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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

BLAINE BLACKSTONE, Plaintiff and Respondent, v. CITY OF LOS ANGELES, Defendant and Appellant.	B234664 (Los Angeles County Super. Ct. No. BC391558)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Carmen A. Trutanich, City Attorney, and Paul L. Winnemore, Deputy City Attorney, for Defendant and Appellant.

Law Offices of Gregory W. Smith, Gregory W. Smith; Benedon & Serlin, Douglas G. Benedon and Gerald M. Serlin for Plaintiff and Respondent.

INTRODUCTION

Defendant City of Los Angeles appeals from a judgment in favor of plaintiff Blaine Blackstone entered after a jury trial. The jury found in favor of Blackstone on his cause of action for retaliation in violation of the Fair Employment and Housing Act (FEHA, Gov. Code, § 12940 et seq.) and awarded him $736,312 in damages. We affirm.

FACTS

A. *Plaintiff Rises Through the LAPD Ranks*

Plaintiff joined the Los Angeles Police Department (LAPD or Department) in 1979. He was promoted several times to Police Officer III. He was assigned to the elite Metro Division, and two years later he was promoted to the rank of Police Officer III+1, an assistant squadron leader with a pay bonus for hazardous duty.

In 1989, plaintiff voluntarily took a paygrade bonus reduction to Police Officer III in order to become a police dog handler in the Metro Division K9 unit. After four years, he transferred to the mounted unit. A year later, he transferred to the Narcotics Division K9 unit.

Plaintiff was promoted to Sergeant I in 1998 and worked as a field sergeant, overseeing patrol functions. He was promoted to Sergeant II and was assigned to Internal Affairs for two years. He then moved to the Community Safety Operations Center.

Throughout this time period, plaintiff's performance evaluations were consistently high. He had no history of discipline. He was commended for his work and leadership, and for his "respect for diversity, Affirmative Action, and . . . reverence for the Department's Core Values and Mission Statement."

B. ***Plaintiff Obtains a Position In the LAX Bomb Detection K9 Unit***

In May 2003, plaintiff applied and was selected for a supervisory position in the LAX Bomb Detection K9 Unit (LAX Unit). This was a coveted position within LAPD. Plaintiff was promoted to Sergeant II+1, with a bonus for hazardous duty.

Plaintiff learned of the position from Patricia Fuller (Fuller), who had worked with him previously and knew he had K9 experience. Fuller was a K9 handler in the LAX Unit and held the rank of Police Officer III+1. Plaintiff and Fuller had never had any problems between them previously.

Plaintiff was the training coordinator and for a time the only supervisor in the unit. In May 2004, Sergeant Chris Thiffault (Thiffault) was assigned to the LAX Unit. He had no dog handling experience but had been a sergeant longer than plaintiff and was given responsibility for administration. Both plaintiff and Thiffault reported to Lieutenant Robert Green, the Officer in Charge (OIC) of the Hazardous Devices and Materials Section, which oversaw the LAX Unit.

Responsibility for security at LAX is shared by LAPD and the Airport Police Department (Airport PD). There was a good deal of animosity between the LAX Unit and Airport PD K9 unit, mainly because some officers in the LAX Unit believed that Airport PD officers were security guards, not police officers, and they should not be allowed to handle police dogs. Plaintiff was assigned the task of resolving morale problems between the two units.

Plaintiff met with Airport PD supervisors to let them know that he did not share the animosity toward their officers. He agreed to share the LAX Unit's space with Airport PD, and he organized joint training exercises and social activities.

One morale booster was a bulletin board located in the LAX Unit's squad room, referred to as the "Wall of Shame." Members of the two organizations posted cartoons and photographs poking fun at one another, which contributed to camaraderie between the two organizations. Although plaintiff did not create the "Wall of Shame," he obtained permission to maintain it from Captain Charles Roper, the commanding officer of the Emergency Services Division and Lieutenant Green's supervisor. Captain Roper

did tell plaintiff to be careful that no cartoons were posted making fun of anyone who was "thin-skinned," and plaintiff communicated this to his subordinates.

Plaintiff received recognition from the LAPD, Airport PD and the federal Transportation Security Administration (TSA) for resolving the morale and cooperation between the LAX Unit and Airport PD. He was recognized for his expertise in K9 bomb detection training and in particular for his creation and implementation of a unique off-lead detection (OLD) program at LAX, in which dogs could roam off-leash among people and baggage to detect guns or explosives. He received letters of commendation from the TSA and spoke at an international conference held by the TSA.

Plaintiff received positive performance evaluations in 2003 and 2004. Lieutenant Green wrote that plaintiff "is an extremely capable and has clearly demonstrated that [he] is more than qualified to promote to Lieutenant of this department." Lieutenant Green was promoted to Captain in October 2004, after which he reviewed the 2004 performance evaluation with plaintiff and the evaluation was finalized.

C. *Plaintiff's Performance Evaluation of Fuller*

Fuller was one of the officers who had expressed animosity toward Airport PD officers. She, along with Officers Donald Bender and John Long, were responsible for fomenting the animosity. She was resistant to plaintiff's efforts to improve relations between the two units. She refused to participate in training exercises if Airport PD officers were participating, and even refused to come in the LAX Unit's offices if an Airport PD car was parked outside. Fuller's impact on the LAX Unit was described as "divisive," "confrontational" and "negative," and one of her superiors even described her as "an institutional terrorist."

Fuller frequently used vulgar and suggestive language and conduct of a sexual nature, which had a disruptive effect in the workplace. She routinely complained about everything that happened in the LAX Unit, particularly if it involved the Airport PD. However, she never complained about the "Wall of Shame" or complained of sexual harassment or gender discrimination.

