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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SEAN THOMPSON, Plaintiff and Appellant, v. PEOPLE COORDINATED SERVICES OF SOUTHERN CALIFORNIA, INC., et al., Defendants and Respondents.	B263805 Los Angeles County Super. Ct. No. BC500561

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

Law Office of David R. Denis and David R. Denis for Plaintiff and Appellant.

Epstein Becker & Green, William O. Stein and Rhea G. Mariano for Defendants and Respondents.

INTRODUCTION

Sean Thompson appeals from a judgment entered upon a jury verdict in favor of his former employer People Coordinated Services of Southern California, Inc. (PCS), its president Virgie P. Walker, and its employee Robert Aguirre (collectively, respondents).

On appeal, Thompson contends the trial court erred (1) in sustaining the demurrer to Thompson's disability discrimination, disability harassment, and fraud causes of action without leave to amend and (2) abused its discretion in excluding certain evidence at trial. We agree the trial court erred in sustaining the demurrer to plaintiff's seventh cause of action for disability discrimination, but find no prejudice to Thompson. We also conclude Thompson suffered no prejudice from the trial court's exclusion of certain evidence at trial. We thus affirm the judgment.

BACKGROUND[1]

1. *Factual background*

PCS is a private nonprofit corporation that provides, among other things, antigang and gang prevention programs for at-risk youth, senior social services, and substance abuse services targeted to lower income communities in Los Angeles. Walker has been the president and CEO of PCS since 2004.

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[1] Our factual recitation generally is drawn from the allegations in the first amended complaint (FAC) and judicially noticed documents. It includes an overview of those facts relevant to the appeal and to give context. We discuss additional allegations from the FAC and other parts of the record in later sections.

During the relevant time period, Thompson worked at PCS as a youth counselor in a gang prevention program called GRYD.[2] The GRYD program was funded by the City of Los Angeles. Aguirre became Thompson's direct supervisor in 2009.

Thompson alleges Aguirre engaged in a pattern of harassment against him based on his race. Thompson alleges Aguirre challenged him to physical confrontations, referred to him as someone from the " 'hood,' " belittled him, asked that Thompson be fired, made false reports that Thompson had violated PCS policies, engaged in a pattern of verbal abuse including yelling at him, made disparaging racial remarks, and had school police search for Thompson to harass him.

Thompson alleges that he complained to Walker in writing on October 25 and 28, 2010, about Aguirre's "continuous pattern of harassment and effect on his health." He alleges he was specific that Aguirre's actions caused him stress requiring him to leave work early and that he had been diagnosed with high blood pressure as a result of Aguirre's "harassment and hostility." Following this complaint, Thompson was placed under the supervision of Director Byron Parker. Thompson alleges he made further complaints about Aguirre's behavior to Walker and Parker at the end of 2010 and in 2011.

On September 28, 2011, Thompson allegedly was ordered by his doctor "to stay away from the PCS workplace, due to stress induced by . . . Walker and Aguirre." He informed Parker that "due to the constant overly aggressive actions of . . . Aguirre, he was ill and that he was leaving early to consult with" his doctor.

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[2] Thompson worked a second job as campus security for Los Angeles Unified School District (LAUSD).

On November 18, 2011, Walker allegedly told Thompson he would be transferred because he could not work with Aguirre. Thompson did not wish to be transferred. On November 21, 2011, Walker telephoned Thompson and asked him to come to the PCS main office. Thompson alleges that during that call, he "reminded . . . Walker . . . that he was taking a medically necessitated leave of absence, due to the need to tend to his own health issues. . . . [He] reported to . . . Walker that he was not feeling well, due to his medical condition, undue stress brought about by harassment from . . . Walker and Aguirre. [He] further communicated that he was going to take medical leave."

Thompson went to Walker's office and waited from 11:20 to 3:20, taking lunch from 1:00 to 2:00. Thompson alleges Walker ignored him for several hours as he waited to meet with her. Eventually, Thompson told the receptionist he was leaving "due to the effects of his medical condition." Thompson alleges he suffered from "a headache and aggravation of his high blood pressure condition." The next day, November 22, 2011, he "called PCS and reported that he would not be in attendance that day, relative to the workplace, due to his condition of illness, work-induced stress."

