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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MIHAJLO BUJKO, Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	B217193 (Los Angeles County Super. Ct. No. EC044839

APPEAL from a judgment of the Superior Court of Los Angeles, Laura Matz, Judge. Affirmed.

The Law Offices of Edgar B. Pease III, Edgar B. Pease III; The Law Offices of Cynthia A. de Petris and Cynthia A. de Petris for Plaintiff and Appellant.

Ballard, Rosenberg, Golper & Savitt, John B. Golper, John J. Manier and Eric C. Schwettmann, for Defendants and Respondents.

Appellant Mihajlo Bujko, a former physical education teacher at a North Hollywood high school, contended that in 2005, he observed respondent Angela Hewlett-Bloch, then an assistant principal, enter the boy's locker room while male students were dressing for a football game. He reported this incident and was thereafter allegedly subjected to acts of retaliation and harassment by Hewlett-Bloch and other members of the school's administration, including a negative performance evaluation, disciplinary conferences called to correct misbehavior and inadequate performance, and a threatened transfer to a new school. Appellant reported these actions to the LAUSD's Office of the Inspector General (OIG), claiming to be the subject of whistleblower retaliation. While OIG's investigation was pending, OIG's hotline received an anonymous call making serious charges against appellant, including that he had posted pictures of nude underage girls on the internet. Appellant contended that these charges -- which allegedly were made by respondent Randall Delling, the principal of the high school -- and OIG's manner of investigating them furthered his discomfiture and distress, leading to his constructive discharge.

Appellant filed a complaint asserting a claim of whistleblower retaliation against respondents Hewlett-Bloch, Delling, the Los Angeles Unified School District (LAUSD), and Vernon Pitsker, an OIG investigator.[1] He also sought to pursue claims for intentional infliction of emotional distress, invasion of privacy, abuse of process, slander and defamation. Demurrers were sustained to the non-whistleblower claims. Appellant's claim against Pitsker for whistleblower retaliation was summarily adjudicated in favor of Pitsker. The claim for

[1] There were six other individuals named in the complaint; all were dismissed by appellant prior to the hearing on the demurrer to the operative fourth amended complaint.

whistleblower retaliation against the remaining respondents was tried to a jury, which rendered a verdict in favor of those respondents. Appellant contends: (1) the trial court erred in excluding evidence pertaining to OIG's investigation under a statute which renders its investigative files confidential; (2) the trial court improperly responded to a jury question, causing the jury to conclude that appellant had not made a protected disclosure; (3) the trial court erred in denying appellant a new trial on grounds of irregularity in the proceedings or misconduct of the jury; (4) the trial court erred in sustaining the demurrer to his non-whistleblower claims; and (5) the trial court erred in granting summary judgment in favor of Pitsker on the whistleblower retaliation claim. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint*

The fourth amended complaint, the operative complaint for purposes of this appeal, asserted a claim for whistleblower retaliation.[2] The acts of retaliation

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[2] A school employee's claim for retaliation for reporting criminal activity potentially implicates more than one statutory scheme. Labor Code section 1102.5, subdivision (b), which applies to any employer, provides that an employer may not "retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." In addition, Education Code section 44110 et seq., the "Reporting by School Employees of Improper Governmental Activities Act," specifically protects public school employees and states that "any person" will be liable for an action for damages if that person "intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee or applicant for employment with a public school employer .for having made a protected disclosure." (Ed. Code, § 44114, subd. (c); see *id*., § 44112, subd. (d) [definition of "person" for this act includes not only "any individual," but also "any state or local government, or any agency or instrumentality of any of the foregoing"].)
(Fn. continued on next page.)

undertaken by respondents allegedly included: excessive scrutiny of appellant's daily activities at work, a negative performance evaluation, unfounded accusations of failing to supervise students and of wrongful conduct involving fellow employees, interference in appellant's election to the position of department chair and with his right as a senior employee to choose his schedule, and a letter of displacement advising appellant to seek new employment at a different school. The retaliatory acts were also said to include OIG's investigation of a tip accusing appellant of "pedophilia" which was "outside the scope of any proper 'OIG' investigation," based on "totally unfounded" accusations, and "meant solely to retaliate against [appellant] [and] to make his life miserable." As a result of this "harass[ment]," appellant took early retirement and lost salary and pension benefits.

The fourth amended complaint also asserted claims for intentional infliction of emotional distress, violation of civil rights/invasion of privacy, abuse of process, and slander/defamation.[3] These non-whistleblower claims focused primarily on the OIG investigation conducted by Pitsker. The complaint alleged that another investigator for OIG, Phillip Moriel, was originally tasked with investigating

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Education Code section 44113 further provides that "[a]n employee may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to an official agent matters within the scope of this article." An employee who violates those provisions "may be liable in an action for civil damages brought against the employee by the offended party." In the fourth amended complaint, the retaliation was said to be in violation of both Education Code section 44110 et seq. and Labor Code section 1102.5.

[3] Unlike the retaliation claim, which was asserted against all respondents, the non-whistleblower claims were asserted against the individual respondents, except the claim for abuse of process, which was asserted against LAUSD and Pitsker only, and the slander/defamation claim, which did not name Hewlett-Bloch.

appellant's report concerning Hewlett-Bloch and appellant's claim that he suffered whistleblower retaliation. Moriel allegedly found that appellant had been retaliated against by Delling and Hewlett-Bloch. Pitsker, Moriel's superior, "did not like the results of [Moriel's] investigative report" and insisted that he change his findings. When Moriel refused to do so, "Pitsker took over the investigation" and "began an improper investigation outside the scope of his authority[,] investigating . . . allegations of pedophilia against [appellant]."[4] During the course of this investigation, Pitsker allegedly confiscated appellant's work computer, and subpoenaed personal and private information related to appellant's MySpace account.[5] The defamation claim alleged that Pitsker publicly stated that appellant was a pedophile or was under investigation for pedophilia when confiscating his computer.

B. *Pretrial Proceedings*

Respondents demurred to the complaint, contending, among other things, that their liability was precluded by governmental immunity, specifically, the immunity of Government Code section 821.6 which covers "instituting or prosecuting . . . judicial or administrative proceeding" and section 820.2 which covers immunity for discretionary acts.[6] The court overruled the demurrers with

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[4] According to the complaint, "[t]he [OIG] [wa]s only authorized to investigate 'white collar crime' and whistleblower allegations -- not allegations of pedophilia."

[5] The abuse of process was said to stem from the subpoena.

