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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

ELVIRA TAPIA MENDEZ, Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	B240919 (Los Angeles County Super. Ct. No. BC457248)

APPEAL from a judgment of the Superior Court of Los Angeles County, John L. Segal, Judge. Affirmed.

Daniel J. Koes for Plaintiff and Appellant.

Gutierrez, Preciado & House and Calvin House for Defendants and Respondents.

Elvira Tapia Mendez appeals from a summary judgment in favor of respondents Los Angeles Unified School District (LAUSD) and Marcia Koff, the principal of the school where Mendez worked. Mendez argues that there are triable issues of fact whether she was laid off in retaliation for complaining that Koff assaulted her. She also argues that whether Koff intended to injure her presents a triable issue of fact for purposes of the workers compensation exclusivity rule. We disagree and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Mendez was intermittently employed by the LAUSD between December 1998 and November 2010. Initially, she was a teacher's assistant, then a clerk. In 2002, she became an office assistant. After a self-initiated break in service beginning in April 2003, she was reinstated as an office technician at the end of 2005. She again resigned in April 2006 and was reinstated as an office technician in April 2007.

Upon her reinstatement in 2007, Mendez worked at Encino Elementary School until she was laid off in November 2010. She was an office technician assigned to special education services. Bette Kaplan was the school's principal until June 2010. In April 2010, Superintendent of Schools Ramon Cortines sent out a reduction in force (RIF) memorandum, which stated that "school-based cuts must be submitted by April 30th (in the budget tool) and remain unchanged after that date. Principals should contact their Fiscal Specialist for information on the budget tool." Kaplan prepared the school budget for the 2010-2011 year in coordination with an LAUSD fiscal specialist. Mendez's position was funded, and her name did not appear on the budget tool, which listed the positions that were eliminated, changed in basis, or reduced in hours.

In July or August 2010, the list of affected positions was sent to the Personnel Commission, the neutral entity of the LAUSD that administers the RIF process for classified staff according to the collective bargaining agreement and Education Code section 45308. That section provides in pertinent part: "Whenever a classified employee is laid off, the order of layoff within the class shall be determined by length of service." Accordingly, the RIF process allows the most senior person in a classification whose position is affected to bump out the least senior person in a classification. The process repeats for each affected position, and as a result those with greater seniority in a classification are reassigned to other locations, and those with lesser seniority are laid off. In 2010, the seniority system was automated, but results also were cross-checked manually. On August 20, 2010, LAUSD Interim Personnel Director Ann Young Havens issued an update, advising that school-based cuts had been placed in the budget tool, the RIF process would be administered according to seniority and bumping rights, and those laid off would receive 45-day notices in the fall.

Also in August 2010, Koff became the Encino Elementary School principal. During a meeting in August or early September 2010, Koff told Mendez and other staff members that, to protect student privacy, parents should not be allowed to view staff computer screens. On September 15, 2010, Koff saw Mendez talking to a parent at her desk behind the counter dividing the walkway from the desk area. Koff told the parent to move to the counter. The parent attempted to explain the subject of her conversation with Mendez, but Koff insisted that she move away from Mendez's desk. Koff then pulled Mendez out of her chair by her shoulders, grabbed her left arm, and dragged her to the counter. Mendez felt a sharp pain in her upper left arm. During the incident, Koff told Mendez: "I told you not to

speak to parents so close to your workstation."[1] Ten minutes later, after Mendez had returned to her desk, Koff put her hands on Mendez's shoulders and whispered into her ear: "I don't want you to speak to parents next to your desk. That is one of the many complaints from the district."

Based on this incident, Mendez filed a police report against Koff the next day. She contacted her union representative about it on September 20, and complained in writing to Local District Superintendent Linda del Cueto on September 28. In the first week of October 2010, Mendez refused to proceed with the workers compensation claim the LAUSD had filed on her behalf. Also in the first week of October, Koff was asked to respond to Mendez's complaint against her during a meeting with LAUSD directors Lisa Gaboudian and Dea Tramble. Koff was interviewed by police about the incident at the end of October 2010. No criminal charges were filed against her.