Thompson reported to his usual GRYD school site on November 23, but was told Walker wanted him to report to the main school district office. Thompson alleges he "immediately became nauseated and ill over the fact that he had been ordered to go to the [school district's] main office before his scheduled leave." A half-hour later, he "called the PCS main office to inform them that he was taking a medical leave of absence, for the remainder of the day." Walker left Thompson a voicemail message requesting he call her immediately; if he did not,

"she would assume that [he] had resigned from his position." Thompson alleges he returned the phone call and spoke to the receptionist, "but was not allowed to speak with . . . Walker."

On November 27, 2011, Thompson wrote to the principal of the GRYD school site where he had been assigned to tell her he was surprised to learn he was being transferred. He alleged he told the principal that he would be absent "on medically necessitated leave" on November 28 and 29, 2011, but would return his keys on November 30 "in preparation of his leave."

Thompson alleges that on December 1, 2011, his doctor "extended" his medical leave from December 1 through December 8, 2011, "due to a diagnosis of work-place induced anxiety and depression." He alleges he "personally delivered documentation of this medical leave to PCS employee Jeff Caperton."[3] His leave again was "extended" by his doctor through January 5, 2012, in order for Thompson to take "prescribed stress management courses."

Walker wrote to Thompson on December 2, 2011.[4] He alleges Walker "acknowledged [his] documented medical leave, through December 8, 2011," but informed him that his employment had been terminated as of November 23, 2011.

Thompson alleges that on January 3, 2012, while he was receiving medical treatment, he learned that "Walker had retroactively caused [Thompson's] insurance coverage to end, as of November 1, 2011. . . . Walker specifically misrepresented the last date of [Thompson's] employment to Kaiser Permanente, the

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[3] Caperton was PCS's controller at the time.

[4] That writing was not attached to the FAC.

medical insurance carrier[,] and misrepresented to [Thompson] that if he paid the premiums through his check that he would have insurance during those time periods." He alleges "[d]efendants and Walker made those statements in October 2009 then randomly through November 2011," and that he "had already paid the medical insurance premium for November[ ] 2011, December[ ] 2011[,] and January 2012 through withholdings of his check." Thompson further alleges that "[a]s a result, without notice, [he] was without medical insurance even though he had paid the premiums through PCS and . . . Walker [had represented] that he would be covered during those time periods." He alleges Walker knew he "was receiving medical treatment for his high blood pressure, as well as therapy to deal with his other manifestations of work-related stress."

2. *Thompson's DFEH and judicial complaints*

On April 16, 2012, Thompson filed a complaint of discrimination under provisions of the Fair Employment and Housing Act (FEHA) with the Department of Fair Employment and Housing (DFEH) and immediately received a right-to-sue notice. Thompson checked boxes on the DFEH complaint for termination, harassment, failure to prevent discrimination, and denial of family or medical leave because of race/color and in retaliation for engaging in protected activity or requesting a protected leave or accommodation.

Thompson then filed a complaint against PCS, Walker, and Aguirre on April 19, 2012, under case number BC483113. The complaint alleged causes of action for wrongful termination in violation of public policy; denial of his rights under the California Family Rights Act (CFRA); violations of FEHA based on racial harassment; failure to prevent discrimination, retaliation, and

harassment; retaliation; and disability discrimination; and fraud-intentional misrepresentation. PCS and Walker demurred to Thompson's seventh cause of action for fraud-misrepresentation. Thompson filed a first amended complaint in response to the demurrer alleging the same causes of action.[5] Respondents again demurred to the fraud cause of action. The parties stipulated to allow Thompson to file a second amended complaint, which he did in December 2012. The second amended complaint amended the racial harassment cause of action to include disability harassment. On January 14, 2013, respondents demurred to the second amended complaint's third cause of action for harassment, partly on the ground Thompson failed to exhaust his administrative remedies for his claim of disability harassment, and the seventh cause of action for fraud.