[6] Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." Section 820.2 provides that a public employee is not liable for injury resulting from an act or omission, where the act or omission was the result of the exercise of discretion, "[e]xcept as otherwise provided by statute."

respect to the whistleblower retaliation claim and then sustained the demurrer without leave to amend as to the remaining claims, stating in its order that there was no conduct alleged for those claims that fell outside the scope of the immunity provided by those provisions and the immunity provided by Government Code section 815.2.[7]

After the trial court overruled in part and sustained in part respondents' demurrers, respondents moved for summary judgment or summary adjudication on the remaining claims. The trial court granted Pitsker's motion for summary judgment, but otherwise denied the motions.

C. *Evidence at Trial*[8]

Appellant testified that on September 16, 2005, at approximately 12:30 p.m., he and Bradford Hodge, another PE teacher, cleared PE students out of the boys' locker room so that the football team could get ready for a game. Appellant and Hodge then returned to their desks, which were located in an office near the entry to the locker room. Frank Medrano, a probationary teacher, was also present. Delling and Hewlett-Bloch came into the entry area. Delling left for a few minutes and when he returned, he and Hewlett-Bloch walked through the locker room. Appellant did not see Delling or anyone else check the locker room before Hewlett-Bloch entered. After seeing Hewlett-Bloch walk through, he and Hodge looked at each other in surprise. Appellant got up and looked inside the locker

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[7] Government Code section 815.2 provides that a governmental entity is not liable for injury resulting from an act or omission of its employee if the employee is immune from liability.

[8] Because the jury found that appellant had not made a protected disclosure when he reported the locker room incident, we limit our discussion to the facts relevant to that finding.

room and saw boys getting dressed. As he felt it was his duty to report "anything under [the] umbrella of child abuse," he called the District office about the incident later that day and subsequently submitted a written report.[9] Sometime thereafter, he filed the whistleblower complaint with OIG because he believed Delling and Hewlett-Bloch were retaliating against him for making the report.

Hodge testified that he saw football team players getting ready for the game when he cleared the other boys out.[10] A short time later, Delling, followed within minutes by Hewlett-Bloch, walked through the locker room. Hodge heard noises coming from the locker room and believed the boys he had seen earlier were still dressing. Hodge believed Hewlett-Bloch's action was inappropriate and that he was required to report the incident. He participated in appellant's call to the District and later submitted a written report. Hodge also believed he was subsequently harassed by Delling and Hewlett-Bloch because of his report and filed a whistleblower complaint with OIG.

Delling and Hewlett-Bloch testified that they walked through the locker room to reach a meeting room where they intended to talk to the football players about racially-motivated fights that had occurred in the preceding weeks. Prior to Hewlett-Bloch's entering the locker room, Delling walked through the room to ensure it was clear. He saw a few boys in uniform, getting their things together to

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[9] Appellant's written report stated that at the time Hewlett-Bloch walked into the locker room, "the door leading to the locker room was open and you could hear the commotion of the boys' football team getting dressed for the upcoming football game"; that immediately after Hewlett-Bloch walked through the locker room, appellant "personally went in and saw the football team in various stages of dress and undress as [he] had anticipated"; and that he reported what he had seen to Hodge and Medrano. In his testimony at trial, appellant did not recall saying anything to Medrano. Hodge did not recall appellant getting up and checking the locker room afterward. Medrano was not called to testify.

[10] Hodge did not recall appellant helping him clear the locker room.

go to the meeting room. Once they had left, Delling motioned Hewlett-Bloch to enter. As she came through, Delling yelled "female on the deck."

Respondents also called Jason Camp, the football team's coach, as well as Andrew Kasek, an assistant coach, and Kenneth Harris, an aide. All three men attended the meeting and were present when Hewlett-Bloch walked through the locker room. Kasek testified that when he saw Delling and Hewlett-Bloch on the field on their way to the meeting, he went into the locker room to make sure the players were in the meeting room. He checked the aisles, saw no one, and told Delling and Hewlett-Bloch it was clear for them to come in. Kasek was behind them when they walked through and was certain no boys were present. Camp testified that he checked the bathroom and shower area while Kasek checked the aisles. Harris testified that he walked up and down every aisle to make sure none of the players had left equipment behind and conducted a head count of the team in the meeting room to ensure all players were present. This occurred before Hewlett-Bloch entered the locker room.

Defense witnesses also testified concerning appellant's past behavior and the animosity he had demonstrated toward Delling and Hewlett-Bloch well before the locker room incident. Salvador Mojica, a PE teacher, testified that appellant said Delling was "not going to be a principal for long after [appellant] g[ot] through with him." Speaking of Hewlett-Bloch, who was African-American, appellant said "the worst thing to work with is a Black female administrator." On one occasion, Mojica overheard appellant making a telephone call concerning a grievance. When Mojica advised appellant to "let it go," appellant responded: "I'm not going to shut up until they pay me to shut up."

The defense also presented evidence that appellant had accused Delling of retaliatory and discriminatory conduct before the locker room incident and had filed an internal complaint alleging sexual orientation discrimination. Appellant

accused Delling of discriminating against him because he was "gay and Slavic."[11] In March 2005, appellant wrote to Delling, stating that "'any act that negatively affects my employment with LAUSD will be considered as a retaliatory act upon me and will be duly noted and reported to the proper parties.'"

The parties agreed to submit special verdicts to the jury. In response to special verdict question one, the jury found that appellant's report to LAUSD that Hewlett-Bloch entered the boys' locker room on September 16, 2005, while male students were in various states of dress and undress was not a protected disclosure for purposes of his retaliation claims. Judgment was entered in favor of the defense. This appeal followed.

DISCUSSION

A. *Exclusion of Evidence Pertaining to OIG Investigation*

1. *Background*

During Hodge's testimony, appellant attempted to introduce a letter sent to Hodge in response to his whistleblower complaint. The letter, dated January 25, 2007, was from Donald Davis, Chief of Staff of LAUSD, and indicated that OIG's investigation had concluded that Hewlett-Bloch entered the boys' locker room while the football team was in the process of getting dressed, but had violated no District policy. Respondents objected to admission of the document.[12] The trial

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[11] At trial, appellant acknowledged making complaints of sexual orientation discrimination, but testified he was not gay.

