Filed 10/20/16 Sercarz v. Regents CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOEL SERCARZ, Plaintiff and Appellant, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents.	B259677 (Los Angeles County Super. Ct. No. BC492513)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth A. White, Judge. Affirmed.

Barrera & Associates, Patricio T.D. Barrera and Ashley A. Davenport, for Plaintiff and Appellant.

Crowell & Moring and J. Daniel Sharp; University of California Office of the General Counsel, Charles F. Robinson, and Valerie C. Shelton, for Defendant and Respondent Regents of the University of California.

Martin & Martin, Kenneth M. Jones and JoAnn Victor, for Defendant and Respondent County of Los Angeles.

Plaintiff and appellant Dr. Joel Sercarz (plaintiff), was a surgeon and professor concurrently employed by defendants Regents of the University of California (Regents or UCLA) and the County of Los Angeles (County). Plaintiff, who is White, asserts that after his UCLA coworkers learned he supported a Black colleague's racial discrimination suit against the Regents and certain UCLA personnel, they retaliated against him by prompting the County to launch an investigation into his time-reporting practices, which eventually led to plaintiff's termination from a County hospital, and by subjecting plaintiff to various forms of workplace mistreatment. Plaintiff sued defendants for retaliation under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.)[1] and other associated causes of action. Plaintiff challenges the trial court's grant of summary judgment in favor of defendants. We affirm.

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[1] Undesignated statutory references that follow are to the Government Code.

I. BACKGROUND

A. Factual History

1. Plaintiff's employment by defendants

In 1992, plaintiff was concurrently hired by the Regents to work as a professor in the Head and Neck Department of UCLA's Geffen School of Medicine and by the County to work as a surgeon at Harbor-UCLA Medical Center (Harbor). In 2005, plaintiff was transferred from Harbor to Olive View-UCLA Medical Center (Olive View), where he was named chief of Otolaryngology-Head and Neck Surgery. In connection with his employment by the Regents, plaintiff worked at UCLA medical facilities in Westwood and Santa Monica and also on occasion at a Veterans Administration hospital (the VA). The Regents promoted plaintiff to full Professor-In-Residence in July 2010. Dr. Gerald Berke, chief of the Head and Neck Department, was plaintiff's supervisor at UCLA.

The County and the Regents were parties to an Affiliation Agreement by which the Regents provided healthcare-related services and training to the County at facilities including Harbor and Olive View and the County allowed its physicians to work as professors and treat private patients at UCLA. Under the Affiliation Agreement, the County was "responsible for hiring, scheduling, promoting, compensating, disciplining (other than academic discipline) and terminating" the physicians it hired to work at its facilities. The County and the Regents agreed to cooperate with each other in disciplinary matters involving personnel concurrently employed by both parties. Each party

agreed to provide "reasonable and timely access to the medical records [and various other documents] of the other Party relating to any claim or investigation related to services provided pursuant to [the Affiliation] Agreement . . . ."

The County determined the schedules for its staff. According to Olive View's "Outside Professional Activities" policy, physicians who concurrently served as UCLA faculty were prohibited from spending the equivalent of more than 20 percent of their County time commitment on outside employment. Such physicians could work at UCLA on County time, however, so long as the work entailed teaching, participating in conferences and seminars, administrative activities, or research. Providing compensated care to patients at UCLA was not allowed on County time. County policies required physicians to document the time they spent performing County work, prohibited them from submitting time reports that included work not performed for the County, and provided that "[f]alsification, tampering with and/or failure to properly complete [timekeeping records] shall be cause for disciplinary action which could include discharge from County service or release from contract."

Plaintiff was required to work 40 hours per week for the County, specified as at least 32 hours at Olive View, with the remaining eight hours eligible to be satisfied by performing administrative work off site, in accordance with the Outside Professional Activities policy. Plaintiff's total compensation was composed of a salary from the County that was determined by a union contract, a stipend from the Regents, and so-called "Z payments" for clinical services he provided through private practice.

2. Plaintiff's involvement in Head's discrimination lawsuit

Christian Head, who is African American, was a colleague of plaintiff's at UCLA. The two were also personal friends. Head worked as a surgeon at UCLA and the VA, where he was supervised by Dr. Marilene Wang.

According to plaintiff, in 2003 or 2004, Wang told him Head was an "Affirmative Action Hire," that hires like Head were the cause of problems at other hospitals, and that she did not want him working with her at the VA. In 2004, Head complained about Wang to an Equal Employment Opportunity Commission counselor whose report referred to plaintiff as a witness to Wang's statement that Head was an "affirmative action case." Head did not file a formal complaint. At a party in 2006 that was widely attended by UCLA personnel, medical residents who traditionally "roasted" their superiors at the annual event presented a slide show that included a photo of Head's face superimposed on a gorilla being sodomized by Berke. In 2009, Dr. Keith Blackwell, another physician in UCLA's Head and Neck Department, told plaintiff he had heard a rumor that Wang and Berke were having an affair; plaintiff relayed the rumor to other colleagues. After Head learned of the affair either on his own or through plaintiff, he made a complaint about the alleged relationship. Plaintiff was interviewed in connection with Head's complaint. At some point Berke learned of plaintiff's involvement in the matter.[2]

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[2] Plaintiff asserts that because Head believed the affair contributed to Berke's and Wang's discrimination against him,

In April 2011, Head filed the first of three complaints against the Regents with the Department of Fair Employment and Housing (DFEH), alleging discrimination, retaliation, harassment, and related misconduct.[3] In May or June, upon Head's request, plaintiff tried to obtain a copy of the "gorilla slide" from residents who had attended the 2006 party. In July, Pamela Thomason, a Regents employee who handled discrimination issues, interviewed plaintiff regarding Head's claims. After plaintiff said he feared retaliation if he told the truth, Thomason told him he seemed to be under stress and should leave UCLA. Both Thomason and Kevin Reed, UCLA's Vice Chancellor for Legal Affairs, told plaintiff he was the only person supporting Head.

Soon after Thomason interviewed plaintiff, Berke asked him why he was trying to obtain the gorilla slide and why he was not on Berke's side. The next day, plaintiff told Thomason and Reed he felt threatened by Berke and was "concerned for [his] future." That afternoon, Berke sent plaintiff a text stating "everything is cool. NBD (no big deal) with helping Chris [Head]. I promise you're going to be fine with the county hassles."[4] In August, plaintiff wrote Reed that Berke was retaliating against him. He wrote that Berke became angry with him after Berke learned plaintiff was seeking the slide and plaintiff had not

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plaintiff's involvement in the rumors and investigation of the affair constituted participation in Head's discrimination claims.

[3] Head filed separate DFEH complaints against Berke, Wang, and other UCLA personnel.

[4] The "county hassles" to which Berke refers is the County's investigation of plaintiff, which we describe in part I.A.3, *post*.

received any patient referrals from UCLA's toll-free physician referral line since then. Reed told plaintiff Thomason would investigate and "promise[d]" he would "see to it that [any retaliation discovered] is stopped and corrected." After Thomason relayed plaintiff's accusation to Berke and emphasized that retaliation was forbidden, Berke responded that he understood the gravity of plaintiff's complaint and asserted no retaliation had occurred or would occur in the future.