Thompson then filed an amended DFEH complaint that added retaliation to the list of wrongful conduct and disability as a basis for respondents' harassment and discrimination. DFEH received the amended charge on January 17, 2013, and issued a right-to-sue notice that same day. On February 5, 2013, Thompson filed a complaint in the underlying action (case number BC500561). It alleged the same causes of action as those in case number BC483113, except that the complaint specified the harassment claim was for harassment on the basis of race and disability. The next month, on March 8, 2013, Thompson dismissed case number BC483113 without prejudice. Thus, the

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[5] Thompson's first amended complaint and second amended complaint in case number BC483113 erroneously identify the case number as BC481488.

earlier-filed case was pending when Thompson filed the action giving rise to this appeal.

On April 15, 2013, respondents filed a notice of related case and a demurrer to the third cause of action for disability harassment, sixth cause of action for disability discrimination, and seventh cause of action for fraud alleged in Thompson's second lawsuit. Respondents' demurrer to the disability claims were based on Thompson's failure to exhaust his administrative remedies within one year of the alleged events. The underlying action then was transferred to the judge who had been assigned to Thompson's first action. Respondents' demurrer ultimately was heard and sustained with leave to amend on August 23, 2013.

Respondents had taken Thompson's deposition on May 10, 2013, before their demurrer was heard. Thompson then filed his FAC on September 13, 2013. The FAC alleged the same causes of action against respondents except that it now separately pleaded its cause of action for disability harassment. It also included new factual allegations in support of the fraud cause of action. Respondents again demurred to the disability harassment, disability discrimination, and fraud causes of action on the same grounds as in their previous demurrers, except to add that the FAC was a sham pleading. In support of their sham pleading argument, respondents asked the trial court to take judicial notice of excerpts from Thompson's deposition testimony and the pleadings filed in the earlier action. The court sustained the demurrer without leave to amend on January 15, 2014.

The jury trial on Thompson's remaining causes of action began a year later on January 23, 2015. The jury returned a verdict in favor of PCS, Walker, and Aguirre on Thompson's

remaining claims. Thompson filed a timely notice of appeal from the judgment.

DISCUSSION

1. *Respondents' demurrer to Thompson's disability claims based on his failure to exhaust his administrative remedies*

a. *Applicable law*

FEHA prohibits harassment and discrimination in employment because of, among other bases, race, mental or physical disability, or medical condition. (Gov. Code, § 12940.)[6] FEHA includes the failure "to make reasonable accommodation for the known physical or mental disability of an applicant or employee" as an unlawful employment practice. (§ 12940, subd. (m).) Under FEHA, it is unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden" by FEHA. (§ 12940, subd. (h).)

The CFRA is part of FEHA. The CFRA makes it unlawful for an employer to deny an eligible employee family care and medical leave. (§ 12945.2, subd. (a).) "Family care and medical leave" includes leave "because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee." (§ 12945.2, subd. (c)(3)(C).) The CFRA also prohibits discrimination in employment because of an individual's exercise of the right to family care and medical leave and prohibits the interference with

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[6] Undesignated statutory references are to the Government Code.

or denial of an employee's exercise of the right to take leave. (§ 12945.2, subds. (*l*) & (t).)

Before filing a civil action for damages under FEHA, an employee must exhaust his or her administrative remedies by filing a verified complaint with the DFEH and obtaining a right-to-sue notice. (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 153 (*Wills*).) The DFEH complaint must be filed within one year of the alleged unlawful acts, state the names of the perpetrators, and "set forth the particulars" of the alleged acts. (§ 12960, subds. (b), (d).) Thus, a plaintiff cannot sue for an act violating FEHA unless the plaintiff "specif[ied] that act in the administrative complaint." (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724.)

This administrative exhaustion requirement is satisfied if FEHA claims in the judicial complaint are " 'like and reasonably related to' " those in the DFEH complaint (*Wills, supra*, 195 Cal.App.4th at p. 154) or "likely to be uncovered in the course of a DFEH investigation" (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1617 (*Okoli*)). Also, an amended DFEH complaint will relate back to the filing date of the original DFEH complaint if the factual allegations in the original complaint would support the new theory of liability alleged in the amended complaint. (*Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 899 [interpreting California law].) In determining whether Thompson timely exhausted his administrative remedies on his FEHA claims, we must construe his DFEH complaint "liberally" and "in light of what might be uncovered by a reasonable investigation." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 268.)

b. *The parties' contentions*

In his original DFEH complaint, filed April 16, 2012, Thompson alleges PCS and its employees, including Walker and Aguirre,

> "harassed him because of his engagement in protected activities, as well as because of his race and retaliated against him for having protested their illegal activities, in the form of employment termination, both for having exercised his rights under California's Family Rights Act[,] as well as for having engaged in said protected activities. Respondents exposed complainant to harassment on the basis of race and/or because of his having engaged in the aforementioned protected activities and caused him to suffer the adverse employment consequence of termination, all in violation of California's Fair Employment and Housing Act, in breach of complainant['s] contractual rights and in perpetuation of fraud." (Block capitals omitted.)