In September 2004, plaintiff prepared Fuller's performance evaluation. He rated her overall performance as proficient, the highest rating possible. With respect to specific areas of performance, he gave her the highest rating of strong, except in the areas of physical fitness, teamwork and effect on morale, in which he rated her competent. He stated that she had "[e]xcellent K9 Handling skills" but "should focus her considerable energy and ability on her specific duties and the task at hand." In his attached statement, plaintiff had only positive comments about Fuller, stating that she "demonstrated a tremendous work ethic and commitment," "showed tremendous initiative" in researching deployment practices for changes to the deployment protocol, was "very outgoing and friendly" in dealing with the public while patrolling the airport, demonstrated "exceptional duty performance" and "performs her daily duties in a truly commendable manner."

Plaintiff explained that Fuller's competent rating in physical fitness was due to the fact that she was not physically fit and did not take advantage of opportunities to work out while on the job. Her competent ratings for teamwork and effect on morale were due to her divisiveness and the fact that "she was an obstacle to the overall goal of bringing the two units together." Fuller "was not a positive contributor to that effort." Plaintiff believed that if Fuller would focus her energy on being a good dog handler, rather than on complaining about the Airport PD, her performance would improve.

Fuller's performance evaluation was reviewed and approved by Thiffault. Then-Lieutenant Green[1] reviewed and approved the performance evaluation, believing it to be fair. Captain Roper then read and approved the performance evaluation.

On January 10, 2005, after Fuller's performance evaluation had been reviewed and approved, plaintiff put it in an envelope and left it on her desk. He did so because she was on vacation, and he was going out of town for a conference and to purchase dogs; he would not return until after Fuller returned from her vacation. Fuller had requested her evaluation because she was applying for a position outside the LAPD.

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[1] Lieutenant Green subsequently was promoted to captain.

Fuller returned to work on January 15. According to Fuller, she did not look at her performance evaluation until the following day. On January 15, she took a call from Captain Roper, who said he was going to stop by the office. She had seen him take cartoons off the "Wall of Shame" in the past. She removed some cartoons and photographs which she thought were inappropriate from the wall before the captain's visit, so that the LAX Unit would not be embarrassed.

The next day, when Fuller looked at her performance evaluation, she was unhappy with the competent ratings for physical fitness, teamwork and effect on morale. She also felt that the comment about focusing her energy on the task at hand was a personal attack. In addition, she believed the attached statement was copied from prior evaluations and omitted some of her accomplishments.

D. ***Fuller's Complaints About Her Performance Evaluation***

Fuller asked Thiffault to change the areas of performance in her evaluation where she did not receive a rating of strong. She complained to Sergeant Michael Salinaz, OIC of the Bomb Squad and a neutral party, about her evaluation and said she was going to "lawyer up." Sergeant Salinaz told Captain Roper what Fuller had said. He also contacted Captain Green, who set up a meeting for February 2 to discuss Fuller's concerns.

Fuller prepared a list of "discussion notes" for the meeting. Nothing in those noted reflected sexually inappropriate behavior or gender discrimination by plaintiff, and they did not mention the "Wall of Shame."

On February 2, Fuller met with Captain Green, Sergeant Salinaz, and Lieutenant Justin Eisenberg, who was replacing Captain Green as OIC of the Hazardous Devices and Materials Section. She complained about the three competent ratings and the statement attached to her performance evaluation. She raised the issues in her "discussion notes." She then took out an envelope containing the pictures and cartoons she had removed from the "Wall of Shame." Captain Green asked if there was a hostile work environment, and Fuller denied that there was. She described it as "unfavorable."

Fuller testified that "unfavorable" work environment meant "sexually hostile" work environment. She had previously complained to Captain Green about the environment and that she was tired of retaliation and being left out of training. She explained that she was referred to by derogatory terms for a woman and excluded.

Captain Green believed that Fuller intended to sue the city if her performance evaluation was not changed. He agreed that the statement attached to the evaluation would be redone. However, he believed that the ratings of competent for physical fitness, teamwork and effect on morale were fair. Captain Green contacted Commander Mark Leap and Deputy Chief John Miller and told them about the meeting with Fuller. He asked Sergeant Salinaz to interview Fuller to determine whether a personnel complaint was warranted. Lieutenant Eisenberg gave Fuller's "discussion notes" to Internal Affairs.

Lieutenant Eisenberg then met with Fuller and plaintiff regarding Fuller's complaints about her performance evaluation. After discussing Fuller's concerns, plaintiff agreed to give her a strong rating for physical fitness, to edit the attached statement so it was not copied from prior evaluations and to add information regarding her training and accomplishments. He refused to change the ratings for teamwork and effect on morale, however.

During a break in the meeting, and outside Fuller's presence, Lieutenant Eisenberg told plaintiff to change all of Fuller's ratings to strong, stating, "If you don't change the evaluation, Fuller is going to sue the Department for sexual harassment or gender bias."[2] Plaintiff responded, "It's a fair and accurate assessment of her performance, and I'm not going to change it."

Fuller then returned to the meeting, where she was told that plaintiff was going to change her performance evaluation. According to Fuller, Lieutenant Eisenberg told plaintiff to have the changes made by the following day.

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[2] Lieutenant Eisenberg denied telling plaintiff to change the performance evaluation or that, if plaintiff did not change it, Fuller was going to sue LAPD.

E. ***Fuller's Claims of Sexual Harassment and LAPD's Response***

After the meeting with Lieutenant Eisenberg and Fuller, plaintiff put Fuller's performance evaluation in his desk drawer, because he was leaving on vacation the following morning. When plaintiff was at the airport on February 3, getting ready to leave on his vacation, he got a phone call from Captain Green, who told him that Fuller had made a complaint against him for sexual harassment and hostile work environment. However, Captain Green told him not to worry about it; it was not a big deal, and he should go ahead and enjoy his vacation.

At some point, Assistant Chief Sandy Jo MacArthur, an expert on the LAPD's discrimination and harassment policies, was consulted regarding separating plaintiff and Fuller. LAPD and the City of Los Angeles have a zero tolerance policy regarding sexual harassment and retaliation. If a claim of sexual harassment is made, the employees involved are separated to minimize the potential for future claims, to protect the employees, and to allow the investigation to proceed. The complaining employee is given the option of transferring, because a forced transfer raises a concern of retaliation. In this case, Fuller did not want to transfer. Chief MacArthur advised that Fuller be allowed to remain and that plaintiff be transferred while the investigation proceeded.