Thomason also followed up on plaintiff's patient referrals with UCLA's Director of Physician Referral Services, Mila Krueger. According to Krueger, physician referrals were generated by a software application that matched the patient's medical condition with physicians' self-reported specialties. Krueger said plaintiff had complained about his number of referrals for more than five years, most recently in July and August 2011. In response to his most recent complaint, she told plaintiff the overall number of referrals was down and gave him a copy of his referral reports from March through mid-August 2011. Krueger said she had not deviated from department practice in any way in order to reduce plaintiff's referrals.[5]

In August 2011, Dr. Thomas Rosenthal, the Chief Medical Officer for UCLA Health System, and Litigation Manager

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[5] In mid-2012, plaintiff again complained, this time to Michael Sachs, the Chief Administrative Officer of UCLA's Head and Neck Department, about receiving insufficient referrals from patients who directly contacted the department for a doctor. After investigating plaintiff's concerns, Sachs "concluded that the data did not support" his claim. Sachs told plaintiff the same and asked to meet with him to address any issues with the referral process, but plaintiff declined to do so. Berke said he provided no direction in how the department distributed referrals.

Patricia Miller of UCLA's Risk Management Department, wrote plaintiff they would recommend he be reported to the Medical Board because a malpractice claim of more than $30,000 had been paid out on his behalf and state law required that physicians be reported under such circumstances. The letter advised plaintiff he had a right to review the relevant records and respond. After plaintiff did so, Rosenthal and Miller decided against reporting plaintiff. Rosenthal and Miller both asserted that at the time of the letter, they had no knowledge of plaintiff's role in the Head investigation. Berke said he had no involvement in issuing the letter.

In April 2012, Head sued the Regents for discrimination.[6] In May, a local newspaper, the Los Angeles Wave, reported on Head's lawsuit and quoted an e-mail plaintiff had recently written to UCLA Chancellor Gene Block: "I appreciate your concern about diversity and tolerance . . . . But why allow my colleague . . . to be depicted at a UCLA event with his head superimposed on the body of a gorilla? You are aware of this, aren't you?"

Plaintiff said the article "outed" him as a witness in Head's lawsuit. A medical resident, Doug Sidell, told plaintiff "he stopped talking to me when he read [the] Wave article." Soon

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[6] Head's initial complaint is not included in the record. The trial court took judicial notice of Head's May 2013 third amended complaint, in which he asserted claims of race discrimination, defamation, and related causes of action against the Regents, Berke, Wang, and three other UCLA physicians. The Regents settled with Head in 2013, and the parties issued a joint press statement in which the Regents acknowledged that "an inappropriate slide was shown" at an event in June 2006 but otherwise denied liability.

after the article was published, Blackwell held a small party at his home for some of the residents. At the party, Sidell apparently presented a video that included a slide that read: "JOEL SERCARZ (1959-2012) IN MEMORIAM." Plaintiff said other department colleagues also treated him worse after the Wave article came out: Blackwell stopped referring certain cancer patients to him;[7] a more junior physician, Dr. Mendelsohn, who specialized in robotic surgery techniques, refused to "proctor" plaintiff in robotics on multiple occasions; a third-party sales representative was allegedly told UCLA would not purchase supplies from his company if he dealt with plaintiff; plaintiff was not provided adequate resident support; six of his lab coats were stolen; he was scheduled to perform surgery while on vacation; and other department colleagues including Blackwell, Nabili, Jeff Suh, and Adam DeConde stopped talking to him.

3. The County's investigation of plaintiff's timekeeping

As part of a routine practice of examining physician timekeeping after abuses were uncovered at a local hospital, the County and Dr. Fawzy Fawzy, UCLA's Senior Associate Dean for

[7] Blackwell said he did so not because plaintiff supported Head but because plaintiff—as well as another surgeon to whom Blackwell also stopped making referrals—often ran two operating rooms simultaneously, which led to "less supervision of the residents during surgery" and an "increase [in] the length of a surgery that [was] already pretty long," and also because another surgeon, Dr. Vishad Nabili, was more skillful in the particular surgery required.

Academic Affairs at the School of Medicine, had arranged in the early 2000's for William Loos, Olive View's Chief Medical Officer, to approve quarterly Z payments before they were released to UCLA medical faculty who also worked at Olive View.

In 2008, Loos noticed a substantially large Z payment—"the highest" he believed he had ever seen compared to other physicians—made to plaintiff. Loos noticed another large Z payment to plaintiff around late 2009 and "believed [he] was the first person to be concerned about the possible conflict" suggested by plaintiff's billing documentation. Loos "had no objection to how much money" plaintiff made, but wondered, based on the amount plaintiff was billing off-site, "whether [there was] enough time that it could be interfering with the county practice." Neither Berke, whom Loos did not know, nor anyone else at UCLA suggested that Loos audit plaintiff's time reports. Nor had Loos "[ever] heard the name Dr. Head or anything involving Dr. Head." Loos discussed the large Z payment with plaintiff's County supervisor, Dr. Jesse Thompson, who agreed they should look into plaintiff's time.[8]

On June 15, 2010, Sachs informed Berke that Olive View was requesting plaintiff's operating room schedule in order to release his Z payment. The next day, Thompson wrote plaintiff that he and Fawzy "would like to resolve this issue of your County timecard and your UCLA activities" and "would like to protect you and validate what you have claimed." Thompson asked plaintiff to document his "UCLA time for a routine week," and plaintiff responded by providing his schedule at Olive View

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[8] Loos testified that Thompson, in fact, may have been the one to initially recommend probing plaintiff's records more closely.

and UCLA for May. In July, Thompson sent an e-mail to Dr. Ronald Busuttil, UCLA's Chair in Surgery, stating, "Fawzy has asked me to have you instruct Berke to provide" plaintiff's clinic schedule at UCLA for January through March 2010. Thompson was unsuccessful in his attempt to obtain records through Berke, as Berke would not agree to provide, and did not provide, any records notwithstanding the requests. Loos eventually received plaintiff's UCLA operating room records from Dr. Kapur, the chief of anesthesiology at UCLA, who had been contacted on Loos's behalf by Dr. Rima Matevosian, Olive View's chief of anesthesiology.

Loos found 19 instances in the three-month period he reviewed where plaintiff reported working at Olive View on his timecard while he was simultaneously billing for services at UCLA. Three of the days in question were on a timecard completed by Olive View employee Lorena Ponce, who processed time reported by surgeons at Olive View.[9]

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[9] On the front of each bi-monthly timecard, physicians recorded the total number of hours they worked each day (e.g., eight). On the back of each timecard, they recorded the specific times they were "in" and "out" of Olive View (e.g., 9:00 a.m., 5:00 p.m.). According to County policy, Ponce was not to fill in incomplete timecards; thus, whenever she received one, she notified the physician that it needed to be completed in full. On occasion, however, when a physician failed to comply with her request, she completed the front of a card where only the back had been filled out, or vice versa. Ponce testified in her deposition that physicians were always aware when she completed their timecards. If she had the total number of hours worked in a day but not the physician's "in" and "out" times, she would insert estimated times based on how the physician completed previous timecards. She testified to doing exactly that

The results of Loos's investigation were forwarded to the County Department of Health Services (DHS) Human Resources office in September 2010, and the matter was assigned to Nicole Young, an investigator in DHS's Performance Management division, in March 2011. Loos's involvement in the investigation ended at that point. Young had no knowledge or prior association with plaintiff and no awareness of Head's lawsuit, which had not yet been filed. In conducting her own investigation, Young reviewed various materials including plaintiff's timecards, UCLA surgery schedule, agreement with the County as to his working hours, and applicable policies and procedures. She interviewed plaintiff, Thompson, and Ponce. Young also contacted UCLA employee Carole Newsom, who verified that the operating room records Young had received from Loos matched UCLA's records.[10]

After completing her investigation, Young reached the same conclusion as Loos: on "19 separate occasions . . . [plaintiff] indicated on his timecards that he was performing County-related work, but was actually engaged in activities which were not approved to be conducted while on County-time at UCLA hospitals located in Westwood and Santa Monica."