By letter dated October 15, 2010, the Personnel Commission notified Mendez of her layoff effective November 30, 2010. An office technician displaced from another school took over Mendez's position, and her duties in special education were assigned to another office technician who transferred from a different school. A total of 1161 office technicians were laid off as a result of the RIF process. Mendez was the only office technician at the Encino Elementary School to be laid off; her co-worker, Diana Coy, was displaced to a different position at another school. Mendez attempted to contact her union representative and others about her layoff, but received no response.

In March 2011, Mendez sued Koff for assault and battery and the LAUSD for wrongful termination under Labor Code section 1102.5, subdivision (b). The

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[1] Mendez did not dispute this fact in LAUSD's separate statement even though her own various recollections of the incident are not clear whether Koff spoke to her during the incident.

trial court denied respondents' motion for summary judgment in January 2012. Respondents filed a writ petition in case No. B239157, and in February 2012 we issued an alternative writ, directing the trial court to either grant summary judgment or show cause why a peremptory writ should not issue. The trial court complied with the alternative writ by granting summary judgment in respondents' favor. Judgment was entered, and this timely appeal followed.

DISCUSSION

A moving defendant is entitled to summary judgment if there is no triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*.) We review the grant of summary judgment de novo, considering "all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We liberally construe the evidence in a light most favorable to the plaintiff. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) However, speculation is not evidence. (*Aguilar, supra*, 25 Cal.4th at p. 864.)

I

Labor Code section 1102.5, subdivision (b) provides in pertinent part 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." A prima facie case of retaliation requires a protected activity by the employee, an adverse employment action by the employer, and a causal link between the protected

activity and the employer's action. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453.) Once the employee establishes a prima facie case, the employer must offer a legitimate, nonretaliatory reason for the adverse employment action. (*Ibid*.) If the employer offers such a reason, the burden shifts back to the employee to prove that the employer's reason is a pretext for intentional retaliation. (*Ibid*.)

Respondents argue Mendez cannot establish a prima facie case because there is no causal link between her complaints against Koff and her layoff, and, even if she could establish a prima facie case, she has no evidence that the RIF process was a pretext for retaliation.

A. *Causal Link*

Mendez contends she can establish a causal link between her complaints and layoff by producing evidence of "nothing more than the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." (*McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 388, citing *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69 (*Morgan*).) She claims the LAUSD was aware of her complaints before she was terminated. The proper question is whether anyone at the LAUSD who knew of Mendez's complaints was involved in the layoff process. (See *Id.* at p. 73 ["In the absence of evidence that the individuals who denied appellant employment were aware of his past filing of a grievance, the causal link necessary for a claim of retaliation cannot be established"]; see also *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 100, 110, 116–118 [causal link established where supervisor initiated disciplinary proceeding against employee for

retaliatory motives even though decision to terminate was made by someone unaware of employee's complaint].)

Mendez argues a jury could find she was terminated by principal Koff or someone at a higher level at the LAUSD who knew of her complaints. But Mendez offers no evidence that Koff herself, or superintendent Del Cueto and operations directors Gaboudian and Tramble, who handled Mendez's internal complaint against Koff, had any involvement in the 2010 layoff process.

Instead, Mendez relies on principal Kaplan's testimony that when Kaplan prepared the budget for the 2010-2011 school year, she told the LAUSD's fiscal specialist that she preferred to retain Mendez as an office technician. Kaplan believed the fiscal specialist "would abide by what the principal wanted, unless somebody at a higher level said differently." Kaplan's testimony does not create an issue of fact. It is undisputed that the principals make the initial decision to keep, eliminate, change, or reduce school-based positions. Kaplan decided to save Mendez's position, and there is no evidence that the position itself was eliminated or otherwise affected. Mendez's name did not appear on the list of affected positions in the budget tool precisely because her position was not affected by Kaplan's budget decisions, and the position eventually was filled by someone displaced from an affected position at another school. Since there is no evidence that Mendez was laid off because her position was eliminated, Kaplan's testimony, limited as it is to budget development, is not probative.