[12] Prior to trial, respondents had moved in limine to exclude all evidence pertaining to the actions of OIG and its investigators. (As is discussed further below, the court had already ruled such evidence confidential and inadmissible in connection with the summary judgment motions filed by respondents.) The court ruled that the investigative file and communications between Moriel and Pitsker were confidential, and that confidentiality was not waived by placing Moriel's draft reports in his personnel file.
(Fn. continued on next page.)

court reviewed the letter and sustained the objection, finding that the document was part of the confidential investigative file and stating: "Whether [the boys] were dressed or undressed is a matter of fact. You bring in the witnesses who will testify that they saw the boys were undressed or not undressed. You don't need this [document] to prove this [fact]."

2. *Analysis*

The trial court's ruling was based on Education Code section 35401, which provides: "Every [LAUSD OIG] investigation, including, but not limited to, all investigative files and work-product, shall be kept confidential, except that the inspector general may issue any report of an investigation that has been substantiated, keeping confidential the identity of the individual or individuals involved, or release any findings resulting from an investigation conducted pursuant to this article that is deemed necessary to serve the interests of the district." (Ed. Code, § 35401, subd. (c).)[13] Subdivision (e) of this provision states:

The motion in limine did not specifically address the letter to Hodge, although respondents' trial brief contended that it was part of the investigative file because it communicated the result of the investigation and also contended it contained inadmissible hearsay and opinion. In response to an objection raised during appellant's counsel's opening statement, the court further ruled that Delling's call to OIG's hotline requesting that an investigation be initiated was part of the confidential investigative file.

[13] OIG's 2007 and 2008 Annual Reports included summaries of the investigations of appellant's and Hodge's whistleblower complaints. The 2007 Annual Report stated that OIG conducted an investigation into allegations that "a high school principal" had retaliated against "a teacher" for reporting improper governmental activity and that the investigation did not corroborate the allegations. It further stated that "the [a]ssistant [p]rincipal" did "enter the boys' locker room," but "did not violate any District policy or procedure." The 2008 Annual Report, stated: "The OIG conducted an investigation into allegations that a Principal and Assistant Principal attempted to interfere, intimidate and retaliate against a Teacher at a high school for providing or attempting to provide information of improper government activity. [¶] Information provided by the

(Fn. continued on next page.)

"Except as authorized in this section, or if called upon to testify in any court or proceeding at law, any disclosure of information by the inspector general or that office that was acquired pursuant to a subpoena of the private books, documents, or papers of the person subpoenaed is punishable as a misdemeanor."

Appellant does not dispute that OIG investigations and the contents of any reports are generally confidential. He contends that subdivision (e) of Education Code section 35401 creates an exception to nondisclosure where a witness is "called upon to testify in any court or proceeding at law." Appellant misinterprets the statute. Subdivision (c) provides that all LAUSD OIG investigative files and work product "shall be kept confidential." Subdivision (e) does not create an exception to confidentiality and nondisclosure. It provides the penalty for disclosure and creates an exception to imposition of the penalty where the disclosure is made under court order. In other words, it protects parties who obey court orders. It does not suggest that a court must order disclosure anytime a document is or may be relevant to a court proceeding.

Appellant contends in the alternative that OIG waived confidentiality by sending the letter to Hodge. A letter or report informing the complaining party of the result and disposition of an investigation is "the last official act of the investigative process." (*All Angels Preschool/Daycare v. County of Merced* (2011) 197 Cal.App.4th 394, 408.) Accordingly, transmitting the letter to Hodge did not represent a waiver or breach of confidentiality.

Appellant cites *White v. Superior Court* (2002) 102 Cal.App.4th Supp. 1 for the proposition that limited disclosure of public documents made confidential by

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whistleblower was deemed unreliable, and the subsequent investigation did not substantiate the allegations." The trial court ruled that the Annual Reports themselves were not confidential.

statute may be ordered in order to afford a party a fair trial. (See also *Davies v. Superior Court* (1984) 36 Cal.3d 291, 297-299 [statute making certain reports "confidential" does not create an absolute privilege].) The party seeking disclosure in *White* was the defendant in a criminal trial, accused of assaulting a ward of the California Youth Authority while he was employed as a peace officer. OIG had investigated the incident, but refused to produce its investigative materials.[14] Recognizing that "[a] statute that makes information confidential expresses a strong public policy against disclosure," the court nevertheless held that OIG's interest in maintaining appropriate confidentiality of its records should be weighed against the defendant's need for the information to obtain a fair trial, and ordered the files turned over to the court for in camera review. (*White v. Superior Court, supra*, 102 Cal.App.4th at Supp. 7.) Here, the court examined the document, weighed the competing interests, and specifically found that appellant did not need the letter to be disclosed to establish whether boys were undressing in the locker room when Hewlett-Bloch walked through. We find no error in the court's determination. Numerous witnesses were available to testify concerning appellant's contention that there were boys undressing when Hewlett-Bloch walked through the locker room. Appellant himself testified concerning this point, as did Hodge. Appellant could also have called Medrano or any of the boys from the football team. Disclosure of the letter was not required to provide appellant a fair trial.

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[14] Because a different Office of the Inspector General was involved in *White*, the governing provisions were found in Penal Code section 6126.3, which provides that certain documents shall not be released to the public and shall not be subject to discovery, and Penal Code section 6126.5 subdivision (d), which states that a record of an interview is "'deemed confidential for use by the Inspector General and the Secretary of the Youth and Adult Correctional Agency only.'" (See *White v. Superior Court, supra*, 102 Cal.App.4th at Supp. 5.)

Moreover, even were we to agree that the letter was not covered by Education Code section 35401 or that confidentiality had been waived by OIG, the letter was not admissible under the rules of evidence. Respondents objected to the introduction of the letter on grounds of hearsay and lack of personal knowledge. As recognized in *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, an OIG report is likely to "contain[] information which was not directly observable by the investigator who prepared the report" and unlikely to identify the sources on which the investigator relied. (*Id*. at p. 83.) Accordingly, "[b]ecause there is insufficient information to indicate the trustworthiness of the OIG report," it should not be considered. (*Ibid*.) Here, it is evident that the author of the letter, Davis, did not participate in the investigation and had no personal information concerning the presence or absence of boys in the locker room. The information in the letter was conveyed to Davis by OIG investigators, who themselves relied on the reports of third parties. Permitting appellant to introduce the letter would have allowed the jury to consider unreliable hearsay. The court did not err in excluding it.