In his defense, plaintiff said he accepted the job at Olive View pursuant to an oral agreement with Thompson that no "specific hourly commitment [was] required" because he was

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with respect to plaintiff's timecard for the last half of January 2010.

[10] Rosenthal, together with Reed and Fawzy, authorized Newsom to provide this information to Young. Before doing so, Rosenthal was unaware the County had previously obtained plaintiff's operating room logs.

effectively obligated to be available every day, at any time. He said he had been instructed to fill out his timecards by recording eight hours per week as "'administrative hours'" that could be performed at UCLA and he was unsure how to account for those hours because they could take place in clinics and operating rooms. Plaintiff said many of the 19 incidents were for time spent performing administrative work on Wednesdays, a day on which plaintiff was never expected to be at Olive View. It was not until mid-2011 that he received a memo on how to record administrative hours;[11] thus, any infractions before then were "unintentional" and due to plaintiff's practice of filling out his timecard "in a pattern." Plaintiff felt he was being "singled out" as an act of "retribution based on [his] role as a witness to discrimination at UCLA" and that a comprehensive audit of all physicians jointly employed by the County and other hospitals would show that his timekeeping practices were consistent with his colleagues." The County was unpersuaded by plaintiff's position.

Berke and other colleagues of plaintiff at UCLA supported him throughout the investigation. In June 2010, Busuttil said he would call Thompson "again" to stop the investigation. On a phone call later that year among Loos, Berke, and Rosenthal, Loos apprised the others of his initial findings, said there was reason for the investigation to continue since he had not yet reviewed plaintiff's clinic schedule, and told them plaintiff's conduct "appear[ed] to be a serious infraction of county policy"

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[11] Ponce said a number of doctors were confused about how to record their "administrative hours." She said a memo was therefore circulated but that it was an old document intended to serve as a reminder and contained no new information or rules.

that would result in "at least a 30-day suspension or probable discharge." Berke "begged" Loos "not to carry on the investigation anymore" nor to take action against plaintiff who was an "excellent, outstanding surgeon" and a "very valuable physician" needed at both UCLA and Olive View. Rosenthal echoed Berke's entreaties, which Loos believed to be genuine based on Berke's "emotional" tone.[12]

After Loos's investigation was transferred to Young, UCLA continued to support plaintiff. Because plaintiff "was an important witness to us in the Head case," Reed was "very concerned about there not being anything that would look like retaliation; and that UCLA should not participat[e], cooperate, or coordinate in any way in [the County's] investigation other than doing that which [it was] required to do under the affiliation agreement, which [was] to produce documents . . . ." Reed told Rosenthal that "to the extent the relationships that Dr. Rosenthal or his colleagues had with their counterparts at the county could be helpful, [Reed] would appreciate it if they would communicate to the county that [the investigation] was problematic . . . and it would be helpful if they would cut it out." In September 2011, Berke told Thompson he felt Olive View's treatment of plaintiff was "punitive" and "should have been settled or finished by now . . . ." Berke wanted to discontinue UCLA's affiliation with Olive View, and he looked for alternative placements for plaintiff.[13] That same month, Busuttil asked

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[12] This phone conversation was the only time Berke and Loos ever spoke.

[13] In internal communications with other UCLA faculty, Berke expressed some frustration with plaintiff and his situation,

Thompson whether they "could come to an end of the investigation" as it was "time for closure."

In mid-December 2011, the County gave plaintiff a Notice of Intent to Discharge him, which was drafted by Young and signed by Olive View's CEO, Carolyn Rhee (Rhee). The notice stated that the County's investigation was prompted by an "anonymous complaint" received by Loos in 2010 that "included copies of UCLA's surgery schedules."[14] It described the 19

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even as he showed unwavering support in his dealings with the County. In August 2011, Berke told a colleague plaintiff was "emotionally unstable and rather immature" and Berke was "a little tired of" having to "spen[d] a tremendous amount of effort over the years covering up for [plaintiff's] indiscretions on numerous fronts." Berke went on to state that plaintiff "took advantage of his situa[t]ion [at Olive View] and doesn't want to face the music." In September, after plaintiff wrote Busuttil while Busuttil was on vacation to complain about the investigation, Berke told Busuttil plaintiff was "on the war path," that they could talk about the matter once Busuttil returned from abroad, and that it was "not worth worrying about . . . ." After Busuttil asked Thompson to end the investigation, Berke told Busuttil it was "doubtful" the County would listen to him and that while plaintiff wanted to leave Olive View, "nobody [at UCLA] wants him at their facility."

[14] The record contains scant support and, in fact, many indications to the contrary, that anyone made an anonymous complaint against plaintiff or that UCLA operating room records were sent to the County unbidden. Loos said he never received or heard anything about an anonymous complaint, and he provided detailed testimony on why he decided to investigate plaintiff and how he obtained records from UCLA. Young testified she was "wrong" to call the complaint anonymous. She said when Loos provided her information about the case, he told her he had

violations, attached supporting documentation, and summarized investigatory findings gleaned from various interviews and communications with plaintiff and others. As grounds for discharge, the County accused plaintiff of falsifying timecards, falsifying or misrepresenting records, and violating the County's physician time-reporting policy.

After the County provided the notice to plaintiff, Berke asked Mitchell Katz (Katz), the Director of DHS, to intervene and impose a less severe punishment. Berke described plaintiff to Katz as "an excellent surgeon, teacher and administrator" at Olive View and opined that "much of the time card irregularities discovered were due to a misunderstanding between [plaintiff] and his supervisor Dr. Jesse Thompson over how 'administrative time' at UCLA must be spent and how to properly fill out his timecards. Terminating [plaintiff] from the county will be devastating for our teaching program, Olive View Med Center and of course [plaintiff]." Katz, who did not know Berke, responded that all he could do was recommend plaintiff appeal. Around the same time, UCLA Dean of Faculty Affairs Dr. Jonathan Hiatt asked the Chief Medical Officer of DHS "if there would be any possibility for [plaintiff] to keep his job . . . ."