On February 14, while plaintiff was still on vacation, he received a call from Captain Roper. The captain told him he was being removed from the LAX Unit. When plaintiff asked why, all Captain Roper would tell him was that it was because Fuller complained.

The following day, plaintiff called Bureau Chief John Miller and asked for permission to continue working on the OLD program. He felt it was a very important program, and other security agencies wanted him to talk to them about it.

In the meantime, Sergeant Salinaz was asked to interview Fuller, to see if a personnel complaint was warranted. He conducted an interview, at which Fuller, her attorney, and her union representative were present. At the conclusion of the interview, he briefed Lieutenant Eisenberg and/or Captain Green and completed a personnel complaint face sheet.

The complaint face sheet states that Fuller "alleges the presence of a hostile work environment and gender bias within the LAX bomb detection K9 unit." It states that "[a] formal interview was conducted on February 15, 2005. The information provided instances of inappropriate material being displayed on K9 office bulletin boards, unfair favoritism within the unit, gender bias against Officer Fuller, abuse of Los Angeles World Airport Funds and inappropriate use and training of Transportation Security Administration (TSA) K9s. Additionally, Officer Fuller provided a copy of a K9 training record that contained an inappropriate comment." Supporting evidence included Fuller's "discussion notes," items she removed from the "Wall of Shame," and a copy of a training record dated February 8, which was recovered from the desk of Officer Teddy Gonzalez. Captain Roper and Bureau Chief Miller signed the complaint face sheet on February 17.

When plaintiff returned from vacation on February 21, he was immediately sent to Washington, D. C., to do a presentation for the TSA on the OLD program. When he returned three days later, he was told to stay away from the airport, but he was not given any other instructions.

In early March, Lieutenant Daniel Mulrenin, the new OIC of the LAX Unit, called plaintiff and told him that his request to keep working on the OLD program had been granted. However, Fuller was put on the day watch and plaintiff on the night watch in order to minimize interaction between them. In addition, he could not go into the LAX Unit office unless Fuller was not there and he was accompanied by Lieutenant Mulrenin. This made it difficult for plaintiff to perform his duties.

Lieutenant Mulrenin took over plaintiff's old office. There was an incident in which he entered his office and found explosive material in it. Fuller said she put the material in there. This caused him some alarm and he rekeyed his office because of the incident. He also noted that Officer Gonzalez was afraid of Fuller. Lieutenant Mulrenin had used the term "institutional terrorist" to describe Fuller. When asked why, he explained, "I went to the [LAX U]nit with an open mind and to try to resolve issues and differences. And some—some people are just very difficult to deal with."

F. ***Plaintiff's Removal From the LAX Unit***

On March 22, an incident occurred during a training exercise that plaintiff was conducting at LAX. One of the training aids, a simulated bomb, was not retrieved by the participants following the exercise. When it was later found by an airport employee, the terminal was partially closed and the bomb squad was called. The following day, plaintiff prepared a fact sheet explaining what had happened and offering suggestions as to how to prevent similar incidents from happening.

Plaintiff also contacted the bomb squad and requested an audit. On March 30, the bomb squad reported that two chubs of explosive material were missing. Plaintiff requested an investigation, but as far as he knew, it was never discovered how the material went missing, and the material was not recovered. Plaintiff was one of several people who had access to the material.

On April 1, Captain Roper removed plaintiff from the LAX Unit and told him he was going to be transferred to the emergency services division. The captain told him he would never work in a K9 unit again and he was to stay out of the LAX Unit office. The OLD program was discontinued.

Shortly after that, plaintiff went to the Metropolitan Division office to be interviewed by a department psychologist, who was conducting an environmental audit of the LAX Unit. The psychologist noted something looked wrong and asked how plaintiff was feeling. He said he "felt horrible." The psychologist contacted Lieutenant Mulrenin, who took plaintiff to an emergency clinic. Plaintiff was diagnosed with hypertension, and he went out on leave.

On April 22, plaintiff, Thiffault, Lieutenant Mulrenin and the dog handlers involved in the March 22 incident each received a Notice to Correct Deficiencies, also known as a "paper penalty." It is a very light form of discipline, remaining in an officer's personnel file for only six months.

Also on April 22, Captain Roper prepared a document recommending deselecting and reassigning plaintiff; the deselection was the loss of plaintiff's +1bonus for hazardous duty. Captain Roper acted at the direction of his superior, Commander Leap. The

document stated that "[r]ecent events, as well as subsequent in-depth administrative audits by both the Department and federal agencies, have disclosed that [plaintiff] has not provided the necessary level of leadership and managerial oversight required of the position. The Department has an immediate need to replace [plaintiff]."[3]

At this time, Fuller's allegations were still being investigated. No action was taken against Thiffault, who was aware of the "Wall of Shame," or Officer Gonzalez, who was named in Fuller's complaint. Captain Roper testified that it was his understanding that plaintiff was moved for his protection, meaning "it was a consideration because we didn't know how to leave him there with his protagonist also assigned to the unit." Captain Roper did not know why Officer Gonzalez was left in the unit with Fuller, but he stated that "[w]e got a lot of—a little bit of this and a little bit of that, and have to give the employee the benefit of the doubt sometimes." When asked why he did not give plaintiff the benefit of the doubt, Captain Roper explained that plaintiff was moved but eventually returned to the LAX Unit. ~(5 RT 1310-1312)~

In August, plaintiff was loaned to the Los Angeles Fire Department to train arson dogs in the OLD program. He never finished the training. In November, his loan to the fire department was cancelled and he was reassigned to Devonshire Patrol Division.

