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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

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| MARTHA PALMA,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>RITE AID CORPORATION,<br><br>Defendant and Respondent. | B280445<br><br>(Los Angeles County Super. Ct. No. BC465411) |

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

Shegerian & Associates, Inc., Carney R. Shegerian and Jill P. McDonell for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Robert H. Platt, Benjamin G. Shatz, and Alison S. White for Defendant and Respondent.

Martha Palma (appellant) appeals from a judgment entered following a jury trial on her claims of discrimination and harassment against Rite Aid Corporation (RAC). The jury found in favor of RAC on all of appellant's claims, and the trial court entered judgment accordingly. The court then denied appellant's motion for new trial. Appellant makes two primary arguments on appeal: (1) prejudicial juror misconduct, and (2) error related to the jury's determination that appellant failed to exhaust administrative remedies on two causes of action.

Finding no reversible error, we affirm the judgment.

## FACTUAL BACKGROUND

### Appellant's work history

RAC hired appellant as a cashier in 1986. In 2004, she rose to the position of store manager. In June 2009, appellant became store manager at a high volume Highland Park store. Appellant's salary increased as the Highland Park store had double the sales of her previous store.

At the time of her transfer to the Highland Park store, appellant's District Manager (DM) was Brad Lohman. DMs conducted regular inspections at Christmas, followed by back-to-normal inspections in January, and walk-through visits throughout the year. The Highland Park store passed the Christmas 2009 inspection after appellant had begun working there. However, Lohman gave appellant a highly critical assessment in January 2010. Lohman noted that appellant had poor accountability and placed blame on her assistant manager. Lohman gave appellant varying ratings between January 30, 2010 and July 30, 2010. In May 2010, Lohman again noted problems in the Highland Park store. However, he rated appellant overall as competent.

In September 2010, Jilbert Shahdaryan replaced Lohman as appellant's DM. Shahdaryan met with Lohman as part of the

transition process, and they reviewed some of appellant's performance problems that Lohman had noted.

Shahdaryan also visited the stores in his district, and noted that appellant's store continued to be in poor shape in September 2010. On September 7, 2010, Shahdaryan met with appellant and gave her three weeks to complete an action plan to improve her store's condition. Appellant was provided extra personnel during this time, which Shahdaryan did not charge against her labor budget. Shahdaryan visited appellant's store three times during the three-week period. On September 24, 2010, Shahdaryan told appellant she had one more week to improve the store's condition, or he would issue a write-up. Appellant did not complete the action plan. Shahdaryan began drafting a write-up to present to appellant.

**Appellant's disability and first leave of absence (LOA)**

Appellant has rheumatoid arthritis (RA). She first noticed signs of RA in summer 2008. She felt pain in her arms and had trouble getting ready in the morning. Appellant informed Lohman about her condition, when he saw her wearing a brace on her swollen hand. By early 2009, the condition made it more difficult for appellant to perform her job, as she had to lift and move shelves, get merchandise from high above, and lift heavy objects. By July 2010 when Lohman was no longer her DM, appellant was in a lot of pain, often wearing braces on both hands. She had difficulty getting out of bed and grooming herself, and she used a walker.

By September 2010, when Shahdaryan became her supervisor, appellant was working 12- to 15-hour days and the pain was intolerable. RAC employees could see physical changes in appellant, such as her difficulty walking. Appellant's treating physician diagnosed appellant's RA in late 2010 based upon

multiple joint pain, swelling and stiffness, blood tests and x-rays showing damage and erosion to her joints.

At her first meeting with Shahdaryan, appellant tried to explain her condition to him. However, Shahdaryan became upset and impatient with her. In September 2010, appellant told Shahdaryan that she was having a difficult time because of her condition and lack of staff. Shahdaryan recalled that appellant told him of back pain and expressed difficulty with lifting. Shahdaryan told her to delegate. Appellant did not hide her condition. Shahdaryan saw her wearing braces, hunched over, moving slowly and crying in pain.

Appellant took a medical LOA from September 29, 2010 to November 1, 2010, prior to her RA diagnosis.

**Return to work and first write-up**

On October 26, 2010, Shahdaryan audited appellant's store. He rated it red/failing overall and in six specific areas.

On November 2, 2010, appellant returned to work. Shahdaryan then issued the write-up he had started drafting in late September 2010, prior to appellant's LOA. The write-up addressed nearly identical issues initially raised by Lohman in January 2010.

After her LOA, appellant told Shahdaryan about her condition during a store inspection. She also spoke with human resources manager Carlos Viramontes and DM assistant Maria Gomez about her condition. Shahdaryan denied that he knew the cause of appellant's medical LOAs.

**Second LOA**

From November 12, 2010 to November 29, 2010, appellant took a second LOA. During this second LOA, appellant was diagnosed with RA. After her second LOA, appellant was given pain medication and cleared to return to work without restrictions. Appellant admitted to feeling much better and could

perform her job duties. However, her hands and feet were still swollen, and she was not able to bend one knee. Appellant continued to work 10- to 12-hour days. Other than the two leaves of absence, appellant did not ask RAC for any other accommodations.

**Communications between appellant and Shahdaryan**

Appellant testified that Shahdaryan treated her horribly and had a hostile relationship with her from the time that Shadaryan became her DM in 2010. He made mean and humiliating comments, such as "aren't you embarrassed? . . . walking like that." He constantly told her to hurry, and that she was too slow. Shahdaryan commented that appellant was too sick to work and that her disability was making her incompetent.

Shahdaryan testified that he continually tried to help appellant throughout this time. He provided her with additional employees and additional work hours to improve the store to meet company standards. He also extended store inspection deadlines to give appellant more time to prepare her store for upcoming inspections.

**January 2011 inspection**

The post-Christmas back-to-normal inspection scheduled for January 13, 2011, was appellant's last major inspection by Shahdaryan. Appellant had employees come in early in the morning starting on January 10, 2011. On January 13, 2011, appellant had additional employees come in at around 3:00 a.m. to prepare for the inspection: Mary Floyd, Patrisia Respardo, Xochitl Rojas-Alvarado and Monica Sanchez. Appellant testified that she had worked these employees in to her labor budget. Because Rojas-Alvarado's car had broken down, appellant gave her a ride into work. Amy Olivares and Jason Casal also reported to work in the early morning of January 13, 2011. Appellant's store received an overall score of 71.5 percent.

Appellant stated that a passing score was 70 percent, but Shahdaryan stated that 75 or 80 percent was passing.

Appellant instructed Rojas-Alvarado, Olivares and Casal not to clock in or out on January 13, 2011. Appellant told Casal that she would make up the four hours he worked off the clock on January 13 by checking him in two hours before he came to work on two later shifts. Appellant approved the time records for Rojas-Alvadaro, Olivares, and Casal later that day even though none of them recorded time for the morning hours of January 13, 2011.

Asking employees to "work off the clock" is a serious violation of RAC policy, as well as California's wage and hour laws. Working off the clock occurs when an employee works without clocking in or out, regardless of whether the time is paid for by overpayment on subsequent shifts. RAC regularly advises its supervisors that asking employees to work off the clock is an offense that can lead to employment termination. Appellant was aware of these policies.