The County, in a decision made by Rhee based on her independent evaluation of Young's findings, terminated plaintiff on February 2, 2012. Rhee concluded, consistent with Young and Loos, that there were "19 separate instances where [plaintiff]

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received the operating room records "anonymously." It can be reasonably inferred that Young misunderstood Loos, especially considering that the records were "anonymous" insofar as Loos described the patients' names as being "blacked out" when he received the records.

submitted time records to the County reporting full-time work hours at [Olive View], when in reality he was performing surgeries at UCLA in his private practice, earning substantial outside income on County hours." The Notice of Discharge was largely identical to the Notice of Intent to Discharge, including its reference to the "anonymous complaint" and the County's conclusion that plaintiff had been "dishonest when [he] indicated on [his] signed time card that [he] performed duties for the County during time periods in which [he was] performing duties for UCLA." While Rhee could have recommended a lesser penalty, she chose not to do so because she believed Young "met the burden of proof." For that same reason, Rhee said she would have signed the termination letter even if she knew the statement about the "anonymous complaint" was false. Rhee asserted she knew nothing about plaintiff until she received the Notice of Intent to Discharge, and did not know Head, Wang, or Berke. Rhee was unaware of Head's allegations against the Regents or that plaintiff claimed he had been treated adversely on account of his support for Head until December 29, 2011, when Rhee received a letter from plaintiff's counsel.

Although Thompson may have initially agreed with plaintiff's investigation by Loos, he supported plaintiff generally, was not involved in the decision to terminate him, and "didn't want it to happen." Berke expressed a slightly contrary view, concluding plaintiff "did nothing wrong," "totally got fucked" by Thompson, and hoped plaintiff would find a way to get back at the Thompson and the County.[15]

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[15] Berke made these statements to Head in an April 2013 phone conversation. He also told Head the County might have treated plaintiff less harshly if he had been "a little more

After plaintiff's termination, armed security escorted him from Olive View. Young prepared a note that was placed on top of his personnel and performance management files: "EMPLOYEE DISCHARGED FOR DISHONESTY AND TIMECARD FRAUD DO NOT RE-HIRE WITHOUT FIRST CONSULTING WITH DHS HUMAN RESOURCES Performance Management Section." Ponce said within a day or two after plaintiff's discharge, she heard "rumors" at Olive View that plaintiff was let go for "double-dipping," "timecard fraud," and because he was "dishonest." Olive View employee Judy Reno said she also heard, on one occasion within a day of plaintiff's termination, unidentified employees saying plaintiff "was terminated 'for time card fraud.'" Plaintiff said word spread quickly about his termination at both Olive View and UCLA, leading him to believe that Katz, Thompson, Matevosian, and Berke were all disseminating information to others.

As soon as plaintiff left Olive View, the Regents offered him a new appointment as Director of Head and Neck Surgery at UCLA Santa Monica Hospital, with compensation equal to his previous annual salary with the County. When plaintiff complained he was not earning enough, the Regents gave him an additional $35,000 Z payment, which they continued to provide the following year. Ultimately, plaintiff earned $150,000 more from the Regents in 2012 than in 2011, and over $65,000 more in 2013 than in 2012. Between 2011 and 2013, his total

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contrite," particularly given that "[e]verybody at the school, at the university, [was] trying to . . . get him out of that."

compensation grew by approximately 60 percent.[16]

B. Procedural History

In September 2012, plaintiff sued the Regents for retaliation and discrimination, and he sued the County for retaliation, wrongful termination, and defamation.[17] Plaintiff alleged that because he supported Head's discrimination claims after witnessing Wang's mistreatment of Head and the "gorilla slide" and because he complained about discrimination by Berke, the Regents discriminated and retaliated against him by instigating the County's investigation into his timecards, threatening his UCLA position, reducing his number of patient referrals, inducing others not to work with him, and generally ostracizing him. Plaintiff alleged the County retaliated against him by launching the timecard investigation as a means of performing UCLA's "'dirty work'" in response to plaintiff's support for Head and defamed him by telling others it had discharged him for committing timecard fraud, which he did not do.

More than a year later, plaintiff moved for leave to amend his complaint to add Berke as a defendant and additional causes of action. The court denied plaintiff's motion on the grounds it "was an improper attempt to try [Head's case against the

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[16] Plaintiff asserts that his increase in compensation since leaving the County is misleading because he must now pay substantially more out of pocket to receive comparable benefits.

[17] Plaintiff voluntarily dismissed his wrongful termination cause of action against the County in September 2013.

Regents] in this matter[,] . . . that the Plaintiff had lacked diligence in seeking to amend the complaint, that the proposed amendment would delay discovery and trial, and that allowing the amendment would be prejudicial to defendants and Dr. Berke . . . ." In March 2014, plaintiff filed a separate complaint against Berke for violations of whistleblower statutes set forth at Health and Safety Code section 1278.5 and Government Code section 8547. The new complaint was apparently comprised of allegations and causes of action that plaintiff had unsuccessfully sought to add to his existing complaint against defendants.

Defendants individually moved for summary judgment. The County contended plaintiff's retaliation claim against it was meritless because he could not show a causal connection between his support for Head's lawsuit and his termination by the County, nor could he show the County initiated the timecard investigation as a pretext to retaliate against him. None of the County personnel who investigated and decided plaintiff should be terminated knew of Head's claims or plaintiff's involvement in that investigation and lawsuit. And plaintiff's assertions that the investigation was unfounded or suspect, or that other physicians filled out their timecards in the same manner with impunity, did not support an argument for pretext absent any indication of retaliatory motive. Plaintiff's defamation claim was also without merit, argued the County, because he could not show the County published any untrue, defamatory statements and any statements it did make were privileged under Civil Code section 47. The Regents contended plaintiff could not establish a prima facie case against it for either retaliation or discrimination: not retaliation, because plaintiff could not show the Regents subjected him to an adverse employment action or show a causal connection between protected activity and an adverse

employment action, and not discrimination, because plaintiff could not show he suffered an adverse employment action and the facts did not imply any race-based discrimination against plaintiff.

In opposition to defendants' motions, plaintiff contended the evidence showed protected conduct, adverse employment actions, and causation in support of his retaliation claims: after Berke and others at UCLA learned of his role in Head's discrimination suit and after he complained of retaliation, he was discharged by the County and mistreated by UCLA, where colleagues threatened to report him to the Medical Board, denied him resident coverage during his surgeries, reduced his number of patient referrals, and otherwise ostracized him. Plaintiff argued that both causation and retaliatory animus were inferable from the temporal proximity of events and facts showing (1) Berke had power over plaintiff's County position, (2) the timecard investigation was unfounded, and (3) UCLA lacked legitimate reasons for mistreating plaintiff. Plaintiff further argued his associational discrimination claim against the Regents was triable on the same bases as his retaliation claim and that the County had no affirmative defenses to his defamation claim, which was supported by facts showing County employees made false, malicious statements to others about plaintiff being "dishonest" and committing "timecard fraud."