Thompson checked boxes on the complaint form alleging the following conduct occurred on or before December 2, 2011: "termination," "harassment," "failure to prevent discrimination or retaliation," and "denial of family or medical leave." He checked boxes indicating these actions were the result of his "race/color" and in "retaliation for engaging in protected activity or requesting a protected leave or accommodation."

Construing Thompson's statement and the preprinted categories he checked together, the April DFEH complaint can be

read to allege that in violation of FEHA: (1) respondents harassed Thompson on the basis of his race; (2) respondents harassed Thompson for engaging in "protected activities"; (3) respondents fired Thompson on the basis of his race/for complaining about racial harassment; (4) respondents fired Thompson in retaliation for his protesting respondents' "illegal activities"; (5) respondents denied Thompson CFRA leave; and (6) respondents fired Thompson in retaliation for his exercising his rights under the CFRA, including "requesting a protected leave or accommodation."

Thompson filed his amended DFEH complaint in January 2013, more than a year after the alleged discriminatory events occurred. It is identical to his original complaint, except that it checks "disability" as a reason for the alleged discrimination and adds the sentence, "Complainant was harassed and discriminated against due to disability," to the narrative.

Thompson contends his claims for disability discrimination and disability harassment alleged in the FAC are not barred for failure to exhaust his administrative remedies even though they are not mentioned in the original DFEH complaint. He contends the DFEH charge encompasses his disability claims or they likely would be uncovered during an investigation into his DFEH complaint that he was terminated in retaliation for exercising his right to medical leave under the CFRA. For similar reasons, he contends his amended DFEH complaint that explicitly alleges disability discrimination and harassment relates back to the original DFEH complaint.[7] PCS contends Thompson's disability

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[7] The new allegations of disability discrimination and harassment must be supported by the factual allegations in the

claims are distinct from his allegations in the DFEH complaint that he was denied medical leave and terminated in retaliation for exercising his CFRA rights. Thus, an investigation into his CFRA claims also would not reasonably lead to an investigation that he was discriminated against or harassed on the basis of his disability, rendering those claims time-barred.

We agree Thompson's disability harassment claim is not reasonably related to or likely to be uncovered by an investigation of his CFRA claims. Nor do the facts in the original DFEH complaint support a theory of disability harassment for the relation-back doctrine to apply. Thompson's disability discrimination claim, however, is reasonably related to his CFRA claims or likely would be uncovered in the course of an investigation of his CFRA claims. We address each disability claim below.

c. *The demurrer to Thompson's disability discrimination claim should have been overruled, but the error was not prejudicial*

i. The disability discrimination claim falls within the scope of the original DFEH complaint

Thompson's DFEH complaint alleges both that he was denied medical leave (by the box he checked) and that he was terminated in retaliation for exercising his CFRA rights (by the box checked, clarified in his narrative). In support of his claim for disability discrimination under FEHA, Thompson's FAC alleges in part that "Walker retaliated against Plaintiff because Plaintiff requested a reasonable accommodation, which consisted

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original DFEH complaint to relate back to the April 2012 filing date.

of time off from work to care for his serious medical condition based on [the] CFRA. After Plaintiff informed Defendants of his need for reasonable accommodations, Defendants discriminated and retaliated against Plaintiff, and on November 23, 2011, summarily terminated Plaintiff's employment."