**RAC investigation of employees working off the clock**

On January 28, 2011, Chris Wade from RAC's loss prevention department visited the Highland Park store to conduct an unrelated investigation regarding another employee. While at the store, Wade asked Casal, the Assistant Store Manager, why the stockroom was in such disarray. Casal mentioned to Wade that he had come in on his day off to try to improve the condition of the stock room. Because appellant was following Wade and making it difficult for them to talk freely, Wade decided it would be best to continue the conversation in a different setting. However, Casal's statement to Wade that he had worked on his day off triggered an investigation.

An unwilling subpoenaed witness, Brandon Spencer had worked as an assistant manager under Shahdaryan when

Shahdaryan was an assistant manager at the Highland Park store for two years. Spencer testified that he had worked off the clock with some frequency, and Shahdaryan had told him not to get caught. Shahdaryan knew Spencer was working those hours but did not pay him. Spencer continued working off the clock when appellant became GM, and when she realized, she told him she would fire him if he did not stop and made sure he got paid for every hour he worked. Spencer testified that working off the clock was necessary because they did not have the staff to get done what needed to be done.

On February 11, 2011, appellant wrote an email to Shahdaryan, stating:

> "[A]re you trying to fire me? . . . I need to know if I need to start looking for another job. It is very sad that you know that it is impossible to run this store with the hrs that we have and all you do is pressure me more and more, I am so stressed out . . . I don't [*sic*] 7k to run the store or you know what you had with Brandon."

Shahdaryan responded to appellant that he was not trying to fire her, and instructed her to choose her words carefully.

Three days later Shahdaryan gave appellant the first final written warning in her RAC career.

Wade then scheduled a meeting with Casal for February 21, 2011. Wade informed Shahdaryan of the meeting, which Shahdaryan attended. At the February 21, 2011 meeting, Casal provided a series of written statements explaining which employees appellant had asked to work off the clock on the morning of January 13, 2011. Casal identified Olivares and Rojas-Alvarado as employees who had worked with him that

morning.[1] The time records for the Highland Park store for January 13, 2011, were printed out for the meeting. The time records confirmed that Casal, Olivares, and Rojas-Alvarado were not scheduled to work that morning, and none of those employees had clocked in or out that morning. Following the meeting with Casal, Wade partnered with Jaklen Alkyan, a human resources professional, to conduct an investigation.

Wade and Alkyan conducted a series of interviews to investigate the allegations raised by Casal. Shahdaryan did not attend any of these interviews, nor did he know who was being interviewed, when the interviews were occurring, or the results of the interviews.

Wade and Alkyan first interviewed Rojas-Alvarado, who corroborated what Casal had reported. She was at the store with Casal early on January 13, 2011, and was instructed by appellant to work off the clock. Rojas-Alvarado stated that on other occasions, appellant had instructed her to work off the clock. Wade and Alkyan also interviewed Olivares, who admitted that appellant pressured her to work off the clock on January 13, 2011. However, Olivares refused to put this in writing, instead simply writing that she was not owed any money.

Wade and Alkyan also interviewed Roberto Lopez, another associate at the Highland Park store. Lopez was not part of the group that worked in the early morning of January 13, 2011, however, he corroborated that Casal was there early that morning when Lopez arrived to open the store. In addition, Lopez stated that appellant had asked him to work off the clock on a different occasion in 2010.

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[1] Appellant testified that Casal told her that he was ambushed by Shahdaryan and Wade and was pressured to say that appellant had asked him to work off the clock.

Another store associate, Renee Hernandez, was interviewed. Although Hernandez was not asked to work off the clock on January 13, 2011, she revealed that appellant refused to pay her for two hours of reporting time pay when she had reported to the store in the middle of the night to turn off the alarm.

Wade and Alkyan interviewed appellant on March 11, 2011. Appellant denied ever asking anyone to work off the clock. She admitted driving Rojas-Alvarado to work one day when she was not scheduled to work, but denied asking her to work off the clock. Appellant testified that Wade got upset when she would not confess to asking associates to work off the clock.

Alkyan and her boss, Roger Ceballos, met on March 15, 2011, to review the evidence that Alkyan and Wade had gathered. They decided to meet with appellant a second time to allow her to explain her employees' statements that she asked them to work off the clock. On March 17, 2011, Alkyan and Wade had a second meeting with appellant. Without specifics regarding names and dates, Wade said that seven employees had reported that appellant asked them to work off the clock. Appellant asked for the names so she could defend herself, but Wade and Alkyan refused to provide them. Appellant responded that she did not know why her employees would say this, except that she was "putting pressure" on them. Appellant explained that she had altered time punches properly when necessary. At each interview, appellant had the opportunity to provide a written statement of events. She did not mention discrimination or harassment. Alkyan ended the March 17, 2011 conversation by saying that Shahdaryan would give appellant a call. Appellant testified that Alkyan told her that Shahdaryan was the one that was going to decide what to do. Wade and Alkyan denied this.

**Appellant's termination**

On March 18, 2011, Alkyan and Ceballos again discussed the evidence gathered in the investigation and jointly decided to terminate appellant's employment. The decision was consistent with RAC's standard practice that HR -- not DMs such as Shahdaryan -- made termination decisions for policy violations. Ceballos and Alkyan testified that they were the only ones who had any input into the decision to terminate appellant's employment. Neither of them had any knowledge of appellant's medical condition, leaves of absence, or any issues with Shahdaryan.

Between February 21, 2011 and March 18, 2011, Shahdaryan did not have any communication with either Alkyan or Ceballos about appellant. However, after Alkyan and Ceballos made the decision to terminate appellant, they asked Shahdaryan to call appellant to tell her of HR's decision. On March 22, 2011, Shahdaryan made that call.

Nick Goalder first replaced appellant, then Michael McCaughey. Appellant's permanent replacement, Sergio Gomez, who became the store manager within 10 weeks after appellant left, had gout, a type of arthritis. Unlike appellant, Gomez never took a leave of absence while Shahdaryan was his DM and missed less than a week of work due to his medical condition.

**PROCEDURAL HISTORY**

In July 2011, appellant filed an administrative complaint with the California Department of Fair Employment and Housing (DFEH) against RAC, Shahdaryan, and Wade. The DFEH complaint alleged harassment, retaliation, and discrimination based on age, disability, gender, and CFRA leave. Appellant did not check the box for "denial of accommodation."

On July 14, 2011, after a receiving right to sue letter from DFEH, appellant filed suit against RAC and Shahdaryan,

alleging (1) violation of FEHA based on disability for failure to accommodate, discrimination, harassment and retaliation; (2) violation of CFRA based on discrimination and harassment; (3) discrimination on the basis of age; (4) violation of FEHA based on gender discrimination; (5) wrongful termination in violation of public policy; (6) breach of express and implied agreement not to terminate without good cause; (7) intentional infliction of emotional distress; and (8) defamation/coerced self-defamation.[2]

**First trial, reversal and remand**

A trial took place in July 2012. The jury returned a verdict for appellant on her disability discrimination, harassment, wrongful termination and retaliation claims. The jury found in favor of RAC on the CFRA discrimination claims and failure to engage in the interactive process claims.