B. *Special Verdict and Juror Questions*

1. *Background*

The jury was provided a four-page special verdict to assist in its deliberations. Question one asked: "Did [appellant's] report to [LAUSD] that Angela Hewlett-Bloch entered the boys' locker room on September 16, 2005 while male students were in various states of dress and undress constitute a protected disclosure, as that term is defined in the jury instructions?"[15]

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[15] The jury instructions defined "'protected disclosure'" to mean "'a good faith communication' that discloses or demonstrates an intention to disclose information that
(Fn. continued on next page.)

During deliberations, the jurors sent out a note stating: "[We] cannot proceed beyond question [no.] 2. It would appear that we are unable to agree on the meaning of the question. Would it be possible to have 2 and perhaps 1 rephrased so that they are crystal clear[?] We agree on [no.] 1 and not [no.] 2. they tell us we cannot proceed."[16] While the court and counsel were engaged in discussions concerning how to clarify the questions, the jurors sent out a new note: "If we voted on a question and one person wants to go back and change their vote . . . how far along do you have to be before you can go back and change your vote? Can a person keep changing their vote throughout the entire process?"

The court proposed, and counsel agreed, that the jury's query concerning changing a vote would be answered as follows: "Yes. A juror may change his or her vote at any time." Question two of the special verdict was rewritten to state: "Did [appellant's] report to [LAUSD] that Angela Hewlett-Bloch entered the boys' locker room on September 16, 2005 while male students were in various states of dress and undress disclose or demonstrate an intention to disclose an 'improper

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may evidence either of the following: [¶] (1) An improper governmental activity. [¶] (2) Any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition." "Improper governmental activity" was defined to mean "an activity by an employee that is undertaken in the performance of the employees' official duties and meets either of the following descriptions: [¶] (1) The activity violates a state or federal law or regulation . . . . [¶] (2) The activity is economically wasteful or involves gross misconduct, incompetency, or inefficiency." With respect to the law or regulation that might have been violated by Hewlett-Bloch's conduct, the jury was instructed that an act "which is offensive to the senses so as to interfere with the comfortable enjoyment of life or property" could constitute a nuisance or an invasion of the male students' right to privacy.

[16] It is not entirely clear from the record, but it appears that question two originally asked: "Did Mike Bujko's Whistleblower Complaint disclose that Angela Hewlett-Bloch engaged in an improper governmental activity, as that term is defined in the jury instructions?"

governmental activity,' defined to mean the violation of a state law or regulation . . . ." The answer to the jury's question and the revised special verdict were sent in to the jury, along with a note stating: "We have reworded question number 2, per your request. Since you have already decided question number 1, we have not reworded it."

Shortly thereafter, the foreperson sent out a new note stating: "We have a hung jury. We moved back to question [no.] 1 and the vote is [seven to five]. They wanted me to write this letter in regards to what to do." The court called the jurors into court to determine whether anything would assist them in reaching a verdict. Several jurors reported that the first two questions of the special verdict were still not clear. The court asked the jurors to put their problems with the two questions in writing. The jurors sent the following notes to the court: "'Are we supposed to vote on the fact that his report was truthful or that he was required to make the report?'" and "'The portion of the question that is confusing is do we base our vote on the dressed [and] undressed of the students [sic] or by her walking through the locker room . . . during school hours[?]'" The court sent the following response to both questions: "Question no. 1 asks you to determine whether Mr. Bujko reasonably and honestly believed that boys were dressing when she [Hewlett-Bloch] entered the locker room."

The next day, the jurors submitted their final request for clarification: "Do we have to base our answers on Bujko's Report or his initial reaction when the incident first occurred." The court responded: "The question is 'Did his *report* to LAUSD' constitute a protected disclosure." (Italics added.)

Later that day, the jury reached its verdict. It answered "no" to question one of the special verdict, concluding that appellant's report of the locker room incident was not a protected disclosure.

2. *Analysis*

When the jury asks, the court must provide additional guidance even where the original instructions were not legally deficient. (*Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 227.) Failure to do so may constitute error. (*Ibid*.) As is true of any instruction given to a jury, any response to a jury inquiry must accurately reflect the relevant legal principles. (See *Sandoval v. Bank of America* (2002) 94 Cal.App.4th 1378, 1388-1389 [court's response to jury question suggesting plaintiff had burden of establishing increased security measures would absolutely have prevented fatal attack on plaintiff's decedent represented incorrect statement of principles governing causation and required reversal of defense judgment]; *People v. Armstead* (2002) 102 Cal.App.4th 784, 792-794 [court's response to jury question indicating that evidence of other crimes could be used to establish identity, motive or intent when evidence had not been introduced for that purpose violated defendant's due process].)

Appellant asserts that the court's response to the inquiries concerning question one of the special verdict misled the jurors, particularly the inclusion of the phrase "and honestly." He contends it signaled to the jurors that they "had no alternative but to find in favor of [respondents]," and caused them to believe that if there were no boys in the locker room at the time Hewlett-Bloch walked through, they could not resolve the question favorably to appellant, even if appellant believed in good faith that boys were present. Appellant further contends prejudice is established by the fact that the jury "return[ed] to question No. 1 and reverse[d] their earlier finding" after the court provided the language clarifying question one.

Preliminarily, we note that appellant confuses the sequence of events. The jurors' initial query concerning the special verdict indicated that they had reached a tentative decision on question one. Before the court could clarify any portion of the special verdict, however, the jurors sent out a note asking whether a juror could

change his or her vote on a previously settled question. The court correctly advised them in the affirmative and then clarified question two. The jurors then reported they could not reach agreement on any of the special verdict questions. All this preceded any clarification of the meaning of question one.

Moreover, it does not appear that appellant properly preserved the appropriateness of the court's clarification of special verdict question one for appeal. When the court first proposed the wording of the response, counsel for appellant argued against insertion of the words "and honestly." Subsequently, however, he stated to the court: "I think . . . that the [response] that you prepared does answer the question and it's the best possible way to not prejudice them one way or the other that they can still make all the factual decisions but they still have to look at honesty and good faith."

More importantly, we find that the court's response to the jury queries about the special verdict did not mislead the jury with respect to the governing legal standards. Education Code section 44112, subdivision (e) defines "'[p]rotected [d]isclosure'" as "a good faith communication" that "discloses or demonstrates an intention to disclose" improper governmental activity or conditions that threaten the health and safety of employees or of the public. The term good faith "does have a distinct meaning and purpose in the law." (*Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1339.) An inquiry into good faith "'involves a factual inquiry into the plaintiff's subjective state of mind.'" (*Ibid*., quoting *Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 932, italics omitted; see *People v. Nunn* (1956) 46 Cal.2d 460, 468 ["The phrase 'good faith' in common usage has a well-defined and generally understood meaning, being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation."].)