Plaintiff emailed Captain Roper on November 14, asking: "What is your position regarding me working [overtime]? This re-assignment greatly impacted my income this year. I have not had the opportunity to work the [overtime] I had been working at the airport, nor receive the standby. Also . . . since Boomer [plaintiff's canine partner] was

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[3] The TSA had sent out its Annual NEDCTP [National Explosives Detection Canine Team Program] Comprehensive Assessment for LAX on February 24. TSA stated in its overview: "Overall, it was apparent that both the Los Angeles Police Department and Los Angeles World Airport Police Department are tremendous assets to the TSA National Explosives Detection Canine Team Program. The professionalism of these units was constantly displayed, and their dedication and commitment to the program was evident. There were some deficiencies noted during the assessment which were brought to the attention of the participant. The participant assured me they would be followed up on immediately." Plaintiff did not participate in the assessment; Thiffault and Fuller did.

taken from me and reassigned, I have not earned my care and maintenance. Do you have any objection to my working high visibility [overtime] at LAX since it is still [LAX] funded? Please let me know ASAP."

Captain Roper responded: "The inv[estigation] is wrap[p]ing up, be patient. It is not in your best interest to be at the airport until the dust has finally cleared. I can't stop you from applying to work the regular [overtime] detail, through the substation cadre, but you need to think long and hard on this. Right now by being off the radar, you are not generating any new interest or attention. It is best that way." Captain Roper testified that what he meant was that someone close to the investigation "had it out" for plaintiff.

At the time, Captain Roper was aware that Fuller had been making new allegations against plaintiff as well as other officers. Fuller would make the allegations to Lieutenant Mulrenin, who kept Captain Roper informed of them.

In May 2006, a complaint adjudication form was filed relative to the March 2005 disappearance of explosive material. It was initially alleged that plaintiff had improperly stored explosives in violation of LAPD policy. Plaintiff prepared a *Skelly*[4] response, stating that there was no policy as to the storage of explosive material. LAPD then changed the allegations to state "that between January 5, 2005, and March 30, 2005, an unknown Department employee inappropriately removed high explosives from a LAPD explosive storage magazine." The form recommended that the allegation be sustained and that plaintiff be suspended for four days.[5]

On May 26, Commander Michael Downing, Assistant Commanding Officer of the Counter-Terrorism and Criminal Intelligence Bureau, requested that plaintiff be administratively transferred from the OIC of the LAX Unit. He explained that plaintiff's "skills and abilities would be better served in a more general operational division. The

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4 *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215.

5 According to plaintiff, insuring that people who removed explosive material from the storage magazine signed in and out could be both an administrative and training function, "[b]ut as far as the audits and controls, that would primarily be administrative." Thiffault, the administrative sergeant, was not disciplined in connection with the incident.

approval of this administrative transfer would effectively resolve a conflict within the command of Emergency Services Division and foster a more organized and efficient work unit. Pursuant to [the LAPD manual], I have met with [plaintiff] and discussed the reason for the transfer. [Plaintiff] disagrees with the transfer." Commander Downing noted that if the transfer was approved, plaintiff requested assignment to, in order of preference, Metropolitan Division K9 Unit, Mission Area, Hollywood Area.

Before making the request, Commander Downing reviewed plaintiff's personnel file. He knew that plaintiff was an expert in K9 bomb detection. He knew that on March 16, 2005, Captain Green had completed plaintiff's performance evaluation and rated him strong in all categories. He was aware of Fuller's complaint against plaintiff and the April 22, 2005 recommendation for deselection and reassignment. So he was aware that, "in less than five weeks, [plaintiff] had gone from strong in every single category, with having developed a program that was viewed as the most progressive K9 program in the country, to being deselected completely out of the bomb K9."

With respect to the complaint adjudication recommendation resulting from the missing explosive material, Commander Downing approved the recommendation that plaintiff be suspended for four days and signed the complaint adjudication form on May 31, 2006.

With respect to plaintiff's transfer, Commander Downing was informed that there was no Sergeant II position available, and even if there was a position available, plaintiff was not going to get it. This was the decision of Assistant Chief George Gascon. Therefore, on June 28, Commander Downing prepared a recommendation for administrative transfer and reduction in paygrade for plaintiff.

One of the bases for the recommendation was "a complaint . . . by a sworn LAX K-9 Unit member that alleged that [plaintiff] condoned and participated in activities that contributed to a hostile work environment. The complainant also brought to the Department's attention alleged examples of the absence of administrative controls and procedures that negatively impacted daily LAX K-9 Unit operations." Another basis was the March 22, 2005 incident, for which plaintiff "received a Notice to Correct

Deficiencies for his involvement in the incident." Also cited was the discovery of the missing explosive material. The recommendation stated "that two explosive training aids were missing and unaccounted for. These aids had been checked out of the magazine the previous day to officers working with [plaintiff]. Further, it was found that [plaintiff] had issued OLD Program magazine keys to at least five other unit members, however, there were incomplete administrative records documenting this distribution," as well as incomplete records documenting items removed from and returned to the magazine.

Commander Downing reviewed other deficiencies in accounting and record-keeping for the LAX Unit. He concluded his recommendation: "The Department has an obligation to ensure that personnel in coveted positions are there because they have, and continue to demonstrate, the skills necessary for a strong leadership role in the training, development, and supervision of subordinates. Cumulatively, the issues referenced above, show that [plaintiff] did not display the requisite leadership and managerial skills necessary for assignment to the advanced paygrade and bonus position as the officer in charge of the LAX K-9 Unit."

At trial, Commander Downing denied that the administrative transfer and reduction in paygrade was punishment for, or because of, Fuller's complaint. He explained that Assistant Chief Gascon made the decision "because he didn't have a Sergeant Two position . . . in Office of Operations at the time, and would not accept him, would not take him into this organization as a Sergeant Two." When it was pointed out that plaintiff worked a Sergeant II position at Devonshire in 2006, Commander Downing said that plaintiff was "on loan," and the commander did not know if there was an open Sergeant II position. He explained that "[i]f you're on loan, you don't occupy normally a position within the table of organization."

Effective August 20, plaintiff's paygrade was reduced to Sergeant I and he was transferred to Van Nuys Division as a patrol supervisor. He later was assigned to the Employee Representation Unit, still as a Sergeant I.