Mendez claims that Maria Underwood, the LAUSD's designated person most knowledgeable, testified at deposition that Mendez's position was eliminated, and that the principal made the decision to do so. Read in context, Underwood's testimony does not support this claim. Underwood was a human resources officer representing the Personnel Commission. She was in charge of implementing the

RIF process according to seniority, after the principals had prepared their schools' budgets and the list of affected positions was compiled and forwarded to Underwood's office. Underwood was prepared to speak about the RIF process in general rather than about Mendez's case in particular. She acknowledged she had not personally reviewed the case. Mendez's attorney objected to her testimony on that ground.

While Underwood was explaining in general terms what occurs to individuals whose positions are eliminated, Mendez's attorney interposed that he was interested in the specific process by which Mendez was laid off. Underwood then tailored her response to Mendez's case, apparently assuming Mendez's position was eliminated. In that context, she stated that the principal or the local district office would decide which positions to eliminate since the Personnel Commission is not involved in that part of the process. Later in her deposition, Underwood was told that the person who replaced Mendez exercised her bumping rights to do so. Underwood responded that if Mendez was the least senior and the person replacing her was more senior that would be consistent with the RIF process.

Considering Underwood's testimony as a whole, and the objections of Mendez's attorney to her lack of personal knowledge about Mendez's case, it is unreasonable to conclude that Underwood testified Mendez was laid off because her position was eliminated by the school principal or the local district office. There is no evidence that Mendez's position was eliminated, or that any budget decisions for the 2010-2011 school year were made after Koff became the principal of Encino Elementary School. Rather, the evidence shows that the 2010-2011 RIF process already was past the budget stage at the time.

We conclude that Mendez cannot establish a prima facie case because she cannot show a causal link between her complaints about Koff and her layoff. In the absence of evidence that someone involved in the layoff process knew about Mendez's complaints, it is speculative to conclude that the close temporal proximity between the complaints and the layoff was more than coincidental. Mendez's argument to the contrary confuses the budget-end of the RIF process, which affects positions and displaces the individuals who occupy them, and the implementation of the RIF process based on seniority, which may lead to the layoff of individuals whose positions are otherwise unaffected by the principals' budget decisions.

B. *Pretext*

Even were evidence of temporal proximity, without more, sufficient to establish a prima facie case, it cannot raise an inference of pretext once the employer articulates a nondiscriminatory reason for its decision. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1112–1113.) To raise an inference of pretext, an employee cannot simply show the employer's decision was mistaken; rather, the employee must show it was so implausible as to be "unworthy of credence." (*Morgan*, *supra*, 88 Cal.App.4th at p. 75.)

1. *Evidence Regarding Seniority*

Mendez argues that the LAUSD did not establish that the individuals who replaced her had greater seniority than she did since Underwood, the person most knowledgeable, was unable to testify specifically about Mendez's case. But the LAUSD carried its burden when it showed Mendez was laid off as a result of the RIF process. The layoff notice says as much. It did not need to establish that the

decision to lay her off was correct. Even if an error was made in calculating Mendez's seniority, the error would render the decision to lay her off mistaken or incorrect but not necessarily implausible. (See *Morgan*, *supra*, 88 Cal.App.4th at p. 75.)

Mendez argues that seniority was not the true reason for her layoff since office technicians with less seniority than she were not laid off and she was the only person assigned to special education services.

a. *Mendez's Declaration*

Mendez relies in part on a conclusory claim in paragraph eight of her own declaration, which states: "I was the only employee at Encino Elementary School who was terminated, even though I had more seniority than comparable employees who were not laid off." Respondents challenged this statement as irrelevant and lacking foundation. They argue the trial court sustained this objection; Mendez argues it did not. The minute order states respondents' "objections to plaintiff's declaration are SUSTAINED as to numbers 1 and 8, and otherwise overruled." The order lists paragraph eight of Mendez's declaration as raising a triable issue of fact. Respondent's objection to the seniority claim in that paragraph was number six. Since respondents objected to more than one declaration, it is more likely that the trial court's reference to "numbers 1 and 8" (not 1 through 8) pertains to other objections.