On May 15, 2014, this court reversed and remanded for new trial because the trial court had "prejudicially erred in refusing to give a mixed-motive instruction to the jury."

**Second trial**

In September 2016, the matter was retried. The jury found in favor of RAC on all claims.

***Witness use of interpreters***

Three RAC employees who testified in English in the first trial testified in Spanish with interpreters in the second trial. Appellant asserts that, based on their claims that they did not

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[2] Appellant voluntarily dismissed her claims for defamation, coerced self-defamation, and age discrimination. RAC defeated her claims for breach of contract and breach of the implied covenant of good faith and fair dealing via summary adjudication. During trial, appellant voluntarily dismissed her claim for intentional infliction of emotional distress and all four claims against Shahdaryan individually. RAC defeated her claim for gender discrimination through a motion for nonsuit.

understand questions previously posed in English, these RAC employees contradicted their previous testimony which had been harmful to RAC.

Rojas-Alvarado testified in the second trial with an interpreter, that she was previously denied an interpreter, despite having had an interpreter for her deposition. Rojas-Alvarado was impeached at trial on issues such as whether or not she knew of appellant's disability and whether appellant was a hardworking, respectful GM.

Another RAC employee, Patrisia Respardo, asserted the need for an interpreter at the second trial despite failing to request one for the first trial. Respardo was impeached on several aspects of her testimony with testimony from the previous trial, including her denial of hearing appellant state that Shahdaryan had harassed her about her disability.

Roberto Lopez was a 28-year employee of RAC. He also previously testified in English but requested an interpreter at the second trial. Like Respardo, he was impeached on several aspects of his testimony, including appellant's proficiency as a GM.

***Verdict***

On September 26, 2016, the jury began deliberating. The jury returned its verdict the following afternoon.

Regarding discrimination, the jury found that appellant had a physical condition limiting her ability to engage in life activity; that RAC knew of the condition; that appellant could perform the essential duties of her job and had been discharged; but that her physical condition was not a motivating factor.

Regarding failure to accommodate, the jury found that appellant did not protest disability discrimination or harassment. The jury further found that appellant's DFEH complaint was not

related to her claims for failure to provide reasonable accommodation and failure to engage in the interactive process.

The jury found that appellant's medical leave was not a substantial motivating factor in her termination. The jury found against her on her wrongful discharge in violation of public policy claim.

Regarding disability harassment, the jury found that appellant was subjected to unwanted harassing conduct because of her physical condition, but that it was not severe or pervasive.

***New trial motion and evidence of juror misconduct***

On December 1, 2016, appellant filed a motion for new trial. In the motion, appellant argued that she was denied a fair trial on the basis of juror misconduct. She further argued that the court erred in submitting the issue of exhaustion of administrative remedies to the jury. Appellant asserted that she exhausted her administrative remedies on her claims of failure to accommodate and failure to engage in the interactive process as a matter of law.

Appellant offered sworn juror affidavits in support of her motion. The alleged juror misconduct fell into three general categories: (1) evidence of one juror's introduction of personal experience; (2) evidence that a juror did not believe the interpreter was translating correctly; and (3) jurors who did not pay attention or did not participate in deliberations.

***Juror Castro's personal experiences***

Appellant submitted evidence that Juror Castro related a personal experience involving a coworker's disability where documentation was provided to establish the disability.

Juror Robles stated in her declaration that Juror Castro "said in a hostile, bothered tone" that she "'had a co-worker who had a medical issue, but unlike [appellant], he submitted a lot of proper documentation showing he had a medical condition.'"

Juror Castro stated that appellant never did that. The foreperson instructed Juror Castro that she was not to discuss facts involving her own personal experience, but she did so anyway.

Juror Robles declared that the statements by Juror Castro were made "when the other jurors were discussing a question on the special verdict form" concerning appellant's claim for disability discrimination. Juror Robles could not recall exactly what number on the special verdict form was being discussed. Juror Robles further stated that after Juror Castro made her comment, other jurors indicated that they were going to "follow the logic of her example." "A few nodded and stated 'that is a good point. [Appellant] did not submit a lot of medical records, how could [RAC] have been motivated by her medical condition.'"

Juror Ramirez similarly described Juror Castro's comments. According to Juror Ramirez, Juror Castro related her experience with a disabled co-worker in an "annoyed, bothered tone," and commented that appellant did not provide similar documentation. Juror Ramirez declared that even after she reminded the others not to consider facts outside of the case, "most jurors after stated, '[appellant's] claims are not valid. Everyone can see from the lack of medical records.'" Juror Ramirez noted that some jurors appeared to agree that RAC could not have been motivated by appellant's medical condition because she did not submit a lot of medical records.

Juror Lau provided a nearly identical declaration, and then later provided a counter-declaration, stating that she was contacted by appellant's investigator, met with him, then signed the declaration provided to her without reading it. Lau then recalled that Juror Castro said "something about a co-worker of hers with a disability," but denied that the jury had a discussion based on that example. Appellant provided a responsive

declaration, signed by her investigator, indicating that he had two meetings with Juror Lau, that she read the "under penalty of perjury" language before signing, and that he informed her if she had any reservations she should not sign.

Juror Vasquez provided a declaration stating that Juror Castro "compared [appellant's] situation to her co-worker's situation" but later stated that no one paid much attention and that Juror Castro was quickly cut off.

Juror Oliver provided a declaration nearly identical to those provided by Jurors Robles and Ramirez. However, RAC later provided a counter-affidavit from Juror Oliver stating that Castro "began to share a story about her co-worker, and was told by another juror that we could not consider that in our deliberations." Juror Oliver denied seeing any jurors nod in agreement or hear anyone state a conclusion from Juror Castro's comments.

Juror Castro did not deny making the statements. Instead, she stated that she "began to share a story" about her coworker in a similar situation to appellant, but that Juror Ramirez "cut [her] off."

RAC offered declarations which refuted appellant's claim that Castro's comment affected the jury deliberations. Juror Reeves stated that Juror Castro "barely said anything about her coworker, but she was stopped by another juror and we moved on without discussing or considering what [Juror Castro] said in our deliberations (no jurors 'nodded' or stated that it was a good point)." Juror Guy-Ukattah explained that she remembered Juror Castro beginning to share about her coworker, but that "one of the jurors cut her off almost immediately and told her that we were not supposed to discuss other incidents, and that was the end of it." Juror Vasquez related a similar brief, insignificant exchange. Juror Chin acknowledged that Juror

Castro told a story about her coworker, but stated that "another juror told her that we shouldn't consider that. That was all that happened on that issue."

***One juror's statement to another that the interpreter was not interpreting correctly***

Juror Robles sat next to a Hispanic male, Juror Andres. Juror Robles provided a declaration stating that during the testimony of RAC employee Roberto Lopez, Juror Andres turned to her on a few occasions and told her: "'The interpreter is not interpreting right. It is different from what the witness is saying.'" Juror Robles is not fluent in Spanish, although she understands some. As a result, she tended to disregard Mr. Lopez's testimony because she believed it was being changed.