After issuing a tentative ruling in favor of defendants on all of plaintiff's causes of action, the trial court held a hearing on the motions. Plaintiff argued there was evidence Berke had a retaliatory motive against him because Berke's statements in support of plaintiff could plausibly be viewed by a jury as lies: Berke's text to plaintiff stating "no big deal helping [Head]"

followed by "I promise you're going to be fine with the county hassles" was a "threat" that Berke could control the County's timecard investigation if plaintiff continued to support Head; Berke's statement blaming Thompson for plaintiff's termination was inferably deceptive given evidence that "nobody at the County wanted [plaintiff] fired"; and Berke's other support of plaintiff was undermined by his statement that nobody wanted plaintiff to work at their facility. Plaintiff argued there was also evidence of Berke's hand in the County's timecard investigation: there was the e-mail in which Fawzy told Busuttil to have Berke retrieve the operating room logs and there was the fact that the investigation was "reopened" after being "resolved" in April 2011. Plaintiff contended still other facts suggested pretext as well: there was conflicting evidence as to whether the County began its investigation on the basis of an "anonymous complaint," and the investigation itself was groundless, with plaintiff being "singled out" despite completing his timecards in the same fashion as his colleagues.

Defendants disputed plaintiff's characterization of the record, emphasizing that the strength of the County's timecard investigation was "irrelevant" because there was no connection between Young, who recommended plaintiff be discharged after investigating his timecards, and plaintiff's role in Head's lawsuit. In addition, there was no evidence Berke provided the operating room logs to the County or that he influenced anyone at the County to terminate plaintiff, and plaintiff's allegations of mistreatment by his UCLA colleagues did "not rise to the level of retaliatory conduct[.]"

The court was unpersuaded by plaintiff's arguments, finding nothing in the record to indicate that Berke's statements

in support of plaintiff were deceptive or motivated by retaliatory animus or that Berke "initiated [the timecard] investigation, encouraged [the] investigation or had anything whatsoever to do with the outcome of the investigation." Nor did the court see any other link between plaintiff's role in Head's discrimination case and the County's timecard investigation: the County received UCLA operating room logs in accordance with the Affiliation Agreement, and those logs showed plaintiff was "in the O.R. at U.C.L.A. when he's submitting time records saying he's at Olive View." The court noted that plaintiff's allegations of adverse treatment by the Regents were belied by his deposition testimony and other facts in the record, which showed the Regents had promoted plaintiff, he was now earning "in the 600 thousands" compared to the "300 thousands" when the County terminated him in 2012, and he could not articulate how his colleagues' ostracism and other alleged mistreatment had harmed him.

In its written ruling, the court concluded plaintiff could not establish a prima facie case of retaliation against the County because the facts did not support a causal connection between plaintiff's discharge by the County and his support for Head: Loos's investigation of plaintiff's timecards ended in September 2010, months before Berke began inquiring about plaintiff's role in Head's discrimination case. The court further found the record revealed no indication that the Regents improperly influenced the County's investigation of plaintiff or that the County's stated reason for discharging him was pretextual. The court emphasized that even if the County's decision to terminate plaintiff was wrong or unduly severe in light of prior practice, such decision did not raise an inference of pretext absent evidence—which was not present—the County was actually

motivated by retaliation. The court also ruled the County was entitled to summary judgment on plaintiff's defamation claim because any statement along the lines of plaintiff being discharged for misconduct was true and plaintiff could point to no admissible facts showing that a County employee made any untrue, defamatory statement about plaintiff to a third party.

The court granted summary judgment for the Regents on plaintiff's retaliation claim because the County's discharge of plaintiff was not retaliatory and the other acts of which plaintiff complained either had no effect on his career or constituted mere social ostracism that was not severe or pervasive enough to be deemed adverse employment actions. Based on its finding regarding adverse employment actions, the court concluded there was no triable issue regarding plaintiff's associational discrimination claim.

In connection with its grant of summary judgment for defendants, the trial court ruled on nearly 250 evidentiary objections raised by the parties. The court expressly declined to consider facts and arguments raised by plaintiff that were not encompassed by the complaint or set forth in his separate statement of undisputed facts.

II. DISCUSSION

Plaintiff's theory is that Berke wanted to punish him for supporting Head and contributing to the rumor that Berke and Wang were having an affair. Berke did so by instigating the County's baseless timecard investigation, persuading other high-level UCLA personnel, namely Busuttil and Rosenthal, not to support plaintiff with the County, and ultimately recommending

the County terminate plaintiff.[18] Plaintiff's colleagues at the County did not want to terminate him and only did so because of UCLA's influence. If UCLA had genuinely supported plaintiff, it would have ended the Affiliation Agreement. After plaintiff's support for Head's lawsuit became widely known in 2012, other UCLA colleagues began ostracizing and mistreating him as well. Because the timecard investigation was meritless, the County's statements regarding plaintiff's termination for "fraud" and "dishonesty" were defamatory.

On appeal, plaintiff argues the trial court improperly weighed the evidence, which contained disputed issues of fact as to whether the County's reason for terminating plaintiff was a cover-up for retaliation at Berke's direction. Such triable issues included whether plaintiff actually violated the County's timecard policies, whether he was unduly singled out and penalized for irregularities that were subject to less or no discipline when done by others, what prompted the investigation in the first place, and whether retaliation was inferable from Berke's control over plaintiff's County position combined with evidence of Berke's retaliatory motive. Plaintiff argues the court improperly responded to evidence of Berke's motive by erroneously sustaining certain objections by defendants and by otherwise accepting Berke's statements "'at face value.'" Plaintiff further contends the court erred by failing to consider evidence plaintiff engaged in protected conduct prior to 2011, by concluding that plaintiff's protected conduct occurred after the

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[18] Plaintiff argues a factfinder could reasonably infer that Berke recommended plaintiff be terminated to Katz, who influenced DHS's Director of Human Resources, who influenced Rhee, the final decision maker.

timecard investigation was finished, and by declining to consider allegations raised in plaintiff's 2014 action against Berke. Plaintiff also asserts the court erred in dismissing his discrimination claim against the Regents by failing to apply the "deterrence test" in determining whether the Regents subjected plaintiff to adverse employment actions. As to his defamation claim against the County, plaintiff argues the court erroneously sustained objections to evidence supporting that claim, improperly found the County did not make any defamatory statements, and improperly found that any statements made by the County were true. Plaintiff also objects to approximately 70 evidentiary rulings of the trial court.

While plaintiff can establish he performed protected activity of which the Regents were well aware and that the County later subjected him to an adverse employment action, his ability to demonstrate triable issues on some of the elements of retaliation against each defendant does not add up to a full cause of action against either so as to avert summary judgment. Here, plaintiff adduces no evidence that County decision-makers knew of or were otherwise influenced by his role in Head's discrimination suit; without such support, plaintiff cannot establish an inference of causation between his support of Head and termination by the County. Plaintiff's other theories of liability fare no better.