Put simply, appellant was required to prove that when he made his report, he believed in good faith that there were boys undressing in the locker room when Hewlett-Bloch walked through. Question one of the special verdict asked the jurors to determine whether appellant's report of the locker room incident was a "protected disclosure." That term was elsewhere defined in the instruction as a communication made in "good faith." The trial court's response to the jurors' inquiry accurately informed them that they were required to determine whether appellant "honestly believed that boys were dressing" when Hewlett-Bloch entered the locker room.[17]

C. *Potential Juror Misconduct or Bias*

1. *Background*

Two empaneled jurors revealed during voir dire that they were employed by LAUSD. During deliberations, the foreperson of the jury, Pamela Hawkins, sent the court a note stating: "I had some concerns from the first day of deliberations. One of the LAUSD employees wanted to be the foreperson but not sign the paperwork. The two LAUSD employees do not want to go against the District because of the fear of their jobs and they may have to work with these people in

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[17] The jurors' response to the clarified question was not surprising in view of the evidence. Appellant claimed to have seen football players getting ready for the game when he assisted Hodge in clearing the locker room of other students prior to Hewlett-Bloch's walk through and to have looked into the locker room and observed players dressing and undressing after she left. However, Hodge did not recall appellant helping him clear the locker room prior to Hewlett-Bloch's appearance or getting up and looking into the locker room afterward. Multiple witnesses testified that there were no boys in the locker room at the time, and that all the football players were dressed and awaiting Delling and Hewlett-Bloch in the meeting room. The evidence also established that appellant had a history of animosity toward Delling and Hewlett-Bloch, and that he had made multiple claims of retaliation and discrimination in the past.

the future. Please advise me what to do."[18] Hawkins was interviewed and reported that she had heard juror Martin say he wanted to be the foreperson, but did not want to sign the paperwork because he worked for LAUSD and "'did not want to . . . go[] against anybody.'" According to Hawkins, another juror -- Arias -- had said "'I have to be careful in regards to what I say . . . [b]ecause I work for the School District and I already know how it is.'"

The court interviewed Martin. He stated he was "not in the least" concerned about the effect the jury's decision might have on his job. Martin explained that he had been surprised to be left on the jury after he revealed his occupation and acquaintance with some of the witnesses, but stated he was not biased in favor of LAUSD and believed he could be fair. He further explained that he had not wanted to assume the position of foreman because he was concerned that his holding such position would somehow form the basis for an appeal.

The court next interviewed Arias. He denied ever expressing any concern about sitting on the jury and did not believe it was a problem, despite his position with LAUSD. He further stated he was not worried about his job and did not have any bias for or against LAUSD or appellant.

After the interviews, counsel for appellant expressed concern about Martin and counsel for respondents expressed concern about Hawkins, claiming to have seen her discussing matters with fellow jurors in a secretive fashion. The court re-interviewed Hawkins, who denied ever speaking about the case outside the jury room. The court concluded there was no juror misconduct or bias on the part of any of the jurors: "Miss Hawkins . . . has told me they are not talking about [the case] out in the hallway. . . . [W]ith respect to Mr. Martin or Mr. Arias, we learned

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[18] The two jurors, Derek Martin and "Mr. Arias," had revealed their employment and, in Martin's case, his acquaintance with some of the witnesses, during voir dire.

about their purported statements from Miss Hawkins who came out here and couldn't tell me word for word exactly what was said. She was telling me her impressions, and much like your impressions we all interpret things we hear and see with our own filters. It's not always necessarily a reflection of what is really going on. [¶] So I am satisfied that Mr. Martin and Mr. Arias can be fair. They told us that during voir dire. They told all of you about their connections to LAUSD. You all still had peremptories. You could have removed them from the jury . . . knowing their connections. You did not do so. They reaffirmed to me and to all of you here in the courtoom the same things they said during voir dire. And so I am convinced that everything in there is fine."

After the jury rendered its verdict, appellant moved for a new trial alleging irregularity in the proceedings and juror misconduct. The court denied the motion.

2. *Analysis*

Appellant contends the trial court erred in denying his motion for a new trial on the ground that Martin and Arias should have been discharged. We disagree.

A verdict may be vacated and a new trial granted in the case of "[i]rregularity in the proceedings" or "[m]isconduct of the jury" where a juror conceals information on voir dire that indicates partiality or that would have supported a challenge for cause. (Civ. Proc. Code, § 657, subds. (1), (2); *Smith v. Covell* (1980) 100 Cal.App.3d 947, 954-955; see *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 506 ["The right to unbiased and unprejudiced jurors is an ''''inseparable and inalienable part'''' of the right to jury trial. [Citations.] The guarantee includes the right to 12 impartial jurors."].)

Here, the record indicates that two jurors revealed their connection to LAUSD during voir dire and stated that they would not be partial or biased.[19] Hawkins's suggestion that these two jurors had made statements during deliberations indicating possible bias triggered an obligation on the part of the trial court to inquire further. (See *People v. Hedgecock* (1990) 51 Cal.3d 395, 417 ["[I]f during a trial the court becomes aware of possible juror misconduct, it must 'make whatever inquiry is reasonably necessary to determine if the juror should be discharged . . . .'"].) The court interviewed the jurors. Both Martin and Arias stated that their connection with LAUSD would not cause them to be biased for or against either party and denied making any statements to suggest otherwise. "In reviewing the trial court's ruling on a new trial motion, we accept the trial court's credibility determinations if they are supported by substantial evidence, including all favorable inferences that may be drawn from the evidence." (*Karlsson v. Ford Motor Co*. (2006) 140 Cal.App.4th 1202, 1232.) The court concluded that Hawkins misheard or misunderstood the other jurors' statements and that there was no ground for discharge. The record amply supports that finding, and we discern no error in the court's ruling.

D. *Demurrers to Appellant's Non-Whistleblower Claims*

1. *Background*

All respondents demurred to the Fourth Amended Complaint. The trial court sustained the demurrers with respect to the non-whistleblower claims (intentional infliction of emotional distress, violation of civil rights/invasion of privacy, abuse of process, and slander/defamation). Focusing on Pitsker's takeover

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[19] There is no indication in the record that appellant sought to remove the two jurors employed by LAUSD or objected to their presence on the jury during voir dire.

of the whistleblower investigation and his investigation of the alleged pedophilia, appellant contends the trial court erred in sustaining the demurrers of LAUSD and Pitsker to the non-whistleblower causes of action. Specifically, he alleges that the investigation of the pedophilia charge underlying these claims was outside the scope of OIG's authority.[20] For the reasons discussed below, we conclude the court correctly determined that Pitsker's investigation was within the scope of OIG's authority, and that the immunity conferred by Government Code section 821.6 precluded assertion of these causes of action.