***Jurors inattentive or not deliberating***

Juror Ramirez stated in her declaration that "at least three jurors" stated that they were "'not interested'" in deliberating, "were not open to hearing other points of view," and "sat silent." Those were Jurors 5 (Castro), 6 (Reeves) and 7 (Rollins). Ramirez informed the jurors that they had to deliberate, but they did not. These three jurors expressed that appellant should get "'zero' money damages." They stated this at the very beginning of deliberations. Juror Castro spoke up only once, to tell her story about her coworker.

Jurors Castro, Reeves and Rollins denied that they refused to deliberate. Juror Reeves stated that none of the jurors ever said they were not interested in deliberating. She did not state that appellant should get zero damages. Juror Reeves stated that she and Juror Ramirez were "vocal opponents" during deliberations because Juror Reeves felt that no part of appellant's termination was discriminatory or retaliatory.

Juror Castro also denied stating that she was not interested in deliberating. She stated that she contributed to the

deliberations the entire time. Similarly, Juror Rollins denied stating that she was not interested in deliberating and stated that she contributed to deliberations the entire time. Jurors Guy-Ukattah, Oliver, and Chin also submitted declarations denying that Reeves, Castro and Collins refused to deliberate.

Juror Guy-Ukattah was observed "seemingly sleeping as witnesses were testifying" as she was observed with "her head down and eyes closed for periods of time throughout the day on several days during trial." This observation was provided by Juror Ramirez. Juror Guy-Ukattah denied sleeping during trial, stating: "I never slept at any point during the trial. On occasion, I did close my eyes while I was listening to witnesses and processing what they were saying."

Finally, Juror Reeves pronounced in an angry tone at the beginning of deliberations that she and her husband owned a business and the jurors should consider that all time records are kept by businesses. Juror Robles described Juror Reeves as having a "negative attitude" towards the case. Juror Reeves provided a responsive declaration. Juror Reeves stated that Juror Robles asked her if she or her husband owned a business. Juror Reeves responded that her husband did. When Juror Robles asked her, "'is this why you feel this way?'" Juror Reeves responded that her husband's business had nothing to do with her thoughts on the present case. According to Juror Reeves, she never said anything about the handling of time records. She calmly informed Juror Robles that she had nothing to do with her husband's business and never raised her voice.

***Denial of appellant's new trial motion***

On January 6, 2017, the trial court issued an order denying appellant's motion for new trial. The court set forth its rationale in a detailed tentative ruling, which it presented at the hearing on the motion.

The court noted that in ruling on a new trial motion, it is improper to consider juror declarations inquiring into a juror's subjective mental processes as opposed to considering objective, overt acts of misconduct. The trial court noted that appellant did submit some admissible evidence on the subject of juror misconduct based on certain jurors' objective observations.

As to allegations of sleeping during trial, the court noted that it has a "pattern and practice of monitoring jurors throughout a trial." The court found that "[n]o sleeping occurred during this trial, and the court rejects the suggestions to the contrary."

As to reliance on personal experience, the court noted that "[j]urors are entitled to rely on their general knowledge and experience in evaluating the evidence," and "a juror does not commit misconduct merely by describing a personal experience in the course of juror deliberations." The court concluded that there was no evidence that any juror decided the case based on a juror's description of her own experiences rather than the evidence presented at trial.

As to the alleged comment regarding a disagreement in translation, the court found that the statement lacked evidence of any undue influence. The statement was made in reference to a witness that testified on behalf of RAC. The juror that heard the remark found in favor of appellant. Further, the statement of the juror disputing the translation demonstrated a lack of actual prejudice.

Finally, the court found that appellant could not attack the special verdict form on the issue of exhaustion of remedies, as appellant never objected to the special verdict questions which specifically asked the jury to consider the issue of exhaustion.

The court concluded, "I think there was admissible evidence of juror misconduct, but putting aside all of the other

information and just considering the admissible evidence of juror misconduct, there was not sufficient evidence of prejudice."

On January 23, 2017, appellant appealed from the judgment entered November 1, 2016, and the denial of her motion for new trial on January 6, 2017.

## DISCUSSION

### I. Juror misconduct

#### *A. Applicable law and standard of review*

Appellant's arguments regarding juror misconduct were originally set forth in her motion for new trial. A court may grant a motion for new trial where there has been "'[i]rregularity in the proceedings of the court . . . by which either party was prevented from having a fair trial,' as long as the irregularity 'materially affect[s] the substantial rights of the moving party.' [Citation.]" (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 831-832.) Generally, "'the granting of a motion for new trial rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears. [Citations.]' [Citation.]" (*Weathers v. Kaiser Found. Hosps.* (1971) 5 Cal.3d 98, 109 (*Weathers*).)

Allegations of juror misconduct may form the basis for a new trial motion. (Code Civ. Proc., § 657). "An impartial jury is one in which no member has been improperly influenced . . . and every member is '"capable and willing to decide the case solely on the evidence before it."' [Citations.]" (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) When reviewing a ruling on a new trial motion, the appellate court may not reweigh evidence regarding juror misconduct. The fact that two sets of declarations regarding jury misconduct are directly at odds on some points does not support a finding that an order on a new trial motion

was not supported by the record. (*Weathers, supra*, 5 Cal.3d at p. 108.)

Evidence of the internal thought processes of jurors is inadmissible to impeach a verdict. (*In re Hamilton, supra*, 20 Cal.4th at p. 294.) "The jury's impartiality may be challenged by evidence of '*statements* made, or conduct, conditions, or *events* occurring, either within or without the jury room, of such a character as is *likely* to have influenced the verdict improperly,' but '[n]o evidence is admissible to show the [*actual*] *effect* of such statement, conduct, condition, or event upon a juror . . . or concerning the *mental processes* by which [the verdict] was determined.' [Citations.]" (*Ibid.*)

"Misconduct by a juror . . . usually raises a rebuttable 'presumption' of prejudice. [Citations.]" (*In re Hamilton, supra,* 20 Cal.4th at p. 295.) "This presumption aids parties who are barred by statute from establishing the actual prejudicial effect of the incident under scrutiny. . . ." (*Ibid.*) The presumption may be rebutted by the substantial likelihood test, which is an objective standard. (*Id.* at p. 296.) Factors to be considered in determining whether the presumption is rebutted include "the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417 (*Hasson*).) In other words, the presumption is rebutted "if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e. no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.]" (*In re Hamilton, supra,* 20 Cal.4th at p. 296.)

The standard recognizes the "'day-to-day realities of courtroom life.'" (*In re Hamilton, supra,* 20 Cal.4th at p. 296.) It

is "'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' [Citation.]" (*Ibid.*) "[T]he jury is a 'fundamentally human' institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution. [Citation.]" (*Ibid.*) Thus, "'we must tolerate a certain amount of imperfection short of actual bias.' [Citation.]" (*Ibid.*) The Supreme Court has emphasized its "unwillingness to allow the impeachment of jury verdicts on a bare showing that some jurors failed to conform their conduct to the ideal standard of utmost diligence in the performance of their duties." (*Hasson, supra*, 32 Cal.3d at p. 418.)