Respondents argue the DFEH complaint does not refer to disability discrimination—either through a box "checked" for disability discrimination or in the narrative—and thus does not encompass Thompson's disability-based FEHA claims. They also contend "it would not be proper to expand" Thompson's specific CFRA claim that is limited to a two-day period—November 21, 2013, when he allegedly requested medical leave and November 23, 2013, the date Walker deemed his employment ended—"to include his disability claims." Respondents note that Thompson's disability discrimination complaint is based on his allegation that he told Walker in 2010 he had high blood pressure as a result of Aguirre's racial harassment, but Thompson did not allege his employment was terminated because he reported this medical condition to Walker. Based on these allegations, respondents contend an investigation into Walker's denial of his leave and termination of his employment over two days in November 2011 would not uncover Thompson's allegation he was discriminated against because he told Walker about his high blood pressure a year before he requested leave.

We disagree. Thompson's allegations concerning the denial of his CFRA rights, including his termination, are not so specific as to foreclose discovery of his disability discrimination claim in an investigation. Respondents contend *Wills* is parallel. In *Wills,* a bipolar woman sued her employer under FEHA, alleging it discriminated against her on the basis of her disability when it

fired her for, among other things, making verbal threats—conduct the employee alleged related to her mental disability. (*Wills, supra*, 195 Cal.App.4th at p. 148.) Before filing her lawsuit, the plaintiff filed a DFEH complaint, marking only the box for discrimination based on " 'denial of family/medical leave.' " (*Id.* at p. 153.) The DFEH complaint also "did not mention disability, discrimination, retaliation, harassment, or failure to accommodate a disability." (*Id.* at pp. 153-154.) Rather, it alleged the employer refused to reinstate the plaintiff after her medical leave of absence; it did not mention her termination. (*Id.* at p. 154.) In contrast, plaintiff's judicial complaint did not allege denial of family or medical leave, but alleged "six causes of action for FEHA violations based on disability discrimination and harassment." (*Ibid.*) The trial court granted summary judgment, finding the employee failed to exhaust her administrative remedies on her FEHA claims, explaining her DFEH complaint was limited to denial of family and medical leave. (*Ibid.*)

On appeal, the plaintiff contended her employer's written response to the DFEH complaint included facts related to her disability discrimination claim, and thus her employer understood she was claiming disability discrimination. (*Wills, supra*, 195 Cal.App.4th at pp. 155-156.) The Court of Appeal affirmed, holding the employee failed to exhaust her administrative remedies on five of her six claims.[8] (*Id.* at pp. 156-157.) The court concluded plaintiff's claim she was

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[8] The Court of Appeal presumed plaintiff exhausted her administrative remedies on her first cause of action for disability discrimination, affirming the trial court's alternative ruling that the claim lacked merit. (*Wills, supra*, 195 Cal.App.4th at p. 156.)

terminated in retaliation for complaining about harassment was not related to her DFEH complaint: neither the DFEH complaint nor the employer's response to the DFEH mentioned her termination. The employer referred to the plaintiff's allegation it had retaliated against her for requesting medical leave in the response, but that was distinct from plaintiff's new claim it had retaliated against her for reporting harassment. (*Id.* at p. 157.) The court similarly found plaintiff's claims of hostile work environment and failure to prevent harassment based on her disability were distinct from her claims she was fired based on her disability. (*Ibid.*) Finally, the court concluded plaintiff did not exhaust her administrative remedies as to her claims her employer failed to engage with her to determine a reasonable accommodation or to make a reasonable accommodation for her mental disability as neither was mentioned in the DFEH complaint or her employer's response. (*Ibid.*)

We find Thompson's allegations distinguishable from those in *Wills*. In *Wills*, the plaintiff, like Thompson, checked only the box for denial of medical leave, but she also alleged only that she was discriminated against when she was not reinstated following her medical leave. She did not mention her employment termination. Her new claims that (1) she was retaliated against for complaining about harassment, and (2) her employer discriminated against her by failing to accommodate her disability, were not encompassed by the limited allegation in the DFEH charge that she was not reinstated. They also were unlikely to develop from an investigation of the reasons why she was not reinstated.

In contrast, Thompson's disability discrimination claim arises from the *same facts* as his CFRA allegations in the DFEH

complaint. Both claims refer to his termination: Thompson's DFEH complaint alleges he was terminated in retaliation for taking or requesting medical leave; his FAC alleges he was terminated for requesting a reasonable accommodation for his disability, namely to take medical leave. The basis for his CFRA claim and disability discrimination claim thus are the same—the denial of medical leave and the failure to accommodate a disability *by denying medical leave*. Unlike the denial of leave claim in *Wills*, therefore, Thompson's claim he was denied CFRA leave *and terminated* for exercising his rights under the CFRA reasonably would lead to discovery of Thompson's related claim that he was discriminated against for requesting time off work for his disability *and then terminated* in retaliation for requesting that accommodation.