A. Standard of Review

A party is entitled to summary judgment where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment

as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo, "considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) We evaluate the evidence and all reasonable inferences therefrom "in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

In deciding a summary judgment motion, the court may consider, among other things, the parties' arguments, written submissions including declarations, depositions, and statements of material facts the parties contend are undisputed, and matters subject to judicial notice[19] (Code Civ. Proc., § 437c, subd. (b)), with the court's review ultimately restricted to the issues raised in the pleadings (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493). A moving defendant succeeds by demonstrating the plaintiff cannot establish one or more elements of the plaintiff's cause of action (Code Civ. Proc., § 437c,

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[19] We granted plaintiff's request that we take judicial notice of his 2014 complaint against Berke. In so doing, we take notice of the complaint's existence but not the truth of any allegations set forth therein. (See, e.g., *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113 ["[a]lthough the *existence* of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable"]; *Magnolia Square Homeowners Assn. v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1056 [accepting truth of allegations in judicially noticed complaint would violate hearsay rule].)

subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at p. 853), which may be satisfied by showing "the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case . . . .' [Citation.]" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460) or by conclusively negating an essential element of plaintiff's claim (*Aguilar*, *supra*, at p. 854). If the employee in a FEHA discrimination or retaliation action establishes a prima facie case, the employer may seek to obtain summary judgment by showing it took adverse employment action against the employee for legitimate reasons "that would permit a trier of fact to find, more likely than not, that [such reasons] were the basis for the [adverse action]. [Citations.]" (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097-1098; see also *Guz, supra*, 24 Cal.4th at pp. 355-356.) The employee can defeat the employer's showing by pointing to evidence that would permit a trier of fact to find the employer's reason was pretextual or motivated by discriminatory or retaliatory intent. (*Guz*, *supra*, 24 Cal.4th at p. 356.) In other words, the plaintiff may succeed by ""produc[ing] admissible evidence which raises a triable issue of fact material to the defendant's showing."" (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344, italics omitted (*Arteaga*).)

B. The Trial Court's Evidentiary Rulings

Plaintiff challenges approximately 70 evidentiary rulings made by the trial court, including the court's decision not to consider materials plaintiff did not include in his separate statement and the court's apparent overruling of plaintiff's objection to defendants' reply papers.

The parties dispute whether our review of the trial court's evidentiary rulings is subject to a de novo or abuse of discretion standard, an issue our Supreme Court has not decided. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 (*Reid*) [declaring no need under the circumstances to "decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo"].) The weight of appellate court authority favors abuse of discretion review (*Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 143-144; *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1122 ["[e]very single Court of Appeal decision in the past one-half decade has applied the abuse of discretion standard of review in the summary judgment context to admissibility of evidence contentions"] (conc. opn. of Turner, J.)), but a Sixth District appellate court concluded that *Reid*'s "practical effect" obligated it to apply de novo review to all issues as to which the trial court decided summary judgment on the basis of papers alone (*Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451; but see *Rosenfeld v. Abraham Joshua Heschel Day School, Inc.* (2014) 226 Cal.App.4th 886, 902 [Second District appellate court continuing to apply abuse of discretion standard following *Reid*].) Here, it is immaterial which standard we apply because, after reviewing the rulings in question, we conclude (1) the trial court ruled correctly under either a de novo or abuse of discretion standard or (2) the ruling, if reversed, would not create a triable issue in plaintiff's favor.

C. Analysis

1. Plaintiff's retaliation claim against the County

Employers subject to FEHA may not "discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden [by the statute] or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (§ 12940, subd. (h).) To prevail on a claim of retaliation, the employee 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. [Citations.]" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) Protected activity includes "participating in an activity perceived by the employer as opposition to discrimination" and opposing a practice of the employer that the employee believes violates FEHA. (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 380-381.)

The trial court did not err in granting summary judgment for the County on plaintiff's retaliation claim because the record is not reasonably susceptible to a finding of causation between plaintiff's protected conduct—participation in Head's lawsuit and complaints about retaliation by Berke—and his termination by the County. The only causal basis linking one to the other is temporal proximity, which is insufficient to imply the County's decision was pretextual absent facts connecting that decision to animus on the part of UCLA. (*Arteaga*, *supra*, 163 Cal.App.4th at pp. 353-354 [while temporal proximity alone may satisfy prima facie case, it must be combined with "other evidence" to establish pretext after employer has supplied a legitimate,

nondiscriminatory reason for its adverse action].)

Plaintiff pointed to no facts by which a factfinder could reasonably infer Berke either prompted the County's investigation in the first place or otherwise influenced the County to terminate plaintiff. The record overwhelmingly indicates that the County began investigating plaintiff's timecards because of concerns raised by Loos, who did not know Berke and was unaware of Head's complaints against the Regents. Nor did Young, who took over the investigation from Loos, know plaintiff, Berke, or anything about Head's lawsuit. Even if there was some support for the notion that Loos commenced the investigation upon receiving an anonymous complaint, no facts in the record suggest that Berke was the one to have made such complaint. Furthermore, plaintiff overstates Berke's influence over the County generally. While Berke could and did provide input as to plaintiff's compensation and at which hospital he worked for the County, the record does not indicate that Berke exercised total control over such issues. It was the County, rather, that ultimately approved its employees' compensation and determined which physicians to hire at its hospitals.

While plaintiff can and does point to facts showing connections between Berke and other UCLA personnel and the County, those facts do not reasonably support a causal nexus between plaintiff's participation in Head's lawsuit and his termination by the County. Plaintiff's contentions that Berke and others at UCLA wanted him fired from the County are unsupported by the record. Not only were communications from UCLA to County personnel regarding plaintiff nothing but supportive of him, UCLA did the minimum required under the Affiliation Agreement to cooperate with the County's

investigation and, in Berke's case, resisted cooperating entirely.[20]

Although some internal communications between Berke and his UCLA colleagues are less enthusiastic, they at most suggest neutrality or frustration, not retaliatory animus. For example, Berke told Busuttil "nobody wants [plaintiff] at their facility" in the context of trying to place plaintiff at an alternative hospital, i.e., get him out of Olive View, in order to help plaintiff. Berke told Busuttil plaintiff's complaints about the investigation were "not worth worrying about" to assure Busuttil he could address the matter after returning from his vacation abroad. Berke called plaintiff "emotionally unstable and rather immature" and said plaintiff should have been more "contrite" with the County while describing the degrees to which Berke tried to help plaintiff, indicating frustration that plaintiff's own conduct had undermined Berke's support. When Berke's statements are considered in context, they lend no support to plaintiff's argument that Berke's advocacy for plaintiff was inferably implausible and should not be considered at face value. Likewise, the record provides no basis for plaintiff's argument that Berke's text message to him—"NBD (no big deal) with helping Chris [Head]. I promise you're going to be fine with the county hassles."—had an alternative, threatening meaning

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[20] The record does not support plaintiff's contention that Berke facilitated his termination through Katz (see *ante*, fn. 18). The only communication in the record between Berke and Katz, who did not know each other, documents Berke asking Katz to go easy on plaintiff. While it is true that Katz spoke to DHS's Director of Human Resources about plaintiff's investigation, he did so in order to ensure the County was "doing their process correctly" and not "singl[ing] out" plaintiff for "just sloppy timekeeping."

beyond what it signified on its face.[21]

Plaintiff's other arguments for retaliatory motive are also meritless. His contention that the County must have been influenced by UCLA because "nobody at the County wanted [plaintiff] terminated" is contradicted by the statements and conclusions of the County decision makers who actually caused plaintiff to be terminated, namely, Loos, Young, and Rhee. Similarly, his assertion that Berke was trying to cover himself by blaming Thompson for plaintiff's discharge is insupportable because Berke's statement was consistent with all other evidence of his beliefs and motivations. Plaintiff's argument that UCLA must have had a retaliatory motive because it would have canceled the Affiliation Agreement if it had genuinely supported him borders on the outlandish.