In reviewing the denial of a motion for new trial based on jury misconduct, we must review the entire record and determine if any acts of misconduct -- if misconduct occurred -- prevented the complaining party from having a fair trial. (*English v. Lin* (1994) 26 Cal.App.4th 1358, 1364.)

***B. Juror Castro's personal experience***

Appellant argues that by introducing the story of her coworker's disability, and the need for supporting documentation, Juror Castro impermissibly introduced evidence not developed at trial. Appellant argues that a presumption of prejudice arose from such juror misconduct.

First, we address the question of whether Juror Castro's commentary constituted misconduct, then we consider whether, if misconduct occurred, it was prejudicial. We conclude that the declarations provided in this matter support a finding that the conduct at issue did not rise to the level of misconduct.[3] Further,

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[3] We note that, while the court did not make a specific finding that misconduct occurred in this case, the court stated

even if Juror Castro's story did constitute misconduct, there is no substantial likelihood that it caused prejudice.

**1. Misconduct**

As the trial court noted, jurors may rely on their general knowledge and experience. "A juror does not commit misconduct merely by describing a personal experience in the course of deliberations." (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 819 (*Iwekaogwu*) [juror's emotional descriptions of instances of discrimination he had seen not misconduct].) Thus, Juror Castro's act of relating her personal experience did not necessarily constitute misconduct. Declarations provided by several jurors suggest that although Juror Castro began to relate a story about a coworker in a similar situation, she was quickly cut off and the story was not considered further. A review of the case law cited by the parties suggests that such conduct did not constitute misconduct.

Appellant cites *People v. Nesler* (1997) 16 Cal.4th 561 (*Nesler*) for the proposition that disclosure of extraneous information to other jurors tends to demonstrate an intention to influence the verdict. In *Nesler*, a juror concealed bias, prejudice, and previously formed opinions in voir dire. (*Id.* at p. 570.) The juror knew the defendant's babysitter, and provided information to the jury concerning the defendant's drug use and competence as a mother. (*Ibid.*) Thus, the juror brought to deliberations specific, damaging information about the defendant. Further, the

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that "there was admissible evidence of juror misconduct." It is unclear whether the court was addressing the admissibility of evidence, or expressing a finding that certain conduct in this case rose to the level of actual misconduct. As the following discussion reveals, the question of whether Juror Castro's actions constituted misconduct is insignificant in light of our determination that such actions were not prejudicial.

juror shared this information with other jurors at a time when she disagreed with them and in a specific attempt to change their views. (*Id.* at p. 579.) The Supreme Court concluded that the juror's "failure to disclose the information to the court and her intentional use of the information during deliberations" was "more than adequate" to establish serious misconduct. (*Id.* at p. 580.) Here, in contrast, Juror Castro did not purport to have any information about appellant or any other witness appearing at trial. Instead, she attempted to relate a personal experience.

*Smith v. Covell* (1980) 100 Cal.App.3d 947 (*Smith*), involved injuries arising from a car accident. The plaintiff did not experience back pain until six weeks following the accident, and a key issue at trial was whether the plaintiff's disability arose from the accident or a pre-existing condition. In voir dire, a juror admitted to having a back condition, but stated that he would base his decision solely on the evidence presented in the case. However, declarations from fellow jurors indicated that both before and during deliberations, the juror communicated to other jurors his own experience of suffering pain immediately, in contrast to the plaintiff. (*Id.* at p. 952.) Thus, the outside information provided by the juror directly impacted the subject of the trial. The court reasoned that the juror's interjection of this information was both "evidence of a concealed bias and as an objective fact likely to have improperly influenced the jury's verdict. [Citation.]" (*Id.* at p. 953.) In contrast, there is no suggestion that Juror Castro concealed information at voir dire, nor is it likely that brief observations about her coworker's experience directly influenced the verdict.

In *Young v. Bruncardi* (1986) 187 Cal.App.3d 1344 (*Young*), also a personal injury action arising out of an automobile accident, a retired police officer asserted during deliberations that an individual could not be negligent unless cited for a

vehicular violation. Again, in concluding that misconduct occurred, the court's focus was on the juror's interjection of specific, specialized information directly impacting an issue being litigated. (*Id.* at pp. 1349-1350.) The retired police officer made a "statement of law not given to the jury in the instruction by the court." (*Id.* at 1350.) Castro did not provide "extraneous law," but told a story of her personal experience.

The declarations provided in this matter support a finding that the conduct at issue here was more similar to that described in *Iwekaogwu* than that described in *Nesler*, *Smith*, and *Young*. As the *Iwekaogwu* court noted, jurors "'do not enter deliberations with their personal histories erased.'" (*Iwekaogwu, supra,* 75 Cal.App.4th at p. 819.) Like the juror in *Iwekaogwu*, who related instances of discrimination he had witnessed, Juror Castro related observations of a coworker's experiences she had witnessed. While her disclosure may not have been "ideal," a certain amount of imperfection must be tolerated. (*Hasson, supra*, 32 Cal.3d at p. 418.) The declarations provided support a finding that Juror Castro provided a brief, general description of her experience. Further, according to several declarations, Juror Castro did not purport to have specialized evidence or knowledge directly informing the jurors' decision on any specific issue before them. We must assume the court found credible the declarations that downplayed the significance of Juror Castro's story. Thus, as in *Iwekaogwu*, Juror Castro did not engage in proscribed misconduct "merely by describing a personal experience in the course of deliberations. [Citation.]" (*Iwekaogwu, supra*, 75 Cal.App.4th at p. 819.)

**2. Prejudice**

Further, the record supports the trial court's determination that, even if Juror Castro's relation of her story constituted misconduct, any presumption of prejudice was convincingly

rebutted.[4] The declarations make clear that when Juror Castro began relating her story, another juror immediately stopped her, stating that she should not do that. The jury was reminded by the jury foreperson that it could not consider the information provided by Juror Castro. Given this specific reminder of the trial court's instructions to the jury, we are entitled to presume that the jury understood and faithfully followed that instruction. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

In addition, the declarations indicate that the incident was insignificant. Several declarations suggest that the jury foreperson's reprimand to Juror Castro was the end of the incident -- Juror Castro's personal experience was not discussed or openly considered further. According to one juror, Juror Castro "never even completed the story, and it was not a big deal." The trial court was entitled to rely on this evidence, and we do not review the court's credibility determinations. (*Weathers, supra*, 5 Cal.3d at p. 108.) This evidence undermines any presumption of prejudice.