Even if Mendez is correct that the court overruled respondent's objection to her statement about seniority, we are not required to consider it if it lacks foundation. (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 711.) Mendez's declaration provides no basis for the claim she had more seniority than other employees who were not laid off. In her deposition, Mendez testified

she believed she was laid off because her seniority was incorrectly calculated. But she also admitted she did not know how seniority is calculated or who calculates it, and she did not ask anyone to help calculate her seniority. Considering Mendez's limited knowledge about her own seniority and the lack of evidence regarding the seniority of any other office technician, the conclusory claim in her declaration is not shown to be based in fact. Mendez cannot create a disputed issue of fact by contradicting her own testimony in a declaration. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20–22.)

b. *Kaplan's Deposition*

Mendez's seniority argument also is based on a portion of Kaplan's deposition, in which Kaplan stated that during a budget development meeting she told the fiscal specialist that she preferred to keep Mendez over Coy, the other office technician, because Mendez had "more seniority." In other portions of the deposition, on which Mendez also relies, Kaplan explained that Mendez worked half-time in an office technician position and half-time in a special education position. According to Kaplan, each position was under a separate classification. These portions of Kaplan's deposition were not appended to any of the papers presented in relation to the motion for summary judgment. The full text of Kaplan's deposition was attached to respondents' motion in limine, which was filed after the trial court denied summary judgment and before it changed its order in response to the alternative writ.

Mendez argues that had the trial court given the parties' notice and opportunity to be heard before it changed its order, this evidence would have been before it when it reconsidered the summary judgment motion. We disagree. In *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, the

California Supreme Court noted that "if a trial court is considering changing an interim order in response to an alternative writ, it must give the respective parties notice and an opportunity to be heard." (*Id*. at pp. 1250-1251, fn. 10.) This does not mean, however, that the court must allow the parties to present evidence, which was not before the court when it originally ruled on the motion, nor before us when we issued the alternative writ.

Mendez cites *Le Francois v. Goel* (2005) 35 Cal.4th 1094, for the proposition that a trial court may "reconsider its previous interim orders on its own motion, as long as it gives the parties notice that it may do so and a reasonable opportunity to litigate the question." (*Id*. at p. 1097.) As that case makes clear, when the court reconsiders orders on its own motion, it does so to correct errors "in the absence of new facts or new law," rather than in light of facts that the parties could have but did not present earlier. (See *id*. at 1101.) Were the court to consider additional evidence on its own motion, as Mendez suggests, it would allow the parties to avoid the requirements for filing a proper motion for reconsideration under Code of Civil Procedure section 1008. (See *Hennigan v. White* (2011) 199 Cal.App.4th 395, 406 [facts known before opposition to motion for summary judgment are not "new or different facts" for purposes of granting reconsideration].)

The portions of Kaplan's deposition on which Mendez relies were not offered in connection with the motion for summary judgment, and we need not review them on appeal. (*Merrill v. Navegar, Inc.*, *supra*, 26 Cal.4th at p. 476.) But were we to do so, we are not persuaded that they raise a triable issue of material fact. Kaplan testified she chose Mendez during budget development because Mendez had "more seniority" or "more experience" than Coy. It is not clear whether Kaplan used "seniority" in the sense it is used in the RIF process (time

served in a position with the LAUSD) or whether she meant Mendez had been in her position at Encino Elementary School longer than Coy. Similarly, while Mendez claims she was the only office technician trained and assigned to special education services, it is not clear whether she was the only such employee in the LAUSD or at Encino Elementary School. Her representation that the special education position was a result of a consent decree against the LAUSD makes it unlikely that special education services were provided at no other school.

2. *Lack of Notice of Layoff*

Mendez insists she was not laid off pursuant to the RIF process because she did not receive any notice until October 2010 and her name did not appear of any lay-off list. In August 2010, the LAUSD issued an update on the RIF process, advising that employees whose positions were changed in basis received notices in May 2010. As we have noted, Mendez's position was not affected at all, which explains why she did not receive the May notice. The RIF update stated that 45-day notices to laid-off employees would go out in the fall. Mendez received a 45-day notice, consistent with the RIF process. There is no indication she was entitled to any other notice.

That Mendez's position was listed as "active" on a payroll document a week before her layoff notice issued does not establish her layoff was independent of the RIF process. There is no indication that this document, which contains a list of employees funded by certain federal and state programs, was generated as part of the RIF process or that it reflected future layoffs.