2. *Analysis*

There can be no dispute that as long as the investigation of the alleged pedophilia was within the scope of OIG's authority, the specific actions related to the conduct of which appellant complained -- instituting an investigation of his alleged activities, stating publicly that he was being investigated for pedophilia, seizing his computer, and subpoenaing his MySpace account -- were subject to immunity under Government Code section 821.6. "California courts construe section 821.6 broadly in furtherance of its purpose to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits." (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1048 (*Gillian*).) The immunity conferred by section 821.6 is not limited to formal police investigations and criminal prosecutions, but applies to any public employee involved in investigative or prosecutorial functions. (See, e.g., *Hardy v. Vial*

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[20] On appeal, appellant contends only that the court erred in sustaining the demurrers of LAUSD and Pitsker. Appellant identifies no potentially actionable conduct by LAUSD and Pitsker other than that related to investigation of the hotline charges. Any argument that the court erred in sustaining the demurrers of the other respondents to the non-whistleblower claims or that any other conduct supported those claims is therefore forfeited.

(1957) 48 Cal.2d 577, 580, 583 [prosecutorial immunity applied to college officials and administrators who had charged plaintiff with immorality and unprofessional conduct before administrative board]; *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE)* (2007) 157 Cal.App.4th 1056, 1062 (*Richardson-Tunnell*) [investigation of legitimacy of plaintiff's worker's compensation claim, which included videotaping plaintiff at her wedding and while on her honeymoon, "cloaked in immunity because it is an essential step to instituting administrative proceedings"]; *Dawson v. Martin* (1957) 150 Cal.App.2d 379, 381 [building inspector and county board of supervisors immune from suit for "falsely charg[ing]" plaintiff with two violations of the county building code].)

Government Code section 821.6 not only "immunizes . . . the act of filing or prosecuting a judicial or administrative complaint, but also extends to actions taken in preparation for such formal proceedings," including "[a]n investigation before the institution of a judicial proceeding" and "[a]cts undertaken in the course of an investigation." (*Gillan, supra*, 147 Cal.App.4th at p. 1048; accord, *Strong v. State of California* (2011) 201 Cal.App.4th 1439, 1461.) The process of investigation includes subpoenaing evidence. (See, e.g., *Falls v. Superior Court* (1996) 42 Cal.App.4th 1031, 1045 [acts of "subpoenaing a witness for a judicial hearing . . . indivisible from and 'intimately associated with' the act of initiating a criminal prosecution -- for which a prosecutor has always enjoyed immunity"].) It also encompasses a defendant's actions in incidentally making potentially defamatory statements in public. (See, e.g., *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1210-1211 [officers investigating crime immune from liability for statements to friends and neighbors of rape victim suggesting she was lying and indicating she might have been involved in rape and murder of another victim]; *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1291-1293 [district attorney's office immune from liability for issuing press release stating plaintiff had violated Brown

Act where evidence insufficient to institute charges].) "Immunity under Government Code section 821.6 is not limited to claims for malicious prosecution, but also extends to other causes of action arising from conduct protected under the statute," including defamation and intentional and negligent infliction of emotional distress (*Gillian*, *supra*, 147 Cal.App.4th at p. 1048; accord, *Amylou R. v. County of Riverside*, *supra*, at pp. 1208-1214) and invasion of privacy. (*Richardson-Tunnell*, *supra*, 157 Cal.App.4th at p. 1062.)[21]

Appellant contends that prosecutorial immunity does not apply because the investigation of the charge of pedophilia was outside the scope of OIG's authority. (See *Richardson-Tunnell*, *supra*, 157 Cal.App.4th at p. 1062 ["Section 821.6 immunity applies only to conduct within the scope of employment."].) To support this contention, appellant cites LAUSD's whistleblower protection policy, which provides that OIG shall "where warranted, investigate complaints from any person alleging actual or attempted acts of reprisal, interference, intimidation, retaliation, threats coercion or similar acts," and that "OIG's investigation and findings shall be limited to the interference, reprisal or retaliation aspect of the complaint only."[22]

Government Code section 821.6 immunity applies if: "(1) [the defendants] were employees of [a public agency or entity]; (2) [the plaintiff's] injuries were caused by acts committed by the [defendants] to institute or prosecute a judicial or administrative proceeding; and (3) the conduct of [the defendants] while instituting

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[21] Government Code section 821.6 immunity does not apply to whistleblower claims brought under Education Code section 44110 et seq. (*Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1423-1424; see also *Conn v. Western Placer Unified School Dist.* (2010) 186 Cal.App.4th 1163, 1180 [discretionary act immunity under Government Code section 820.2 does not apply to whistleblower claims brought under Education Code section 44110 et seq.].) The trial court overruled the demurrers to appellant's claim for retaliation as a whistleblower.

[22] The trial court took judicial notice of the policy.

or prosecuting the proceeding was within the scope of their employment." (*Amylou R. v. County of Riverside*, *supra*, 28 Cal.App.4th at p. 1209.) "'Duties of public office include those lying squarely within its scope, those essential to accomplishment of the main purposes for which the office was created, and those which, although only incidental and collateral, serve to promote the accomplishment of the principal purposes.'" (*White v. Towers* (1951) 37 Cal.2d 727, 733.) Here, appellant alleged that he acted as a whistleblower by bringing to the attention of his superiors Hewlett-Bloch's wrongful actions, and that respondents retaliated against him in various ways, including by making false charges against him. As the charges themselves were alleged to be an act of retaliation, their investigation was clearly within the purview of OIG's whistleblower duties.

Appellant points out that his complaint alleged that the investigation was a "witch-hunt," that Pitsker acted "knowingly, intentionally and maliciously," and that respondents knew the charges were unfounded. Allegations of this type do not insulate claims from Government Code section 821.6 immunity. (See, e.g., *Baughman v. State of California* (1995) 38 Cal.App.4th 182, 192 ["Under Government Code section 821.6, the officers' actions during the investigation were cloaked with immunity, even if they had acted negligently, maliciously or without probable cause in carrying out their duties."]; *Scannell v. County of Riverside* (1984) 152 Cal.App.3d 596, 604 [investigating detective enjoyed immunity for his actions "regardless of alleged malice"]; *Engel v. McCloskey* (1979) 92 Cal.App.3d 870, 886 [administrator for committee of bar examiners entitled to immunity for instituting administrative proceeding against plaintiff, although he may have had "retaliatory motive"].)