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[4] We reject appellant's argument that the trial court relied on the wrong standard in determining that no prejudice stemmed from Juror Castro's comments. In discussing Juror Castro's comment, the trial court stated that "the declarations in support of and against lack support of a finding indicating a complete disregard of the evidence and sole reliance on personal information." The trial court made the statement in connection with its evaluation of the evidence supporting the parties' competing claims. The comment does not point to a conclusion that the trial court relied on an incorrect standard in determining prejudice. As to the question of whether any presumption of prejudice was rebutted, we may properly assume that the trial court applied the correct legal standard. (*People v. Pearson* (2013) 56 Cal.4th 393, 421). Further, our own independent review reveals that the presumption of prejudice was sufficiently rebutted.

Finally, Juror Castro's experience that a disabled employee must show proper documentation to establish a medical condition was not significant to the issues to be decided by the jury. The question of whether or not appellant had a medical condition was not before the jury. RAC stipulated at trial that appellant had a disability. Thus, appellant was not required to prove this element of her claim. Furthermore, the jury found that RAC knew of appellant's disability. Thus, any perceived failure on her part to provide documentation supporting her disability had no impact on any relevant jury question.

Appellant argues that Juror Castro's story influenced three jurors: Jurors 5 (Castro), 7 (Rollins), and 11 (Guy-Ukattah). Appellant points out that these three jurors voted "no" to question 2, which asked whether RAC knew that appellant had a physical condition limiting her ability to engage in major life activity. In light of appellant's medical leaves, which required her to file information with RAC's human resources department, the evidence was indisputable that RAC knew of appellant's condition. Thus, appellant argues, these three jurors likely relied on Juror Castro's improper injection of her personal experience.

Appellant further argues that the same outside evidence provided by Juror Castro was relevant to crucial questions decided against appellant, such as Question 5 (whether appellant's physical condition was a substantial motivating factor in her discharge); Question 9 (whether appellant protested her discrimination and harassment); and Question 27 (whether appellant's medical leave was a substantial motivating factor in her discharge). Appellant argues that jurors Castro, Rollins and Guy-Ukattah all answered these questions unfavorably to appellant.

The answers of these three jurors to certain questions does not undermine the significant evidence before the trial court that

these jurors were not prejudicially influenced by Juror Castro's brief comments. Juror Castro's declaration indicates that although she "began to share a story about a coworker in a similar position to [appellant]," another juror cut her off and said that the jury was not allowed to consider that information. The next juror then "continued with her thoughts." Juror Castro stated that it was not true that any jurors commented in agreement on the story she began to share. In fact, Juror Castro did "not even get to the point" of what she was going to say, because she was cut off so quickly. Juror Castro opined that the deliberations were fair and no misconduct occurred.

Juror Rollins stated, "I do not recall [Juror Castro] sharing a story about her coworker, and I certainly don't recall the jury discussing or considering this." This evidence that Juror Rollins was unaware of Juror Castro's story undermines any suggestion that she was influenced by the story.[5]

Juror Guy-Ukattah recalled that Juror Castro began sharing a story about her coworker, but she recalled that "one of the jurors cut her off immediately and told her that we were not supposed to discuss other incidents, and that was the end of it." Juror Guy-Ukattah recalled that Juror Castro "never even completed the story, and it was not a big deal." No jurors expressed any agreement with anything Juror Castro had said. Juror Guy-Ukattah noted that Juror Ramirez was biased in favor of appellant from the outset and seemed angry that other jurors did not agree with her. Juror Ramirez tried to get other jurors to

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[5] Appellant argues that in light of the other evidence, Juror Rollins's statement that she could not recall Juror Castro discussing her coworker lacks credibility and must be disregarded. We do not consider credibility at this stage of the litigation. Further, it is possible that the incident was so insignificant that this particular juror did not notice or recall it.

change their responses. Juror Guy-Ukattah stated that she was "not surprised" that Jurors Ramirez and Robles were trying to get a new trial, "because they were unhappy with the outcome." Juror Guy-Ukattah opined that the deliberations were fair.

The trial court was entitled to rely on the declarations submitted by these three jurors to reach the conclusion that no prejudice arose from Juror Castro's story.

Appellant also argues that the timing of Juror Castro's comments should be considered in determining prejudice. Appellant claims that Juror Castro made these comments during discussion of Question 5, concerning whether appellant's disability was a substantial reason for her termination. However, contrary to appellant's assertion, the evidence presented in the declarations was not unanimous as to the timing of Juror Castro's comment. Several jurors could not recall the exact timing of Juror Castro's comment. To the extent that the trial court gave little weight to this aspect of appellant's evidence, it is not our place to substitute our judgment for that of the trial court. (*Weathers, supra*, 5 Cal.3d at p. 108). Further, the timing of the story does not overshadow the significant evidence suggesting that it was a brief, insignificant incident overall.

In sum, upon review of the record, we conclude that the trial court did not err in finding that Juror Castro's comment did not create a reasonable likelihood of prejudice. (*In re Hamilton, supra*, 20 Cal.4th at p. 296.)

***C. Communication that the interpreter was inaccurate***

Juror Robles provided a declaration indicating that Juror Andres told Juror Robles that the interpreter was incorrectly interpreting the words of a witness, Roberto Lopez. Such conduct directly violates jury instruction CACI No. 5008, which states: "You must rely solely on the translation provided by the

interpreter, even if you understood the language spoken by the witness. Do not retranslate any testimony for other jurors." Appellant also contends that Juror Andres's statement to Juror Robles shows that he falsely stated in voir dire that he knew Spanish but could set it aside.

Appellant relies on *People v. Cabrera* (1991) 230 Cal.App.3d 300 (*Cabrera*), for the proposition that failure to rely on the court interpreter's translation constitutes juror misconduct. In *Cabrera*, a defendant appealed from his conviction of committing lewd acts upon his stepdaughter. During deliberations, some of the jurors had expressed disagreement with the translation of certain testimony given in Spanish. Specifically, one juror told her fellow jurors that defendant testified that he "pushed" his stepdaughter, rather than "touched" his stepdaughter, as the interpreter translated. The *Cabrera* court agreed that this was juror misconduct, as the juror was providing evidence outside of the court proceeding. (*Id.* at p. 303.) However, the retranslation did not cause prejudice. While the *Cabrera* court acknowledged the presumption of prejudice that arises from juror misconduct (*id.* at p. 304), the retranslation was irrelevant to the issues before the jury.

Similarly, here, no prejudice arose from Juror Andres's disagreement with the translation of the testimony of Roberto Lopez. Lopez testified on behalf of RAC. His key testimony was that appellant instructed him to work off the clock. He also testified that he provided this information to RAC's investigators, even though he was appellant's friend. Finally, Lopez testified that he witnessed Casal working off the clock on January 13, 2011. Appellant does not clarify how she was prejudiced by a juror's disregard of testimony that was significantly unfavorable to her. Juror Robles pointed to no specific facts or portions of Lopez's testimony that were improperly ignored. Nor did she

explain how it affected the way that she voted. Under the circumstances, the trial court did not err in finding that there was no substantial likelihood of prejudice. (*Cabrera, supra,* 230 Cal.App.3d at pp. 304-305).