Similarly, the "V-4 list," which Mendez represents is the layoff list the LAUSD presented to the union, does not reflect individual layoffs. It is a list of positions eliminated, reduced in basis, or reduced in hours. Underwood testified

that the implementation of the RIF process begins when her office receives "a document that has all of the positions that were eliminated or reduced in basis, reduced in hours." The list to which Mendez refers is consistent with this description. Since the list is only of positions affected in budget development, and Mendez's position was not affected, there is no reason why her name should appear on it.

When asked about the "V-4 list," Underwood noted that there are several kinds of lists. In describing the RIF process, she explained further that the list of affected positions is loaded into a tool used for placement, which is then populated by the automated seniority system. The system holds "the entire classification in seniority order from highest to lowest." The affected positions are color coded in the system, and the bumping process occurs when a person whose position is eliminated is reassigned to the position of the least senior person in the classification as shown on the seniority system. The portions of Underwood's deposition offered in connection with the summary judgment motion and included in the record on appeal do not show that any print document, other than individual layoff or reassignment notices, is generated as a result of the RIF process. The fact that Mendez did not have actual notice she would be laid off until October 2010 does not establish that she was not included in the RIF process, which began when the list of affected positions was sent to Underwood's office in July or August 2010.

In sum, there are no triable issues of fact that anyone who knew about Mendez's complaints against Koff was involved in the process that resulted in her layoff, and that the layoff was not based on her seniority whether or not it was correctly calculated. Because Mendez can establish neither a causal link nor

pretext, summary judgment in favor of LAUSD was proper on the wrongful termination claim.

II

Workers' compensation is the exclusive remedy for injuries caused by the tortious conduct of co-workers acting within the scope of their employment. (Lab. Code, § 3601, subd. (a); *Torres v. Parkhouse Tire Service, Inc*. (2001) 26 Cal.4th 995, 1002 (*Torres*).) An exception exists for injuries caused by a co-worker's "willful and unprovoked physical act of aggression." (Lab. Code, § 3601, subd. (a)(1).) This exception requires that the co-worker acted with a specific intent to injure. (*Torres, supra,* 26 Cal.4th at p. 1005.)

For the first time on appeal, Mendez argues that Koff waived the workers' compensation exclusivity argument because respondents' answer did not list it as an affirmative defense. The rule may be waived if the employer fails to plead and prove it as an affirmative defense in a civil action unless the allegations in the complaint establish its application. (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 96.) The complaint in this case alleges that Mendez suffered a physical injury when Koff, the school principal, dragged her by the arm after seeing her talk to a parent at her desk. Since these allegations describe an on-the-job injury, the complaint itself places the workers' compensation exclusivity rule at issue. (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 366.)

Mendez argues that whether Koff acted with an intent to injure her when she dragged her to the counter presents a triable issue of fact. We disagree. In *Torres, supra*, 26 Cal.4th 995, the California Supreme Court explained: "Flare-ups, frustrations, and disagreements among employees are commonplace in the workplace and may lead to 'physical act[s] of aggression.' [Citations.] '"In

bringing [people] together, work brings [personal] qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flareup. . . . These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment." [Citations.]'" (*Id*. at p. 1009.) Because "willful acts, including aggressive physical acts, may be considered within the scope of employment," the intent to injure requires something more. (*Ibid*., citing *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465, 476 [trend toward allowing actions against employer who "'acts deliberately for the purpose of injuring the employee'"].)

In *Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367 (*Jones*), the court followed *Torres* in holding that the workers' compensation exclusivity rule precluded an assault and battery claim based on evidence that a co-worker grabbed the plaintiff's arm and started "banging her body around" during an altercation over a wheelbarrow. (*Jones*, *supra*, 152 Cal.App.4th at p. 1374.) Mendez attempts to distinguish *Jones* on the ground that the risk of injury in that case stemmed from a physical altercation between two correctional officers in a prison. That distinction is immaterial because *Torres* makes clear that risks of injury are inherent in all work environments because work, regardless of its nature, brings people of different personalities together, causes friction between them, and gives rise to flare-ups, frustrations, and disagreements. (*Torres*, *supra*, 26 Cal.4th at p. 1009.) Thus, under *Torres*, the risk of injury by a co-worker, who loses his or her temper, is no less inherent in an elementary school setting than it is in a prison.