Appellant also points to the allegations in his complaint that without regard to OIG's authority to investigate the allegations, Pitsker himself was acting

"outside the scope of [his] OIG authority." "An employee is acting in the course and scope of his employment when he is engaged in work he was employed to perform, or when the act is incident to his duty and is performed for the benefit of his employer, not to serve his own purposes or convenience." (*Richardson-Tunnell*, *supra*, 157 Cal.App.4th at p. 1062.) "[A] conclusory allegation in a complaint that an employee was acting 'outside the scope of employment' is to be disregarded when the factual allegations and inferences indicate otherwise." (*Javor v. Taggart* (2002) 98 Cal.App.4th 795, 810, italics omitted.) It is clear from the allegations found elsewhere in the complaint that the investigation of the hotline tip concerning appellant was part of the overall investigation concerning whether retaliation had occurred, and that investigation of such matters was part of Pitsker's overall job responsibilities. Accordingly, the court properly concluded as a matter of law that Pitsker was performing the function for which he was employed, and that he (and LAUSD, to the extent LAUSD was liable for his actions) were therefore immune under Government Code section 821.6 from liability for actions related to the OIG investigation.

E. *Summary Judgment in Favor of Pitsker*

1. *Background*[23]

In Pitsker's moving papers, he established that during the relevant period, he was a supervising investigator for OIG and Moriel was an investigator for OIG. In September 2005, appellant made a written report to the local superintendent that

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[23] All respondents moved for summary judgment. As Pitsker's summary judgment motion was the only successful one and is the only one at issue on appeal, we limit our discussion to the specifics of his motion. The grant of summary judgment to Pitsker had the effect of precluding appellant from pursuing at trial any claim against LAUSD based on his conduct in connection with the investigation.

Hewlett-Bloch had gone into the boys' locker room while the football team was "in various stages of dress and undress."[24] In August 2006, appellant filed a complaint against Delling and Hewlett-Bloch under LAUSD's whistleblower protection policy, contending they had retaliated against him for making the report. Appellant's whistleblower complaint was assigned to Moriel for investigation. Moriel prepared a draft report. Pitsker reviewed the report, found it "very poorly written," and concluded Moriel had not performed an adequate investigation or sufficiently supported his conclusions with evidence. Dissatisfied with a subsequent report which, like the first, "relied nearly entirely on the statements and claims by [appellant]," Pitsker took over the investigation himself. In February 2007, OIG's hotline received a tip that appellant "operated a prostitution ring out of Brazil" and "had a MySpace page which featured nude underage girls." Pitsker's "initial concern" was that the tip "could have been a potentially retaliatory act." When conducting the investigation, Pitsker viewed appellant's MySpace profile and found some suggestive pictures of young women on it. This led him to cause subpoenas to be issued for appellant's MySpace records. Pitsker also had the computer from the high school's physical education department removed and analyzed.[25]

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[24] In separate declarations, Hewlett-Bloch and Delling stated that Hewlett-Bloch had walked through the boys' locker room prior to a football game on the way to a meeting. Hewlett-Bloch explained that her foot was injured and in a cast or walking boot, and that the locker room was a shortcut to the meeting room. Both stated that prior to her entry, Delling and others checked the locker room to ensure that no boys were changing clothes.

[25] In a July 2007 letter, LAUSD informed appellant that OIG "recently concluded its investigation into [appellant's whistleblower complaint] and found that [he] did not qualify for Whistleblower protection under the District's Whistleblower Protection Policy" because "[t]he OIG did not substantiate [his] complaint that [Delling and/or Hewlett-Bloch] harassed, threatened, intimidated or retaliated against [him] for reporting alleged improper government activity."

Pitsker stated that the investigation and actions he undertook were "a specific part of his job duties and responsibilities"; that he "conducted these investigations as part of his employment, and for the benefit of the LAUSD"; that he "did not engage in any activities which were for his own benefit, his own purposes, or his own convenience or interest"; and that "all of the work [he] performed in connection with my investigation of [appellant's whistleblower complaint and the OIG hotline tip] was done as a part of [his] duties as Supervising Investigator for the OIG." He further stated that he "had never met and did not know" appellant, Hewlett-Bloch, or Delling," "had no personal interest or stake in the outcome of the investigation" and "did not have any personal like or animosity toward [appellant]." In support of his motion for summary judgment, Pitsker argued, among other things, that he had "legitimate, non-retaliatory reasons for [his] actions," "considered all of the information available to [him] in conducting [the] investigation," and "acted appropriately, within the course and scope of [his] employment, and pursuant to applicable guidelines, practices, and procedures." He further contended that appellant would be unable to proffer evidence that Pitsker's legitimate, non-retaliatory reasons for his actions were "untrue, pretextual, or actually motivated by unlawful retaliation."

In opposing Pitsker's motion, appellant presented evidence that a few days after he made the September 2005 complaint about the locker room incident, Delling and Hewlett-Bloch came to where he was teaching to observe and evaluate him, although he had never before been observed and evaluated by both the principal and vice-principal. He thereafter received an evaluation with negative comments, which he filed a grievance to have removed. A short time later, he was accused of allowing students to act up and view pornography on a computer while under his supervision, and when he asked for the file on this accusation, statements from students which he understood from a third party would have been exculpatory

were missing. In addition, Delling and Hewlett-Bloch failed to allow him the assignment he was due based on his seniority, and Hewlett-Bloch interfered with his election as department chair.

Appellant disputed that Moriel had performed an inadequate investigation. He submitted a declaration, in which Moriel stated that he had conducted a six-month investigation of appellant's allegations, that he "made a determination that [appellant] had been retaliated against by Delling and [Hewlett-Bloch] and others by specific acts of retaliation that [he deemed] to be a direct result of [appellant's] reporting of [Hewlett-Bloch's] inappropriate entry into the boys' locker room," and that "[his] investigation was thorough and complete and accurate and . . . [his] findings were correct."[26] Appellant contended that Pitsker's investigation of pedophilia violated the OIG charter and exceeded the scope of his employment.