G. ***Administrative Adjudication of the Allegations Against Plaintiff***

Plaintiff contested the recommended four-day suspension for the missing explosive material. A Board of Rights hearing was held. On November 30, 2007, the Board found plaintiff not guilty.

The Board found, regarding the March 22, 2005 training incident, that plaintiff "shared responsibility for failing to properly secure the training aid with Lieutenant Mulrenin, Sergeant Thiffault," and two other officers. "At the time the Department recognized this and administered notices to correct to all of them. There was no justification provided by the Department to single out [plaintiff] for additional discipline." Regarding the missing explosive material, the Board found "the Department has failed to demonstrate that [plaintiff] was responsible for the loss of the chubs." Finally, in reviewing the systems in place for storage of explosive material, the Board found there were no deficiencies which rose to the level of misconduct by plaintiff.

Chief William J. Bratton agreed with the Board's decision. On January 29, 2008, he signed an order restoring plaintiff to his position as Sergeant II+1.

The investigation into Fuller's claims of sexual harassment and hostile work environment had been completed in mid-2007. It resulted in 43 allegations of misconduct against 14 officers, including plaintiff, Thiffault, Officer Gonzalez and Fuller herself.

On January 11, 2008, Captain Joel Justice completed his adjudication of the allegations against plaintiff. He sustained four of the allegations, all of which were based on the "Wall of Shame." The allegations were that plaintiff engaged in behavior that amounted to sexual harassment and unbecoming conduct, failed to take appropriate action after becoming aware of misconduct, and compromised the work environment of his subordinates. Captain Justice recommended a Board of Rights hearing and removal.

Captain Justice recommended a seven-day suspension for Thiffault based on the "Wall of Shame." He explained that he did so because Thiffault was subordinate to plaintiff. The captain recommended a five-day suspension for Officer Gonzalez for conduct amounting to sexual harassment and unbecoming conduct. As to the allegations

against Fuller, failure to report misconduct in a timely manner and making an improper remark in the workplace, "[t]hey were adjudicated as nondisciplinary, employee's actions could have been different training."

Captain Justice was aware that Fuller had complained about the ratings plaintiff had given her on her performance evaluation, and he took that into consideration when he adjudicated the allegations. He also was aware that Fuller had filed a lawsuit for $4.7 million. He denied that that had any impact on his adjudication.

On March 25, Chief Bratton signed a complaint directing plaintiff to a Board of Rights hearing on the sustained allegations.

On April 18, plaintiff received a letter from his commanding officer stating that even though he was found not guilty at his Board of Rights hearing [on the four-day suspension], the "downgrade from Sergeant II+1 to Sergeant I was still in effect. According to [Internal Affairs], an error was made when the order . . . was completed." The commanding officer was "instructed to inform" plaintiff that he was still a Sergeant I.

A Board of Rights hearing was held on the sustained allegations, and on March 18, 2009, the Board found plaintiff not guilty on all four counts. The Board stated it had "reviewed materials that were posted on this unofficial bulletin board and although the materials were viewed as immature and problematic, the content did not rise to the level of misconduct. There was testimony and/or exhibits that shows that Officer Fuller asked people to place clippings on the board and that she, in fact, placed clippings on the board herself. It appeared that Fuller joined in the bulletin board related activities in the office."

The Board noted Captain Green's testimony that Fuller's complaint to him was that there was a "Metro Boy" clique, and she used the term "unfavorable environment," rather than "hostile work environment." "Officer Fuller herself testified that she was not offended by the bulletin board and that some of the items were funny." In sum, the "Wall of Shame" "was favorable for morale and enjoyed by all," and "there was insufficient evidence that [plaintiff] engaged in behavior that amounted to sexual harassment."

With respect to the allegation that plaintiff engaged in unbecoming conduct by allowing the "Wall of Shame" to remain, the Board observed: "Ironically, you had two tenured command officers who had observed the Wall of Shame on various occasions and by the same line of reasoning, given their tacit approval to its existence. In fact, neither of these individuals ordered that the Wall of Shame come down despite both of them having concerns about some of the items posted at one time or another." While "the Department faulted [plaintiff] for not having any meetings with his personnel to discuss his expectations about the appropriateness of items posted on the unofficial bulletin board," there was "no evidence that this was ever done by any supervisor in the chain of command until well after Officer Fuller had filed her complaint." The Board found that plaintiff "felt that he had the support of his direct supervisor and his commanding officer to carry on with the Wall of Shame. Although he admittedly could have used some better judgment concerning certain items that were posted," there was no unbecoming conduct.

As to the allegation of plaintiff's failure to take appropriate action upon becoming aware of misconduct, there was "ample testimony that lends to the position that the then commanding officer, Captain Roper, had knowledge of the board and its content and thus conveyed concurred approval."

Regarding the allegation of a compromised work environment for plaintiff's subordinates, the Board stated: "Captain Green testified that he thought Officer Fuller was trying to undermine [plaintiff]. He also testified that Fuller complained to him about the unit. It appeared to Captain Green that Fuller didn't like the way the unit was being run. Fuller liked the previous sergeant, but felt that she was losing control and stature within the unit. She complained about a Metro Click [*sic*] and not being part of it." Plaintiff gave her "a normal amount of assignments" and included her in training assignments. The evidence showed she was "an unhappy employee, not an employee in a compromised environment." The evidence also showed that Fuller "was not the most popular in the unit. Although she was never excluded from activities, she often avoids

contact with other officers, and other members of the unit always treated her well with nothing less than dignity and respect."

Chief Bratton again agreed with the Board of Rights decision. However, plaintiff was not restored to his former paygrade of Sergeant II+1, returned to the LAX Unit, or even transferred to any K9 unit. According to Commander Downing, he did not consider returning plaintiff to the LAX Unit "[b]ecause in my view, there was a breakdown in supervision. There were no control systems in place. The work environment was bad, even if they didn't find him guilty of the hostile work environment . . . ." When plaintiff was with the LAX Unit, "there was a void of leadership," based on the TSA audit and Lieutenant Mulrenin's subsequent change of command audit.