Viewed in the light most favorable to Mendez, the facts do not support a reasonable inference that Koff acted with the specific intent to physically injure

Mendez. (*Torres*, *supra*, 26 Cal.4th at p. 1009 ["plaintiffs may rely on circumstantial evidence to prove the intent to injure"].) Mendez described Koff generally as "threatening and intimidating," and claimed that Koff improperly touched her on the shoulders at other times as well. This description of Koff's personality and mannerisms, even if true, does not establish that Koff harbored an intent to physically injure Mendez on a specific occasion.

The undisputed facts indicate that Koff had told staff, including Mendez, not to allow parents to see their computer screens. Koff apparently believed she had made it clear that parents were not to be allowed close to staff workstations, and she was upset to see Mendez talk to a parent at her desk. Mendez's claim that she was not told she should not speak to parents at her desk, even if true, shows at most that Koff's outburst resulted from a miscommunication. Thus, even though Mendez believed she had done nothing to provoke Koff, Koff apparently believed Mendez had not followed her earlier instruction.

A plaintiff's burden to raise a triable issue of material fact in opposition to summary judgment is slight but real: there must be evidence that would allow a reasonable trier of fact to find the fact in plaintiff's favor in accordance with the particular standard of proof. (*Aguilar*, *supra*, 25 Cal.4th at p. 845.) Here, that burden is to present evidence that would permit a reasonable trier of fact to find by a preponderance of the evidence that Koff specifically intended by her conduct not simply to discipline or humiliate Mendez, but to physically injure her. But nothing in the evidence suggests that Koff pulled Mendez to the counter dividing the walkway from the desk area for the specific purpose of inflicting pain or physical injury, or that her overreaction was anything other than an emotional flare-up caused by her perception that Mendez had defied a valid work-related instruction.

Summary judgment for Koff was proper, as the claim of assault and battery against her is barred by the workers' compensation exclusivity rule.

III

Mendez argues the alternative writ denied her a right to notice and a hearing because she was not given an opportunity to file a preliminary opposition in this court, and the trial court immediately complied with the writ without notifying the parties. As we have explained, notice and an opportunity to be heard are required before a trial court may change an interim order in response to an alternative writ. (*Brown, Winfield & Canzoneri, Inc. v. Superior Court, supra*, 47 Cal.4th at pp. 1250-1251, fn. 10.) Mendez does not specify the remedy she seeks, but we may not reverse a judgment for a procedural error absent a miscarriage of justice. (*Quail Lakes Owners Assn. v. Kozina* (2012) 204 Cal.App.4th 1132, 1137.) Our de novo review on appeal has not identified any prejudice and has established the validity of the trial court's judgment. For the same reasons, the trial court's failure to include a statement of decision in its order complying with the alternative writ does not require reversal. (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448-449, and cases cited therein.)

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

I concur:

SUZUKAWA, J.

EPSTEIN, P. J.

I concur in the majority's affirmance of summary judgment on the wrongful termination cause of action against respondent Los Angeles Unified School District (LAUSD). I respectfully dissent from the majority's affirmance of summary judgment on the assault and battery cause of action against respondent Marcia Koff.

As recounted in the majority opinion, the undisputed facts are that between 2007 and 2010, appellant Elvira Tapia Mendez worked as an office technician at Encino Elementary School. Koff became the school principal in August 2010. She told staff not to allow parents to view their computer screens, and on September 15 was upset to see Mendez talking to a parent at her desk behind the counter separating the desk area from the walkway. After the parent refused to move away from Mendez's desk, Koff pulled Mendez out of her chair by the shoulders and dragged her by the left arm to the counter, causing Mendez to experience sharp pain in the upper arm. Koff also reminded Mendez: "I told you not to speak to parents so close to your workstation."

The question is whether Mendez's assault and battery claim against Koff is barred by the workers' compensation exclusivity rule in Labor Code section 3601, subdivision (a) or whether it falls under the exception for willful and unprovoked physical acts of aggression in subdivision (a)(1). As the majority points out, the answer depends on whether Koff acted with a specific intent to injure Mendez. (See *Torres v. Parkhouse Tire Service, Inc*. (2001) 26 Cal.4th 995, 1005 (*Torres*).) Mendez argues that whether Koff acted with an intent to injure her presents a triable issue of fact. Respondents contend no triable issue exists since Koff's actions were less grave than acts held in other cases to fall within the exclusivity rule. I do not agree that the cases respondents cite require us to find as a matter of law that Koff did not intend to injure Mendez.