Nor do the disability discrimination allegations in Thompson's FAC " 'add[ ] an entirely new basis for the alleged discrimination,' " such that the DFEH complaint should not be expanded to encompass it, as respondents contend. (*Okoli, supra*, 36 Cal.App.4th at p. 1615 [finding alleged unlawful retaliation that occurred *after* plaintiff filed a DFEH charge would not reasonably have been uncovered in investigation of charge's alleged race and national origin discrimination claim based on denial of promotion and derogatory comments].)

The body of Thompson's FAC does allege he told Walker in October 2010 about his high blood pressure caused by Aguirre as respondents argue. But, respondents ignore Thompson's specific allegation in support of his disability discrimination claim that respondents denied his request for a reasonable accommodation and terminated his employment "after he requested time off to care for [his] actual and/or perceived disability, or medical

condition, high blood pressure and work induced stress from harassment." Construing this allegation liberally as we must, this statement fairly can be read to allege Thompson's request for time off included the reason for the request—to care for his high blood pressure and work-induced stress from harassment. Thus, as we have said, an investigation into respondents' alleged denial of Thompson's request for CFRA leave likely would uncover the reasons why he requested leave—for his high blood pressure and stress due to harassment—*and* his claim that respondents discriminated against him for seeking an accommodation—leave—for this disability.[9]

For these same reasons, the amended DFEH complaint's allegation Thompson was discriminated against on the basis of his disability would be supported by the facts in the original DFEH complaint to relate back to the 2012 filing date.

Accordingly, we conclude Thompson exhausted his administrative remedies for his seventh cause of action for disability discrimination. The trial court's error in sustaining the

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[9] We do not conclude, however, that all of the alleged bases for Thompson's disability discrimination claim relate to the facts in the DFEH complaint or would be uncovered in an investigation of that complaint. Like the complaint in *Wills*, Thompson's DFEH complaint makes no mention of respondents' "failure . . . to participate in a meaningful interactive process in an effort to reasonably accommodate Plaintiff's disability" as alleged in the FAC. Unlike the judicial complaint in *Wills*, however, Thompson has not stated respondents' failure to participate in the interactive process as a separate claim for relief. It is merely an alternative ground in support of his disability discrimination claim.

demurrer to the seventh cause of action was not prejudicial, however.

ii. Thompson has not demonstrated prejudicial error

Respondents contend that, even if the trial court erroneously sustained the demurrer to Thompson's disability discrimination claim, the error was not prejudicial because his disability discrimination claim is based on the same facts as his CFRA claim. Thus, the jury could not have found in favor of Thompson on his disability discrimination claim given it found respondents did not violate the CFRA. We agree.

We may not set aside a ruling—even if made in error—"unless . . . the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) " '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, *including the evidence*," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, italics added; see also Code Civ. Proc., § 475.) Our Supreme Court has " 'made clear that a "probability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' " (*Cassim,* at p. 800.) Because the error here is not reversible per se, Thompson bears the burden to demonstrate it is prejudicial. (*Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 82.) To do so, Thompson must " 'spell[ ] out in his brief exactly how the error caused a miscarriage of justice.' " (*County of Los Angeles v. Nobel Ins. Co.* (2000) 84 Cal.App.4th 939, 945.)

Thompson has failed to meet his burden. In response to respondents' argument, Thompson merely contends respondents may not rely on evidence presented at trial to support their argument. But, examining the record, including the evidence presented at trial, is exactly what we must do to determine if prejudicial error occurred. Further, Thompson's blanket assertion that he was prejudiced because he was barred from submitting evidence at trial in support of his disability claim does not demonstrate a reasonable probability—in light of the jury's verdict on his CFRA claim—that he would have prevailed on that claim had it been presented to the jury. Having examined the record, including the evidence, we conclude Thompson could not have succeeded on his disability discrimination claim.