The City of Los Angeles settled Fuller's lawsuit for $2.25 million, and she remained in the LAX Unit until her retirement. Officer Gonzalez was permitted to remain in the LAX Unit. Thiffault remained in the LAX Unit. He was promoted to Sergeant II+1 and oversees both administration and training. Captain Green was promoted to Commander. Captain Roper remained in his position until his retirement.

PROCEDURAL HISTORY

Plaintiff filed this action on May 28, 2008, alleging causes of action for gender discrimination and retaliation under FEHA. On his cause of action for gender discrimination, plaintiff alleged that he was removed from his position, transferred, demoted, and falsely accused of violating department regulations "because of Plaintiff's gender[,] male, and because he refused to treat females differently from male officers." On his retaliation cause of action, he alleged the foregoing actions constituted retaliation.

Following trial, the jury found that "the City of Los Angeles/LAPD engage[d] in conduct that, taken as a whole, substantially and materially adversely affected the terms, conditions, or privileges of [plaintiff's] employment." It found that plaintiff's gender was not a motivating factor in the LAPD's conduct, therefore finding in favor of defendant on the gender discrimination cause of action.

On the retaliation cause of action, the jury found that plaintiff's supervisor ordered him to change Fuller's performance evaluation, and plaintiff refused to follow that order because he reasonably and in good faith believed it to be discriminatory. The LAPD took adverse employment action against plaintiff based on his refusal to follow his supervisor's order to change Fuller's performance evaluation, causing plaintiff harm. The jury awarded plaintiff $225,526 for his past economic loss, $160,786 for future economic loss, and $350,000 for past noneconomic loss.

DISCUSSION

On appeal, defendant challenges the sufficiency of the evidence to support the jury's verdict. Specifically, defendant contends there is no substantial evidence that plaintiff engaged in protected activity or that an adverse employment action was motivated by retaliatory animus. For the reasons set forth below, we disagree.

A. *Standard of Review*

When a party challenges the sufficiency of the evidence to support a jury verdict, "we apply the substantial evidence standard of review." (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1096.) "'Actions for unlawful discrimination and retaliation are inherently fact-driven, and we recognize that it is the jury, and not the appellate court, that is charged with the obligation of determining the facts. Nonetheless, the jury's verdict stands only if it is supported by substantial evidence. "In determining whether a judgment is supported by substantial evidence, we may not confine our consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the [jury]. [Citation.] We may not substitute our view of the correct findings for those of the trial court [or jury]; rather, we must accept any reasonable interpretation of the evidence which supports the [factfinder's] decision. However, we may not defer to that decision entirely. '[I]f the word "substantial" means

anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.' [Citations.]

"'"Although each case must be judged for sufficient evidence on its own peculiar circumstances, a number of general guidelines may be set forth. First, a judgment may be supported by inference, but the inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork. [Citation.] Thus, an inference cannot stand if it is unreasonable when viewed in light of the whole record. [Citation.] And although an appellate court will normally defer to the trier of fact's drawing of inferences, it has been said: 'To these well settled rules there is a common sense limited exception which is aimed at preventing the trier of the facts from running away with the case. This limited exception is that the trier of the facts may not indulge in the inference when that inference is rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men. The trier of the facts may not believe impossibilities.' [Citations.]" [Citation.]' [Citation.]" (*Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1218-1219.)

We do not reweigh credibility and cannot reject testimony found by the jury to be credible. (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 598; *Evje v. City Title Ins. Co.* (1953) 120 Cal.App.2d 488, 492.) If, without regard to conflicts in evidence and considering the evidence in the light most favorable to the prevailing party, there is substantial evidence to support the jury's findings, the findings must be sustained and the conclusion is final. (*Field v. Mollison* (1942) 50 Cal.App.2d 585, 591.)

B. *FEHA*

Under FEHA, it is an "unlawful employment practice" "to discriminate against [a] person in compensation or in terms, conditions, or privileges of employment" on the

basis of that person's gender. (Gov. Code, § 12940, subd. (a).) FEHA "also prohibits employers from retaliating against employees for engaging in protected activity—i.e., for 'discharg[ing], expel[ling], or otherwise discriminate[ing] against any person because the person has opposed any practices forbidden under this part . . . .' (*Id*., § 12940, subd. (h).)" (*Joaquin v. City of Los Angeles*, *supra,* 202 Cal.App.4th at p. 1219.)

To establish a prima facie case of unlawful retaliation, a plaintiff must demonstrate that he or she engaged in a protected activity, the employer subjected him or her to an adverse employment action, and there was a causal link between the protected activity and the employer's action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) If the employee can state a prima facie case, the burden shifts to the employer to demonstrate that the adverse employment action was taken for a reason other than retaliation. (*Yanowitz*, *supra*, at p. 1042; *Flait*, *supra*, at p. 476.) If the employer is able to do so, the presumption of retaliation is removed, and the burden shifts back to the plaintiff to produce evidence demonstrating that the employer's articulated reason was merely a pretext, and there was intentional retaliation. (*Yanowitz*, *supra*, at p. 1042; *Flait*, *supra*, at p. 476.)

C. *Protected Activity*

Defendant first claims that there is no substantial evidence that plaintiff engaged in protected activity, in that "the record reveals no evidence from which a reasonable trier of fact could find [plaintiff] sufficiently communicated to Lieutenant Eisenberg—or any superior officer—that he refused to change Fuller's performance evaluation because he believed [Lieutenant] Eisenberg's order was discriminatory."

Defendant relies on the Supreme Court's opinion in *Yanowitz v. L'Oreal USA, Inc.*, *supra,* 36 Cal.4th 1028, holding "that an employee's refusal to follow a supervisor's order that [he or] she reasonably believes to be discriminatory constitutes protected activity under the FEHA and that an employer may not retaliate against an employee on the basis of such conduct when the employer, in light of all the circumstances, knows that

the employee believes the order to be discriminatory, even when the employee does not explicitly state to [his or] her supervisor or employer that [he or] she believes the order to be discriminatory." (*Id*. at p. 1036.)