Nor do plaintiff's arguments in terms of the timing of events bolster his position. The record does not support plaintiff's contention that the County concluded its timecard investigation in April 2011 only to revive it after UCLA learned of plaintiff's role as a witness in Head's lawsuit. The only facts plaintiff points to in support of that assertion are two e-mails from April 14. In the first, plaintiff asks to meet with Busuttil

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[21] In essence, plaintiff argues that because Berke theoretically had a reason to feel ill will towards him—owing to plaintiff's roles in the rumor of Berke's affair and Head's lawsuit—all of his communications regarding plaintiff should be viewed as suspect. That position goes too far as it would essentially preclude summary judgment in any retaliation case where the employee's protected activity supplied the employer with any possible reason for hostile feelings toward the employee, regardless of whether any facts suggested the employer was actually motivated by hostility.

about Olive View. In the second, Busuttil forwards plaintiff's e-mail to Berke with the note: "What's this about. An Audit? I thought this was resolved?" Busuttil's e-mail, standing alone, does not support an inference that the County had actually concluded the investigation in or prior to April 2011. Although the record indicates plaintiff may have participated in protected conduct in 2009 or 2010, when he was interviewed in connection with Head's complaint about the alleged affair between Berke and Wang, that fact does not suggest the County commenced its investigation for retaliatory reasons absent facts implying a connection between Berke (or others at UCLA) and Loos.[22]

Even if plaintiff could establish a prima facie case for retaliation, the trial court properly granted summary judgment for the County because plaintiff could not point to evidence rebutting its legitimate reasons for his termination. "In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias." (*Guz*, *supra*, 24 Cal.4th at p. 356.) But merely showing ""that the employer's decision was wrong or mistaken"" is insufficient ""since the factual dispute at issue is whether [retaliatory] animus motivated the employer, not whether the employer is wise, shrewd, prudent, or

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[22] Plaintiff points to no facts suggesting the Regents knew about Head's 2004 EEOC report complaining about Wang or plaintiff's mention as a witness in it. Head did not file a formal complaint based on the report and did not mention it in his own complaint against the Regents. Nor did plaintiff tell anyone at UCLA he was mentioned in the report. Thus, plaintiff's role in Head's 2004 complaint does not constitute protected conduct. Plaintiff's assertion that Wang and Berke must have known about the report is mere conjecture without foundation.

competent. . . . Rather, the [employee] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' . . . and hence infer 'that the employer did not act for the [asserted] non-discriminatory reasons.'" [Citation.]" (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216; see also *Arteaga*, *supra*, 163 Cal.App.4th at p. 344 [under FEHA, an employer has the "'right to interpret its rules as it chooses, and to make determinations as it sees fit under those rules,'" which may include "'fir[ing] an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason'"].)

Here, plaintiff attempted to poke holes in the foundation underlying the County's decisions to investigate and terminate him, but the record bears no reasonable inference that the County's actions were pretextual. The facts show, at most, that the County's decision was unduly harsh. There is no dispute that plaintiff submitted timecards that, on their face, indicated he was working at Olive View while he was performing surgery at UCLA, and that such timecards manifested violations of County policy. The record also shows that Loos initiated the investigation of plaintiff, and not other physicians who may, according to plaintiff at any rate, have similarly misreported their time, because plaintiff's Z payments were far larger than his colleagues'. Thus, the County not only offered a legitimate reason for terminating plaintiff but also a legitimate basis for "singling him out" to investigate. Plaintiff could not point to evidence implying such decisions were a cover-up for

retaliation.[23] That the County did not alter its decision to discharge plaintiff based on his proffered explanations for the improper timecards—a misunderstanding of how to record his time and reliance on an assistant—or his assertions that his practices were no different from his colleagues', does not reasonably support a finding that the investigation and termination were therefore inexplicable or implausible so as to suggest a cover-up for an unlawful motivation.

2. Plaintiff's retaliation claim against the Regents

The trial court did not err in granting summary judgment for the Regents on plaintiff's retaliation claim. As set forth in our discussion on retaliation by the County, the record manifests no triable issues as to whether the Regents, motivated by retaliation, caused plaintiff's termination by the County.

Plaintiff's other allegations of mistreatment by the Regents do not constitute actionable adverse employment actions, which must "materially affect the terms, conditions or privileges of employment," (*Yanowitz*, *supra*, 36 Cal.4th at p. 1036) such as by

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[23] Plaintiff makes much of the fact that Young admitted to "oversights" in her investigation. Young's explanation of such "oversights"—neglecting to identify one of the relevant dates when asking Newsom to verify plaintiff's operating room schedule, mischaracterizing the "anonymous complaint," and unintentionally writing "January" instead of "March" when otherwise describing one of the March timecards in the Notice of Discharge—do not support plaintiff's position that the investigation was therefore pretextual. None of the issues Young identified were purposeful or placed into question the validity of the County's findings.

"adversely and materially affect[ing] an employee's job performance or opportunity for advancement in his or her career."[24] (*Id.* at p. 1054.) Because retaliation claims "are

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[24] Plaintiff argues, in challenging the trial court's ruling on his associational discrimination claim, that the court should have applied the "deterrence test" rather than the "materiality test" to determine whether the Regents subjected him to an adverse employment action. This argument properly applies not to plaintiff's discrimination claim but to his retaliation claim, which is why we address it here. Suffice it to say from our citation to *Yanowitz*, we find plaintiff's argument unconvincing. "Under the deterrence standard, a sanction or adverse measure to which an employee is subjected in retaliation for protected conduct is actionable so long as the employer's action is 'reasonably likely to deter employees from engaging in protected activity.' [Citation.]" (*Yanowitz*, *supra*, 36 Cal.4th at p. 1050, fn. 8.) In 2005, our Supreme Court expressly rejected applying the deterrence test to FEHA retaliation claims, concluding that the more stringent "materiality test," whereby "an employer's adverse conduct must materially affect the terms and conditions of employment," should apply instead because FEHA discrimination claims were subject to the materiality test and the Legislature gave no indication it intended to offer more protection to claimants of retaliation than discrimination. (*Yanowitz*, *supra*, at pp. 1050, 1051 & fn. 9.) The following year, the United States Supreme Court held the deterrence test applied to retaliation claims brought under title VII. (*Burlington N. & S. F. R. Co. v. White* (2006) 548 U.S. 53.) The trial court committed no error. It, and we, must continue to apply the materiality test adopted in *Yanowitz*, both because "the federal courts' interpretation of the comparable provisions of title VII is not determinative of the proper interpretation of the provisions of the FEHA" (*Yanowitz*, *supra*, at p. 1051) and because the decisions of our Supreme Court "are binding upon and must be followed by all the state

inherently fact-specific," whether the employer's conduct qualifies as an adverse employment action depends on the "unique circumstances of the affected employee as well as the workplace context of the claim." (*Id*. at p. 1052.) "Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as affecting the terms, conditions, or privileges of employment . . . ." (*Id*. at p. 1054.) Conduct does not constitute an adverse employment action simply because it is "'contrary to the employee's interests or not to the employee's liking . . . .'" (*Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357, citation omitted.)