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[26] Moriel attached a copy of his draft report to his declaration. Moriel found that Hewlett-Bloch had not violated any District policy or procedure. Nonetheless, he concluded that appellant had suffered retaliatory acts for reporting that she had, including the negative evaluation, Hewlett-Bloch's refusal to accept him as department chair until she had been provided certain documentation, the disciplinary conference based on the students' alleged misbehavior, and Delling's call to the OIG hotline.

Pitsker's declaration discussed OIG's confidentiality policy at length. He stated: "Pursuant to the LAUSD Whistleblower Protection Policy, Education Code § 44110 et seq., and Education Code § 35401 et seq., all reports and other information obtained during the course of an investigation into alleged improper governmental activity are kept confidential by the OIG. During the course of an OIG investigation into a so[-]called 'Whistleblower Complaint,' all witnesses are informed of the confidential nature of the investigation and that personal information will be protected from disclosure pursuant to LAUSD policy and the above[-]referenced laws." (Italics omitted.) He further stated that documents gathered or generated during an OIG investigation were not the property of individual employees, and that as an employee, he was "not authorized to disclose or release the contents of any such documents . . . ."

In response to respondents' objection that any and all matters related to the OIG investigation were confidential, the court ruled that the draft report and statements in Moriel's declaration concerning the specifics of his investigation were confidential and inadmissible under Education Code section 35401, subdivision (c).

The trial court granted Pitsker's motion for summary judgment. The court found that appellant "failed to provide a factual evidentiary showing supporting a prima facie claim for retaliation, as there are insufficient facts to show that any act by [Pitsker] was adverse to [appellant's] employment." In addition, there was "no evidence showing that as a result of the investigation, [appellant] was subject to any sort of employment consequence, such as discipline for filing a claim not in good faith." Moreover, Pitsker had "offered evidence showing that this investigation, concerning persons with [whom Pitsker] was not acquainted, was conducted in good faith and according to recognized procedures."

2. *Analysis*

Appellant contends the trial court erred in granting Pitsker's motion for summary judgment. However, his opening brief fails to address the trial court's bases for granting summary judgment. Accordingly, he has waived any challenge. (*Paulus v. Bob Lynch Ford, Inc*. (2006) 139 Cal.App.4th 659, 685.)

a. *Appellant's Brief Ignores the Bases for the Trial Court's Grant of Summary Judgment in Favor of Pitsker*

Appellant's opening brief contains a section heading stating that the trial court erred in granting Pitsker's motion for summary judgment. However, in the body of his brief, he cites none of the evidence submitted in support of or in opposition to Pitsker's motion for summary judgment and makes no argument about the evidence. Instead, he focuses at length on whether his report concerning

Hewlett-Bloch was a disclosure of an improper governmental act or an internal personnel disclosure.[27]

It is true that Pitsker and the other respondents had argued in support of their motions for summary judgment that appellant's report was not protected under the relevant whistleblower statutes because it was an internal personnel disclosure and not a protected disclosure of improper governmental activity. Their contentions were based on the holding in *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, where the plaintiff, the principal of a junior high school, contended her transfer was in retaliation for disclosure of four legal violations, including that female students had reported a male physical education teacher was peering into their locker room. The court concluded that the disclosure could not support a whistleblower retaliation claim because the plaintiff was merely forwarding complaints made by others and had made the disclosure as the teacher's supervisor to ensure that appropriate personnel action -- not legal action -- was taken. (134 Cal.App.4th at pp. 1384-1385.)

Here, the trial court came to a different conclusion concerning appellant's report, stating in its order that to the extent the motions for summary judgment or summary adjudication were based on the theory that appellant's report represented an "[i]nternal [p]ersonnel [d]isclosure" rather than a "[p]rotected [d]isclosure of [i]mproper [g]overnmental [a]ctivity," they were "denied for the reasons stated in [appellant's] opposition." The court specifically stated that "the facts of this case

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[27] In the remaining portion of the opening brief devoted to his appeal from the grant of Pitsker's motion for summary judgment, appellant argues that Pitsker was not immune from liability under Education Code section 44110 et seq., as Pitsker and the other respondents had argued in support of their motions. The court rejected the contention that immunity precluded prosecution of appellant's whistleblower retaliation claim when it overruled the demurrers to that claim. Nothing in its summary judgment order suggests the court granted Pitsker's motion on statutory immunity grounds.

are distinguishable from . . . [*Patten*]," because "it is undisputed here that [appellant] contacted the District Superintendent to report misconduct by his superiors, over whom he had no personnel management authority." The court clearly understood that appellant's report could potentially be found to be a disclosure of improper governmental activity and that the holding in *Patten* did not protect Pitsker or any of the respondents from appellant's whistleblower retaliation claim.

b. *The Order Granting Pitsker's Motion for Summary Judgment Was Appropriate in View of the Evidence Presented*

Notwithstanding appellant's failure to address the actual bases for the trial court's order, we find no error in the grant of summary judgment to Pitsker.

When a defendant moving for summary judgment "presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors," he or she will be entitled to summary judgment, "unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing." (*Caldwell v. Paramount Unified School Dist*. (1995) 41 Cal.App.4th 189, 203.)

Pitsker presented evidence that he engaged in a good faith investigation of appellant's whistleblower retaliation claim in his position as investigator for OIG, that the investigation was conducted in accordance with recognized OIG procedures, that he was not acquainted with appellant or any of the other parties, and that he had no retaliatory motive or reason for animosity. He came to the conclusion that there had been no improper retaliation, and that the allegedly retaliatory actions undertaken by Delling and Hewlett-Bloch were justified by the information available to them at the time. The only evidence appellant presented

to create a triable issue concerning Pitsker's motivation was the evidence indicating that a different investigator -- Moriel -- undertook a similar investigation and came to a different conclusion. The fact that Moriel reached a different conclusion is not evidence that Pitsker acted in bad faith or from a retaliatory motive.

As for his investigation of the hotline tip, Pitsker did not make the allegation of misconduct against appellant; he merely investigated it to determine whether it was legitimately based on any actions of appellant or whether it had been fabricated for retaliatory purposes. The evidence did not support that Pitsker intended to engage in an act of reprisal or retaliation against appellant by investigating the tip.[28] The trial court's order granting Pitsker's motion for summary judgment was supported by the evidence before it.

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[28] Although Moriel's draft report was not admitted into evidence, we note that it indicated Moriel, too, looked into the pedophilia allegations to determine whether they were made for retaliatory purposes.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.