Yanowitz makes it clear that "[s]tanding alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination." (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1046.) While the employee need not make a formal complaint to be engaged in protected activity, the employee's actions must make it clear that the employee is opposing activity the employee reasonably believes constitutes unlawful discrimination; "complaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct. [Citations.]" (*Id*. at p. 1047.)

However, the "'employee is not required to use legal terms or buzzwords when opposing discrimination. The court will find opposing activity if the employee's comments, when read in their totality, oppose discrimination.' [Citation.]" (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1047.) "'The relevant question . . . is not whether a formal accusation of discrimination is made but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.' [Citation.]" (*Ibid.*)

Viewed in the light most favorable to the judgment (*Joaquin v. City of Los Angeles, supra,* 202 Cal.App.4th at p. 1218), the evidence shows that plaintiff prepared Fuller's performance evaluation, which was reviewed and approved by Thiffault, Captain Green, and Captain Roper. Fuller attempted unsuccessfully to get Thiffault to change the areas of performance in her evaluation where she did not receive a rating of strong. She then complained to Sergeant Salinaz and threatened to "lawyer up." Sergeant Salinaz conveyed Fuller's concerns to Captain Roper and Captain Green.

Fuller met with Captain Green, Sergeant Salinaz, and Lieutenant Eisenberg. She complained about the three competent ratings and the statement attached to her performance evaluation. She also raised the issues in her "discussion notes," including the "unfavorable" work environment.

Captain Green believed that Fuller intended to sue the city if her performance evaluation was not changed. He agreed that the statement attached to the evaluation would be redone. However, he believed the three competent ratings were fair. Captain Green contacted his superiors and told them about the meeting with Fuller. He asked Sergeant Salinaz to interview Fuller to determine whether a personnel complaint was warranted. Lieutenant Eisenberg gave Fuller's "discussion notes" to Internal Affairs.

Lieutenant Eisenberg then met with Fuller and plaintiff regarding Fuller's complaints about her performance evaluation. After discussing Fuller's concerns, plaintiff agreed to give her a strong rating for physical fitness, to edit the attached statement so it was not copied from prior evaluations and to add information regarding her training and accomplishments. He refused to change the ratings for teamwork and effect on morale, however.

During a break in the meeting, and outside Fuller's presence, Lieutenant Eisenberg told plaintiff to change all of Fuller's ratings to strong, stating, "If you don't change the evaluation, Fuller is going to sue the Department for sexual harassment or gender bias." Plaintiff responded, "It's a fair and accurate assessment of her performance, and I'm not going to change it."

In defendant's view, plaintiff's statement to Lieutenant Eisenberg "reasonably conveyed that his refusal to change the ratings for teamwork and effect on morale was because those ratings were 'a fair and accurate assessment of her performance.' . . . His communications did not convey that his refusal to follow Lieutenant Eisenberg's order was based on a reasonable belief that the order was discriminatory." Defendant's view of the evidence is too narrow.

The totality of the circumstances show that Fuller received a fair and accurate performance evaluation. When she complained, plaintiff agreed to edit the attached

statement to more fully reflect Fuller's accomplishments and to give her a strong rating for physical fitness based on her representations regarding her fitness training away from the unit. Plaintiff refused to change the other two competent ratings.

When Lieutenant Eisenberg told plaintiff to change the other two ratings, Fuller had already complained to other officers about her ratings and threatened to "lawyer up." Lieutenant Eisenberg told plaintiff to make the changes not because Fuller deserved the higher ratings but because, if the ratings were not changed, "Fuller is going to sue the Department for sexual harassment or gender bias." Under these circumstances, plaintiff's statement that his ratings were fair and accurate and he would not change them clearly conveyed his objection to engaging in discriminatory behavior, i.e., giving Fuller preferential treatment based on her gender.

In support of its position, defendant cites Lieutenant Eisenberg's testimony. He testified that his role in the meeting with plaintiff and Fuller was "to see if a solution could be worked out in terms of a more accurate assessment of the rating period. And the way I walked away from that meeting was that [plaintiff] recognized the shortcomings of the rating, and voluntarily agreed to make the changes to make it more accurately reflect the performance of Officer Fuller."

Lieutenant Eisenberg further testified that he never ordered plaintiff "to make any specific changes to the rating, for example, check all the boxes." He also testified that Fuller did not "say the changes should be made because she's a woman," and he did not "leave the meeting thinking that [plaintiff] had to make the changes because he's a male."

The jury clearly disbelieved Lieutenant Eisenberg's testimony to a certain extent. Even if the jury did believe that Fuller never said the changes should be made because she was a woman, and that he did not think plaintiff had to make the changes because he was a man, a finding that plaintiff engaged in protected activity is not precluded. There was evidence that Lieutenant Eisenberg sought to have plaintiff give Fuller preferential treatment based on her gender, so she would not file a claim of gender bias. Plaintiff refused to do so, instead stating that the rating he had given her was fair and he would not change it.

D. *Retaliatory Intent*

Defendant further contends there is no substantial evidence that an adverse employment action was motivated by retaliatory intent. Defendant's first claim is that "there is no substantial evidence that his superiors knew that he had engaged in protected activity." As discussed above, there is evidence that plaintiff communicated to his superiors—through Lieutenant Eisenberg—that he had engaged in protected activity.

Defendant next claims that it "proffered legitimate, nonretaliatory reasons for each adverse employment action," and plaintiff failed to present substantial evidence that those reasons for pretextual. We disagree.

In defendant's view, the only evidence plaintiff presented that LAPD's reasons were pretextual was his testimony that he believed he was not working in a K9 unit "because the Department is still angry at me for not changing Fuller's rating." There is, however, much more.

As plaintiff points out, proof of an employer's retaliatory intent and its causal connection to an adverse employment action "is likely to depend on circumstantial evidence, since they consist of subjective matters only the employer can directly know, i.e., his attitude toward the plaintiff and his reasons for taking a particular adverse action." (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713.) Circumstantial evidence of retaliatory intent and causal connection "typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers." (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153.)