In *Soares v. City of Oakland* (1992) 9 Cal.App.4th 1822 (*Soares*), the plaintiff, a city jail worker, sued a co-worker for attacking him from behind and placing him in a choke hold. (*Id*. at p. 1824.) At trial, an eye-witness testified that the defendant pulled the plaintiff out of a prisoner's cell "with a lot of force" and with a forearm against his neck, causing the plaintiff's face to turn "a little bit purple." (*Ibid*.) The defendant testified he did not intend to injure the plaintiff and used only a "minimum amount of force" to stop him from assaulting a prisoner. The defendant claimed he had the plaintiff's neck in the crook of his elbow. The plaintiff immediately got out of the hold, and the defendant grabbed his arm and walked him out of the cell. (*Id*. at pp. 1824–1825.) The trial court instructed the jury that a willful act requires a specific intent to injure, and the jury returned a verdict for the defendant. (*Id*. at pp. 1825–1826.) The appellate court held the jury instruction was proper. (*Id*. at p. 1826.)

In *Torres*, *supra*, 26 Cal.4th 995, the plaintiff sued a coworker for back injuries sustained when the defendant grabbed the plaintiff's back support belt while the plaintiff was fixing a tire, lifted him off the ground, and dropped him on his knees. (*Id*. at p. 1000.) The plaintiff claimed this was a malicious act; the defendant maintained it was horseplay. (*Ibid*.) After the trial court instructed the jury that liability requires finding the defendant acted with the intent to cause injury, the jury decided the case in favor of the defendant. (*Id*. at pp. 1000–1001.) In a split decision, the Court of Appeal reversed, disagreeing with *Soares*, *supra*, 9 Cal.App.4th 1822, as to whether Labor Code section 3601, subdivision (a)(1) required a specific intent to injure. (*Torres*, at p. 1009.)

The California Supreme Court in *Torres* resolved that question. It held that a specific intent to injure was indeed required. (*Torres*, *supra*, 26 Cal.4th at p. 1000.) The court explained that "[f]lare-ups, frustrations, and disagreements

among employees are commonplace in the workplace and may lead to 'physical act[s] of aggression.'" (*Id.* at p. 1009.) "Because an employee's willful acts, including aggressive physical acts, may be considered within the scope of employment" and thus within the scope of the exclusivity provision of Labor Code section 3601, subdivision (a), the court concluded that the exception in subdivision (a)(1) required an intent to injure. (*Torres* at p. 1009, citing *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465, 476 [trend toward allowing actions against employer who "acts deliberately for the purpose of injuring the employee"].) The court rejected the contention that the intent to injure requirement would shield violent employees from liability: "In situations where employees acting within the scope of employment commit violent, injurious acts against coemployees, triers of fact could reasonably infer an intent to injure to take the actions outside the exclusivity rule's protection. (See [Lab. Code,]§ 3601, subd. (a)(1); *Soares*, *supra,* 9 Cal.App.4th at p. 1831.) . . . As with other mental states, plaintiffs may rely on circumstantial evidence to prove the intent to injure. [Citations.]" (*Torres*, at p. 1009.)

The issue before the courts in *Torres* and *Soares* was the propriety of the jury instruction on the intent to injure requirement. The properly instructed jury in each case resolved conflicting evidence in favor of the defendant, apparently crediting the evidence of innocent horseplay in *Torres* and of a lack of intent to injure in *Soares*. Neither case was decided on the ground that the evidence supported a verdict for the defendant as a matter of law, which is what respondents urge us to do here.

Respondents also rely on *Jones v. Department of Corrections and Rehabilitation* (2007) 152 Cal.App.4th 1367 (*Jones*), where the court held an assault and battery claim was barred by the workers' compensation exclusivity

rule. (*Id*. at p. 1384.) The plaintiff in that case, a correctional officer, sought to retake a wheelbarrow needed by inmates in her charge. The defendant, a fellow correctional officer, "blocked her and refused to move out of her way. He grabbed her arm and started 'banging her body around.'" (*Id.* at p. 1374.) The court reasoned that this incident was not as grave as an example used in *Torres* of a case involving the throwing of a hammer. (*Jones*, at p. 1384, citing *Torres*, *supra*, 26 Cal.4th at p. 1008.)