Appellant argues that the same translator was used for other Spanish-speaking witnesses (Alvarado-Rojas and Respardo), and speculates that jurors Andres and Robles likely also disregarded the interpreter as to the other Spanish-speaking witnesses. However, there is no evidence to support this argument. Indeed, Robles only stated in her declaration that she "tended to disregard Mr. Lopez'[s] testimony." She did not mention disregarding any other witness's testimony. Appellant's speculation regarding translated testimony not referenced in Robles's declaration does not establish the likelihood of prejudice required.

Appellant argues that, in contrast to the testimony in *Cabrera,* the testimony provided by Lopez was relevant to the case, therefore Juror Robles's disregard of the testimony was prejudicial. We agree that the testimony was relevant in establishing RAC's defense to appellant's claims of discrimination. However, there was no substantial likelihood that the incident unfairly prejudiced appellant.

***D. Juror bias, refusal to deliberate, and sleeping***

Appellant's evidence in support of the motion for new trial included evidence that three jurors stated bias and refused to deliberate. Further, it included allegations of one juror sleeping. Appellant argues that this evidence constituted further misconduct to be considered in determining whether appellant received a fair trial.

Refusing to deliberate means that a juror prejudged the case. This constitutes juror misconduct. (*Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 792 (*Grobeson*).) In

*Grobeson*, a juror provided a declaration that, during a break in trial, another juror engaged her in conversation and stated, "'"I made up my mind already. I'm not going to listen to the rest of the stupid argument."'" (*Id.* at p. 784.) The trial court found that the juror's conduct was prejudicial on all causes of action that were decided on a nine-to-three vote, and the Court of Appeal affirmed. (*Id.* at pp. 786, 796-797.)

In addition to *Grobeson*, appellant relies on *Andrews v. County of Orange* (1982) 130 Cal.App.3d 944 (*Andrews*) and *Deward v. Clough* (1966) 245 Cal.App.2d 439 (*Deward*). *Andrews* was an appeal from a verdict in favor of the county on the plaintiffs' claims for inverse condemnation due to noise and pollution from a nearby airport. During a field trip to inspect the plaintiffs' homes, a juror commented that the plaintiffs already had enough money, therefore should not get more, and that the "'whole thing is a big farce.'" (*Andrews*, at p. 957.) The same juror relied on evidence outside the record during deliberations. (*Id.* at p. 958.) Further, the same juror separated himself from the group after an angry exchange with the jury foreperson, and refused to return for deliberations for about 15 minutes. (*Id.* at p. 959.) Certain acts of misconduct committed by other jurors which may not have been sufficient, standing alone, to have prejudiced plaintiffs, added to the probability that the plaintiffs were denied a fair trial. (*Id.* at p. 960.) The Court of Appeal determined that a new trial was required. (*Ibid.*) Similarly, in *Deward*, on the last day of trial, a juror was overheard saying, "'"I don't see why they don't open up the jury room now. We could bring in a verdict already."'" (*Deward, supra*, at p. 443.) On the basis of this comment, the court accepted that the juror had prejudged the case. (*Id.* at p. 444.) Upon review of the record, the Court of Appeal determined that prejudice was likely. (*Id.* at p. 446.)

Appellant argues that the misconduct at issue here is as serious as the misconduct that occurred in *Grobeson, Andrews* and *Deward*. In stating that they did not want to deliberate, would not award any damages, and sleeping, jurors violated the court's instructions to evaluate the evidence. Appellant argues that this conduct must be evaluated in light of the entire record, including Juror Castro's introduction of extraneous evidence and Juror Andres's criticism of the interpreter.

Appellant acknowledges that the trial court had to evaluate conflicting declarations as to whether the alleged misconduct occurred. Appellant claims that the declarations relied upon by appellant "demonstrated consistency and accuracy, while defense affidavits were offered by wrongdoers denying their conduct and were unreliable." In making this argument, appellant ignores the applicable standard of review. We may not re-evaluate the evidence or the trial court's credibility determinations. The fact that two sets of declarations regarding jury misconduct are directly at odds on some points does not support reversal of the trial court's factual determinations. (*Weathers, supra*, 5 Cal.3d at p. 108.)

The trial court was entitled to believe the accused jurors' responsive declarations, indicating that they did not refuse to deliberate or sleep during the proceedings. The court noted "contradictory" declarations among the jurors as to the jurors' motivations and conduct "reflect differences in personalities among the jurors as opposed to evidence of bias." Further, the trial court rejected entirely the suggestion that any juror was sleeping, commenting that the court's practice was to monitor jurors and concluding that "[n]o sleeping occurred during this trial, and the court rejects suggestions to the contrary."

Appellant suggests that we should look to *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42 (*Ovando*), and

inquire as to whether the totality of the circumstances, "including the nature of the misconduct and the surrounding circumstances," resulted in a substantial likelihood that one or more jurors was actually biased against appellant. (*Id.* at p. 58.) At issue in *Ovando* was a juror's concealment of significant facts in voir dire. (*Id.* at pp. 59-60). In that case, the record as a whole failed to rebut the presumption of prejudice. (*Id.* at p. 60.) However, the *Ovando* court granted significant deference to the trial court's decision to grant a new trial on the issue of juror misconduct. The court considered the nature of the subject matter: the Rampart police scandal, which was a "volatile subject that provoked strong feelings" among the public. In light of those circumstances, and the nine-to-three verdict, the appellate court could not conclude there was no reasonable probability of prejudice. (*Ibid.*)

In contrast to the trial court in *Ovando*, the trial court here rejected appellant's evidence of juror bias and sleeping. We must "defer to the trial court's findings of historical fact and credibility determinations if they are supported by substantial evidence. [Citations.]" (*Ovando, supra*, 159 Cal.App.4th at p. 59.) Because opposing declarations support the trial court's determination, we decline to disturb the trial court's findings.

**II. Exhaustion of administrative remedies**

Appellant's claims of (1) failure to reasonably accommodate; and (2) failure to engage in the interactive process, were disposed of on the ground of failure to exhaust administrative remedies. The dismissal of these two claims followed the jury's responses to the following questions:

> "Question No. 14: Did [appellant] file a DFEH administrative complaint against [RAC] that was like or related to her claim for failure to provide reasonable accommodation?"

> "Question No. 19: Did [appellant] file a DFEH administrative complaint against [RAC] that was like or related to her claim for failure to engage in the interactive process?"

The jury answered "No" to both questions. Thus, appellant could not prevail on these two claims.

***A. Procedural background***

In her DFEH complaint, appellant alleged claims of harassment, retaliation and discrimination based on age, disability, gender and CFRA leave.

RAC attempted to prevail on its exhaustion defense as to appellant's claims of failure to provide reasonable accommodation and failure to engage in the interactive process through a motion in limine. RAC argued that appellant should be precluded from introducing evidence on these two claims due to her failure to allege these theories in her DFEH complaint. The motion was denied.

Evidence was introduced at trial regarding exhaustion of administrative remedies. Appellant's counsel introduced as evidence the DFEH complaint, and questioned appellant about it. In addition, RAC's counsel pointed out during a sidebar argument that the jury would be instructed on, and ultimately decide, the issue of exhaustion of administrative remedies.