Defendant claims that the LAPD decided to separate plaintiff from Fuller "pursuant to LAPD policy and in order to minimize the potential of future discrimination claims, protect the involved employees, and allow the misconduct complaint investigation to run its course." However, the LAPD allowed Officer Gonzalez to remain in the LAX unit, even though Fuller had complained about him as well. In addition, Fuller's complaints centered on items posted on the "Wall of Shame." As the Board observed, plaintiff's superiors, including Captain Roper, had seen and tacitly approved of

the "Wall of Shame," and Thiffault had seen and was aware of the "Wall of Shame," but plaintiff was the only one against whom action was taken. Further, at the Board hearing, "Captain Green testified that he thought Officer Fuller was trying to undermine [plaintiff]. He also testified that Fuller complained to him about the unit." Yet, it was plaintiff who was removed from the LAX Unit; Fuller was allowed to remain. That plaintiff was singled out for removal from the LAX Unit supports a finding that the policy reason given for LAPD's actions was pretextual, and plaintiff was being punished for engaging in protected activity. (*Colarossi v. Coty US Inc.*, *supra*, 97 Cal.App.4th at p. 1153; *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 817.)

Additional evidence that LAPD's "policy" reason for removing plaintiff from the LAX Unit was pretextual is Captain Roper's testimony that he did not know why Officer Gonzalez was left in the unit with Fuller, but "[w]e got a lot of—a little bit of this and a little bit of that, and have to give the employee the benefit of the doubt sometimes." When asked why he did not give plaintiff the benefit of the doubt, Captain Roper could not give any explanation other than that plaintiff was moved but eventually returned to the LAX Unit.

Also telling is the fact that after plaintiff's removal from the LAX Unit, Fuller continued to make new allegations against plaintiff as well as other officers. Fuller made the allegations to Lieutenant Mulrenin, who kept Captain Roper informed of them. Lieutenant Mulrenin had difficulties with Fuller, whom he described as an "institutional terrorist," yet she remained in the LAX Unit, apparently given the "benefit of the doubt," while plaintiff continued to suffer adverse employment actions.

Defendant next claims that plaintiff was removed from the LAX Unit based on the March 22, 2005 training incident and the missing explosive material. As the Board found, as to the training incident, plaintiff "shared responsibility for failing to properly secure the training aid with Lieutenant Mulrenin, Sergeant Thiffault," and two other officers. All received notices to correct, but only plaintiff was singled out for additional discipline, with "no justification provided by the Department." LAPD also provided no basis for singling out plaintiff for discipline over the missing explosive material. Again,

that plaintiff was singled out for discipline supports a finding of retaliation. (*Colarossi v. Coty US Inc.*, *supra*, 97 Cal.App.4th at p. 1153; *Iwekaogwu v. City of Los Angeles*, *supra*, 75 Cal.App.4th at p. 817.)

Defendant further asserts that "[t]he primary reasons for removing [plaintiff] from the [LAX] Unit were lack of leadership and appropriate controls." According to Commander Downing, the problems in the LAX Unit "show[ed] that [plaintiff] did not display the requisite leadership and managerial skills necessary for assignment to the advanced paygrade and bonus position as the officer in charge of the LAX K-9 Unit." Yet, plaintiff had received positive performance evaluations in 2003 and 2004, before Fuller's complaints. At that time, Captain Green wrote that plaintiff "is an extremely capable and has clearly demonstrated that [he] is more than qualified to promote to Lieutenant of this department." Captain Green testified he was aware that, "in less than five weeks, [plaintiff] had gone from strong in every single category, with having developed a program that was viewed as the most progressive K9 program in the country, to being deselected completely out of the bomb K9." That plaintiff was recognized as "extremely capable" and recommended for promotion prior to his protected activity, and was identified as not competent to hold his position and recommended for demotion after his protected activity is evidence that LAPD's given reason for its adverse employment actions was pretextual. (See *Colarossi v. Coty US Inc.*, *supra*, 97 Cal.App.4th at p. 1153.)

Other evidence of retaliatory intent includes statements by plaintiff's superiors. When Captain Roper removed plaintiff from the LAX Unit, he told plaintiff he would never work in a K9 unit again. Additionally, plaintiff's program, the OLD program, was discontinued, despite the praise it had received and the fact that LAPD had sent plaintiff to other agencies to help them develop similar programs. Captain Roper told plaintiff to remain "off the radar" while Fuller's claims were being investigated, because someone close to the investigation "had it out" for plaintiff.

Commander Downing testified that he recommended an administrative transfer and reduction in paygrade for plaintiff after he was informed by the assistant chief of

police that there was no Sergeant II position available, and even if there was a position available, plaintiff was not going to get it. Even after plaintiff was absolved of wrongdoing by the Board, Commander Downing refused to restore plaintiff to his former paygrade of Sergeant II+1 or to return plaintiff to the LAX Unit based on plaintiff's supposed lack of leadership and control systems. The statements by Captain Roper and Commander Downing support a finding that LAPD continued on a course of retaliation against plaintiff based on his refusal to change Fuller's performance evaluation rather than any misconduct or lack of competency on his part.

Moreover, defendant proffers what it claims are legitimate, nonretaliatory reasons for each adverse employment action LAPD took against plaintiff. However, "[a]n individual employment decision should not be treated as a '"'watertight compartment, with discriminatory statements in the course of one decision somehow sealed off from (that is, irrelevant to) every other decision.'"' [Citations.]" (*Iwekaogwu v. City of Los Angeles, supra*, 75 Cal.App.4th at p. 817.) Taken together with Captain Roper's and commander Downing's statements, LAPD's actions support an inference of retaliatory intent in the adverse employment actions against plaintiff. Substantial evidence supports the jury's verdict.

DISPOSITION

The judgment is affirmed. Plaintiff is to recover his costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J. WOODS, J.