The *Jones* court's reasoning is problematic. *Carr v. Wm. C. Crowell Co.* (1946) 28 Cal.2d 652 (*Carr*) held that a hammer throwing incident at a construction site was within the scope of employment for purposes of respondeat superior. (*Id.* at pp. 654–656.) The case was cited in *Torres* as an example that willful, malicious, and even criminal acts may be committed within the scope of employment, rendering the employer liable under respondeat superior. (*Torres*, *supra*, 26 Cal.4th at p. 1008.) The court explained that the exclusivity rule in Labor Code section 3601, subdivision (a) is intended to be coextensive with respondeat superior situations. (*Torres*, at p. 1002.) But violent, injurious acts by employees, even if they are within the scope of employment, may also fall under the exception in Labor Code section 3601, subdivision (a)(1) if they are committed with a specific intent to injure. (*Torres*, at p. 1009.)

Since *Torres* did not offer the hammer throwing incident in *Carr* as an example of an act committed without a specific intent to injure, the court in *Jones*, *supra*, 152 Cal.App.4th 1367 was incorrect to use hammer throwing as a measuring stick for the intent to injure requirement. By concluding that "banging [the plaintiff's] body around" was no graver than throwing a hammer at a person, the *Jones* court did not consider whether a jury could reasonably infer a specific intent to injure from the defendant's act. (*Id.* at pp. 1374, 1384.)

On appeal after a motion for summary judgment, we must draw reasonable inferences from the evidence in favor of Mendez, the opposing party. (See *Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1522.) For purposes of the motion, respondents have adopted her version of the incident. This undisputed version may support a reasonable inference that Koff intended to injure Mendez.

The incident did not result from horseplay, frolicking or fun-making in order to negate any hostile intent on Koff's part as a matter of law. (See *Torres*, *supra*, 26 Cal.4th at pp. 1007, 1009.) On the contrary, Mendez described Koff as generally "threatening and intimidating." Koff's statements during the incident indicate she was upset because she believed Mendez had failed to follow her instruction not to speak to parents close to her workstation. Koff reacted with physical aggression, which was unprovoked. (See *id*. at p. 1005.) She pulled Mendez by the arm with force sufficient to force her out of her chair and to cause pain. Even though this was a work-related conflict and, thus, within the scope of her employment, Koff's unprovoked physical aggression is not necessarily within the exclusivity provision of the workers compensation law. When a superior physically assaults an employee perceived to be insubordinate, the otherwise unprovoked assault may not be justified by claiming the employee did not comply with instructions. (See, *e.g.*, *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 723, citing *Miller v. Reed* (1986) 27 Ohio.App.3d 70,73 [use of force on employee not brought within scope of exclusivity rule by need for employee discipline].)

The majority characterizes the issue to be that Mendez had the burden of presenting evidence from which a reasonable trier of fact could conclude that Koff intended "not simply to discipline or humiliate Mendez, but to physically injure her." I agree, and I believe the showing by Mendez was sufficient to meet that standard. Given the background of animosity between Koff and Mendez and the

wide range of alternatives available to Koff to handle the situation, she selected what probably is the worst alternative short of using a weapon. A trier of fact could indeed conclude that Koff intended to humiliate Mendez, to teach her a lesson, and to inflict some injury upon her to make her point. There are, of course, other inferences that may be drawn, and at a full trial Koff may present evidence that entirely rebuts the showing by Mendez. But that is not a question that may be resolved on summary judgment.

Viewing the facts in the light most favorable to Mendez, as we must in the summary judgment context, I cannot say as a matter of law they do not support a reasonable inference that Koff acted with a specific intent to inflict some injury on Mendez, in addition to any other motives she may have had. Because a triable issue of fact exists whether the assault and battery claim falls under an exception to the workers' compensation exclusivity rule, Koff is not entitled to summary judgment.

Therefore, I concur in part and dissent in part.

EPSTEIN, P. J.