Like Thompson's CFRA claim, his disability discrimination claim is based on (1) PCS's alleged denial of his request for a reasonable accommodation, and (2) PCS's retaliation against him for requesting a reasonable accommodation by terminating his employment.[10] Thompson's request for a reasonable

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[10] Thompson also alleged PCS "failed to reasonably participate in a meaningful interactive process in an effort to determine a reasonable accommodation" for him. FEHA imposes a separate, independent duty on employers to engage in an "interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (§ 12940, subd. (n); *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 232.) As we have concluded, Thompson did not timely exhaust his administrative remedies with respect to a separate claim for failing to engage in the interactive process. Regardless, the jury's

accommodation "consisted of time off from work to care for his serious medical condition based on [the] CFRA." Thus, Thompson's alleged request for medical leave under the CFRA is identical to Thompson's request for a reasonable accommodation under FEHA.

The court instructed the jury that, to establish his claim that PCS interfered with his rights to take medical leave under the CFRA, Thompson must prove: he was eligible for medical leave; he requested or took medical leave for his own serious health condition; he provided reasonable notice to PCS of his need to take medical leave, including its timing and length; PCS interfered with his right to take medical leave; he was harmed; and PCS's conduct was a substantial factor in causing his harm. The jury also was instructed that "[f]or notice of the need for leave to be reasonable, Sean Thompson *must make PCS aware that he needs medical leave*, when the leave will begin, and how long it is expected to last. The notice can be verbal or in writing and does not need to mention the law. An employer cannot require disclosure of any medical diagnosis, but should ask for information necessary to decide whether the employee is entitled to leave." (Italics added.) Although not part of the jury instructions, the regulations governing the CFRA provide that " 'the employee must state the reason the leave is needed.' " (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1256, quoting former Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(1), renumbered as Cal. Code Regs., tit. 2, § 11091, subd. (a)(1).)

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finding Thompson did not make his need for leave known to PCS would doom such a claim.

By special verdict, the jury found Thompson did *not* "provide reasonable notice to [PCS] of his need for medical leave," thus finding PCS did not violate Thompson's CFRA rights. With respect to Thompson's claim that PCS retaliated against him for exercising his CFRA rights, i.e., taking medical leave, the jury found Thompson did *not* take medical leave. Accordingly, PCS could not have retaliated against Thompson for exercising his CFRA rights. The jury also found Thompson's exercise of his CFRA rights was *not* "a substantial motivating reason for [PCS's] decision to discharge" him with respect to Thompson's wrongful discharge in violation of public policy claim.

Based on the jury instructions, therefore, the special verdict's response that Thompson failed to provide reasonable notice to PCS of his need for medical leave encompasses a finding that Thompson did not make PCS aware of his need for medical leave. Because the reasonable accommodation Thompson allegedly requested was to take time off work to care for his "actual and/or perceived disability, or medical condition, high blood pressure and work induced stress from harassment," i.e., medical leave, the jury necessarily also would have concluded Thompson did not make PCS aware of his need for that accommodation. That finding in turn would preclude the jury from concluding PCS denied Thompson a reasonable accommodation or that PCS terminated his employment in retaliation for requesting time off work as an accommodation.

The record supports this finding. First, the only evidence presented to show Walker knew Thompson had high blood pressure was from 2010. Thompson sent Walker an email on October 25, 2010, complaining about Aguirre. In it, he wrote: " 'My doctor stated that my blood pressure was very high.' "

Thompson also wrote that he never previously had high blood pressure, and he attributed it to Aguirre's conduct.[11] Walker testified that before she received the October 25, 2010 email, she had not heard Thompson had high blood pressure. She testified he never provided her with a doctor's note stating he had high blood pressure. Walker further testified that during conversations she had with Thompson about his complaint described in his October 2010 email, Thompson did not mention he had a medical condition or that he was suffering from high blood pressure. She also testified that after she investigated the incident described in his email, Thompson never told her he had high blood pressure.

Thompson, on the other hand, testified that at a December 3, 2010 meeting with Walker, Pickett, and Aguirre to address his complaint about Aguirre, he told Walker he "wasn't feeling well" and that he "was being stressed out because of the situation" with Aguirre. He testified he told Walker the type of medical condition he had discussed with his doctor and, after prompting from his counsel, recalled the medical condition was hypertension. Thompson could not recall having provided a doctor's note to PCS regarding his high blood pressure before November 23, 2011, the date his employment ended, however.