RAC later moved for a directed verdict on appellant's failure to accommodate claim based on the adequacy of appellant's DFEH complaint. RAC argued that in her charging document filed with the DFEH, appellant declined to check the box for failure to reasonably accommodate. In opposition, appellant argued that the issue was more than just whether or not appellant checked the appropriate box on her DFEH claim form. Instead, appellant argued, the issue was whether this cause of action "would be reasonably uncovered upon the DFEH

investigation." The trial court denied the motion, stating "I think there's been sufficient notice."

After the close of evidence, RAC argued the exhaustion issue twice in closing argument, without objection from appellant. RAC's counsel argued:

> "On the failure to accommodate claim . . . she didn't check the box. You will see there's a box on the DFEH charge. . . . You'll have to check the box that says failure to accommodate or do something to put [RAC] on notice of it. She didn't do that."

RAC made similar arguments to the jury, without objection, on the failure to engage in interactive process cause of action.

Counsel jointly agreed to use the special verdict form, which asked the jury to consider the question of exhaustion in Questions 14 and 19. Appellant made no objection to these questions on the special verdict form.[6]

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[6] The trial court rejected RAC's Special Instruction No. 8, which instructed the jury: "Before filing a civil action alleging claims under the Fair Employment and Housing Act, including violations for failure to accommodate and failure to engage in the interactive process, an employee must exhaust his or her administrative remedies with the Department of Fair Employment and Housing (DFEH) by filing an administrative complaint addressing the specific claims and parties at issue."

The proposed instruction went on to explain that in order to exhaust her administrative remedies, a plaintiff must "specify the particular act made unlawful by FEHA in the administrative charge."

The trial court refused the instruction on the ground that the special instruction was unnecessary, as "CACI adequately cover[ed]" the content of the instruction. Thus, it was apparent that the issue of exhaustion would be submitted to the jury -- but that the topic was adequately covered with other instructions.

In her new trial motion following the verdict, appellant briefed the exhaustion issue. She argued that the trial court erroneously submitted the exhaustion of administrative remedies issue to the jury and that the evidence did not support the jury's findings. The trial court found that "[t]he question of exhaustion of remedies became a jury issue after the court denied [RAC's] efforts to prevail in pretrial motions." It also found that a challenge to the issue having been submitted to the jury was forfeited.[7]

***B. The record supports the trial court's determination that appellant forfeited her argument that exhaustion was not a jury issue***

Appellant challenges the trial court's ruling that the exhaustion issue was a jury issue. Appellant cites *Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1346, for the proposition that failure-to-exhaust issues do not involve triable issues of fact and should be resolved by dispositive motion unless a statute of limitations issue exists.

In denying appellant's motion for new trial, the trial court found that appellant forfeited this issue by failing to challenge

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There was no objection to the apparent intention of the court to submit the issue of exhaustion of administrative remedies to the jury. The court then inquired, "are we all good on the instructions?" All counsel responded in the affirmative.

[7] Appellant points out that the trial court did not directly address her substantial evidence challenge to the jury's findings on Question Nos. 14 and 19. However, where the record lacks express findings, we must assume the trial court made any findings necessary to sustain its order. (*In re Marriage of Carlsen* (1996) 50 Cal.App.4th 212, 215.) Thus, we assume the trial court found sufficient evidence to support the jury's findings on Question Nos. 14 and 19.

the submission of the issue to the jury. "'"*Failure to object to a verdict before the discharge of a jury and to request clarification or further deliberation precludes a party from later questioning the validity of that verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected*." [Citation.]' [Citation.]" (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1242.) "Generally, the determination of either waiver or estoppel is a question of fact, and the trier of fact's finding is binding on the appellate court. [Citations.]" (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319.) Only when the facts are undisputed and only one inference may reasonably be drawn, the issue may be considered one of law. (*Ibid.*)

Here, the facts leading up to the submission of the exhaustion issue to the jury, support the trial court's finding of forfeiture. Appellant never objected to the submission of Questions 14 and 19 to the jury. Appellant presented the DFEH form to the jury during appellant's testimony for the purpose of establishing appellant's right to sue. The parties agreed to stipulate to the jury that appellant did not check any boxes on the form for failure to accommodate and failure to engage in the interactive process. Further, appellant did not object when RAC argued to the jury that appellant failed to exhaust her administrative remedies by neglecting to check the appropriate box.

Appellant argues that she asserted throughout the proceedings below that her DFEH complaint was sufficient as a matter of law, including in her pretrial brief and in opposing the motion in limine, at which time she argued that the issue should have been raised in a summary judgment motion. Appellant further argues that when the trial court denied the directed verdict and found that the DFEH complaint provided "sufficient

notice," this should have ended the issue. Appellant cites legal authority suggesting that when the issue of forfeiture is a close call, we should assume that she preserved her rights. (*People v. Champion* (1995) 9 Cal.4th 879, 908, fn. 6.)

This is not a situation where we are deciding the issue of forfeiture for the first time on appeal. Instead, we are reviewing a trial court decision. That decision was factual, based on the trial court's first hand observation of the events occurring throughout the proceedings. While the question is a close one, we are required to uphold the trial court's factual findings if supported by the record. The record shows that it was readily apparent that, following the trial court's denial of the directed verdict, the issue of exhaustion would be submitted to the jury. Appellant allowed the issue to be submitted to the jury without objection. Under the circumstances, we find that the record supports the trial court's finding of forfeiture.

***C. Appellant's substantial evidence argument is not well taken***

Appellant attempts to frame this issue as one of substantial evidence. Appellant argues that the evidence does not support the jury's findings on the question of exhaustion of administrative remedies as to the two causes of action at issue.

Appellant argues that the only evidence relevant to the issue of exhaustion of appellant's failure to accommodate and failure to engage in the interactive process claims is her DFEH claim form. The DFEH claim form alleges disability discrimination. It does not mention or describe a lack of reasonable accommodation or a failure to engage in the interactive process. Appellant cites *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 268 (*Nazir*), for the proposition that a DFEH charge "must not only be construed liberally in favor of plaintiff, it must be construed in light of what might be

uncovered by a reasonable investigation." Appellant argues that "if an investigation of what *was* charged . . . would necessarily uncover other incidents that were not charged, the latter incidents could be included in a subsequent [civil] action." (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1615 (*Okoli*).) Appellant argues that an investigation of her disability harassment and discrimination claims would necessarily uncover incidents of failure to accommodate and failure to participate in the interactive process. Thus, her DFEH claim form was sufficient to include those two causes of action.

As set forth above, appellant did not object to the submission of Questions 14 and 19 to the jury. Appellant fails to point to any jury instruction or other means by which the jury was presented with the legal standards set forth in *Nazir* and *Okoli*. Therefore, we decline to undertake an analysis of whether the jury properly applied those standards. (*Woodridge Escondido Property Owners Assn. v. Nielsen* (2005) 130 Cal.App.4th 559, 574 [issues not raised in the trial court proceedings are forfeited].)

**DISPOSITION**

The judgment is affirmed. Each side to bear its own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST