of Burbank.

Plaintiff argues at length that based on his college degree and trade licenses, he "should have clearly been chosen as one of the three hired [e]lectrician [a]pprentices because no other hired candidate possessed the [equivalent] education or experience as [Plaintiff]." He contends that since the last 10 electrician apprentices hired since 2009 were in their 20s and early 30s, Burbank's hiring practices are discriminatory and have an

adverse impact on people over 40 years old. Plaintiff argues that Burbank's employees lied about the true rationale for not hiring Plaintiff. For support, Plaintiff cites interrogatory responses from Burbank, and excluded graphs and charts, but none of these documents were admitted at trial and thus cannot support his argument.

Plaintiff essentially asks this court to reweigh the evidence on appeal and adopt his interpretation of the testimony, which we cannot do. Under the substantial evidence rule, we are required to accept all evidence which supports the successful party, disregard the contrary evidence, and draw all reasonable inferences to uphold the verdict. (*Minelian v. Manzella* (1989) 215 Cal.App.3d 457, 463.) This court may not reweigh the evidence, reassess the credibility of the witnesses, or resolve conflicts in the testimony, and we will not disturb the judgment if there is evidence to support it. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.)

Based on the foregoing, we conclude substantial evidence supports the jury's verdict and affirm the judgment.

DISPOSITION

The judgment is affirmed. Defendant City of Burbank is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.*

We concur:

EDMON, P. J.

ALDRICH, 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.