Plaintiff conceded in his deposition that his practice had not suffered because of changes in how his colleagues treated him. While he found it "disturbing" that he no longer got referrals for "certain types of cases," he "[could] live with it" because his practice was "extremely busy," "very lucrative," and he could "barely keep up with it." It is undisputed that after the County terminated plaintiff from his position as chief of Head and Neck Surgery at Olive View, the Regents named him director of Head and Neck Surgery at UCLA-Santa Monica Hospital and dramatically increased his compensation.[25]

Nor was plaintiff's employment harmed in other ways.

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courts of California" (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

[25] There are no facts in the record to support plaintiff's claim that Berke or others at UCLA awarded him this new position or additional compensation in order to buy his "loyalty and silence" in the Head case.

UCLA never recommended that he be reported to the Medical Board, and plaintiff offered no evidence that its initial intent to do so had harmed him professionally or otherwise. He acknowledged that the alleged threat to the sales representative lest he do business with plaintiff had no effect as the representative continued to provide products to plaintiff without any issues. Even though Mendelsohn refused to proctor plaintiff in robotics, another physician did so. Plaintiff had begun receiving "more steady resident participation," with facts in the record indicating that the earlier lack of residents was a widespread issue not confined to plaintiff—"a simple mathematics problem" caused by too few residents for the number of surgeries taking place[26]—and that the problems were essentially resolved once a "very hands-on" residency director took over resident assignments.

Plaintiff's other allegations of mistreatment are trivial or unsupported by the record. As to colleagues who reportedly shunned him, plaintiff admitted he continued to talk with Blackwell, consulted with Nabili on cases, and otherwise "[kept] to [him]self" without ever seeking consultations with Suh, Mendelsohn, or Berke. Plaintiff reported that other colleagues treated plaintiff no differently after his involvement in Head's lawsuit became known and that plaintiff continued to have cordial relations with them. In addition, when Sachs informed

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[26] Plaintiff acknowledged there was an "understanding - - that you can't always get a resident. . . . Sometimes they're not available." He admitted there was only one resident assigned to the entire Head and Neck Department at UCLA-Santa Monica Hospital from 2010 to mid-2013 and that he began receiving more resident support in early- to mid-2012.

Berke plaintiff was complaining about hostile treatment by his coworkers, Berke told plaintiff's colleagues "to be professional with [him]." (Cf. *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 213 [holding "an employer may be held liable for coworkers' retaliatory conduct if the employer knew or should have known of the coworkers' retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct"].) Plaintiff conceded that the assistant who scheduled him for surgery while he was on vacation did so unintentionally, and he provides no basis for a factfinder to conclude that someone stealing his lab coats materially and adversely affected his career.

Even when viewed collectively (see *Yanowitz*, *supra*, 36 Cal.4th at p. 1055 [retaliatory acts may be considered as "a series of subtle, yet damaging, injuries"]), plaintiff's allegations still fail to qualify as an adverse employment action because they did not amount to a material change in plaintiff's terms, conditions, or privileges of employment. The record does not indicate that any mistreatment by plaintiff's colleagues had a material, detrimental impact upon his finances, career advancement, or effectiveness as a surgeon and faulty member. Although plaintiff states generally that his colleagues' actions caused him to suffer emotional and psychological damage, he does not articulate any particular adverse effects and acknowledges he did not seek any medical treatment, medication, or other services for such complaints. "[A] pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment" (*id.* at p. 1054 & fn. 13), and any hostile conduct by plaintiff's colleagues, even when viewed in totality, was not so "severe or pervasive" that it,

in itself, qualified as an adverse employment action (*id.* at p. 1056, fn. 16).

3. Plaintiff's associational discrimination claim against the Regents

An employee may sue his or her employer under FEHA for discrimination based on the employee's association with a member of a protected class, such as race. In order to establish a prima facie case of direct racial discrimination, an employee must generally show "'(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive.' [Citations.]" (*Horne v. District Council 16 Internat. Union of Painters & Allied Trades* (2015) 234 Cal.App.4th 524, 534.) In an associational discrimination claim, the plaintiff employee must show he or she was associated with or advocated for a member of a protected class. (See *Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876-877.)

Because plaintiff could not show an adverse employment action by the Regents in support of his retaliation claim, his associational discrimination claim necessarily fails as well. Furthermore, the record is not amenable to inferences that plaintiff was discriminated against because of his association with an African American. Plaintiff stated there was "no problem" with him being Head's friend on account of Head's race and that he was not treated differently because he performed research with Head. He said Berke's behavior toward him changed only after Berke learned of his and Head's involvement

in the rumors about Berke's alleged affair with Wang and his other colleagues' mistreatment arose after the Wave article was published. Neither circumstance, without more, suggests a racially discriminatory motive.

4. Plaintiff's defamation claim against the County

"The tort of defamation 'involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.' [Citation.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) Plaintiff asserts it was defamatory for Young to draft and place the statement he was terminated "for dishonesty and timecard fraud" in his personnel file, where it was available to anyone having access to the file. He contends that Katz, Thompson, Matevosian, and Berke also defamed him by publishing and republishing the statement that plaintiff was "dishonest" and "committed timecard fraud." Such statements were false, plaintiff contends, because the reason for his discharge was false: he never committed timecard fraud. While plaintiff lacked direct knowledge that any County employee actually circulated any statements about his termination to others, he argued they must have done so because numerous people at the County and UCLA knew details about his discharge.[27]

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[27] Plaintiff admitted he had no information that Katz had communicated anything to anyone regarding his investigation or termination and believed Katz defamed him solely because Katz "[ran] the organization." He also admitted having no knowledge that Matevosian spoke to anyone about his termination. He claimed to have seen e-mails by Thompson to UCLA personnel

The trial court did not err in granting summary judgment on plaintiff's defamation claim because plaintiff could not show the County published any particular statements about his termination and, to the extent the evidence suggests any statements were published, it also shows that such statements were true. Regarding publication, plaintiff pointed to no facts showing that any particular person at the County circulated any particular statement about his termination. There is no evidence that the note in his personnel file, a copy of his Notice of Discharge, or any other documents regarding his termination were distributed to anyone. The only evidence of statements being circulated about plaintiff's termination come from the testimony of Ponce and Reno, who heard others saying plaintiff was terminated because he committed timecard fraud and was dishonest. To the extent such statements provide evidence of publication, they were not defamatory because they were not false: the County terminated plaintiff for timecard fraud and dishonesty. That plaintiff contests the grounds for those findings by the County does not negate the truthfulness of the statements.

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about his investigation and discharge but stated he could not describe them because they were privileged. Nor did plaintiff have knowledge that Berke (who was not a County employee, of course) disseminated defamatory statements about plaintiff's termination to anyone. His basis for accusing Berke of defamation was that Berke was a "proven liar" who "wanted [plaintiff] fired from the County" and was "[t]he only person with an incentive to discredit [plaintiff]." Apart from the County's notices of termination and its intent to terminate, and the statement placed in plaintiff's personnel file, the record contains no documents in which any County or UCLA employee discusses why plaintiff was terminated.

DISPOSITION

The judgment is affirmed. The Regents and the County are to recover their costs on appeal.

KRIEGLER, J. *

We concur:

BIGELOW, P.J.

GRIMES, J.

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* Associate Justice of the California Court of Appeal, Second Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.