Second, the jury heard conflicting testimony about whether Thompson told Walker he had a medical condition and needed to take time off work for it. Based on its special verdict answers,

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[11] On cross-examination, Thompson recanted a statement he made under oath in an earlier filed declaration that he had been under medical care for high blood pressure for the past 10 years.

the jury presumably resolved those conflicts in respondents' favor crediting Walker's testimony over Thompson's.

Thompson could not recall having told Walker he had a medical condition during their November 18, 2011 meeting about his transfer. Walker testified Thompson did not tell her that he needed time off of work, that he needed medical leave, that he had a medical condition, or that he was ill at that meeting.

Thompson testified that when he and Walker spoke on the phone the following Monday morning, November 21, 2011, he told her he was not feeling well and was going to "take some time off to see my doctor . . . . medical leave." On cross-examination, he testified he did not tell Walker he needed an accommodation. Thompson then responded, "yes" to his counsel's question, "Back in November of 2011, did you know asking for time off work for medical leave is what's known in the legal community as an accommodation?" He again responded "yes" when his counsel then asked him, "Did you ask for that accommodation in November 2011?"

Walker, however, repeatedly denied that Thompson told her he needed medical leave during that conversation on November 21. She also denied that Thompson told her he had any medical issues or that he was ill. Walker testified she learned from her receptionist at some point that Thompson was ill and went home.

Thompson testified that he "took off ill" the next day; he called the main office "to let them know that I wasn't coming in." He did not speak to Walker or Caperton. Thompson returned to work on November 23, 2011, the day before Thanksgiving. Walker testified she emailed and texted Thompson that morning. When she did not hear back from him, she prepared a memo to

send to Thompson advising him that his resignation had been accepted. She emailed the memo to his personal email that afternoon and also sent it by FedEx (but to the wrong address).

Thompson testified he did not check his email that day. He went to the doctor on Friday, November 25, 2011. Medical records from Thompson's November 25, 2011 doctor's visit indicated Thompson " 'complains of headaches for the past two weeks.' " Those records also stated, " 'Take patient off work for three days.' " Thompson returned to the doctor on Monday, November 28, 2011. Walker testified she learned Thompson was at a doctor's appointment when she texted him on November 28.

The parties agree that on December 1, 2011, Thompson dropped off a doctor's note with Caperton from his November 28, 2011 doctor's visit. That note stated, " 'Date of onset of condition 11-28-2011.' " Caperton did not say anything to Thompson about his employment status when Thompson gave him the note.

To support his testimony, Thompson also introduced a letter he emailed to Walker dated December 8, 2011. In it, Thompson wrote, "You called the GRYD office around 10:45 a.m. on the 21st of November and asked me to come to the main office. I had told you that I was not feeling well that morning due to my medical condition[,] and that I was probably going to take some medical leave for a short time." He also wrote that after waiting to meet with Walker, he "told the receptionist that I was going home sick. I called in sick on November 22 per company policy." He stated he returned to work on November 23 and after being asked to drive to the LAUSD main office, he "felt very nauseated and nervous." He further stated "the situation about the transfer . . . took a toll on me both mentally as well as physically (very stressed). I then called PCS's main office around 1:30-2:00 p.m.

and stated that I was taking the rest of the day on sick leave since I was not feeling well. I was then shortly placed on medical leave by my doctor." Thompson testified to these statements (among others) that he had made in the emailed letter. He testified Walker never wrote back to him to tell him his statements were untrue.

After considering this testimony and the documentary evidence, the jury concluded Thompson did not make PCS aware of his need for medical leave. The jury, therefore, apparently believed Walker's testimony that Thompson did not tell her he needed medical leave. Had the jury heard Thompson's disability discrimination claim, it likewise could have concluded only that Thompson did not tell Walker he needed the leave or time off work to accommodate his disability—his blood pressure and stress condition.

Although section 12940, subdivision (m) does not *require* an employee to "first come forward and request a specific accommodation before the employer has a duty to investigate such accommodation" (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954), courts of appeal have explained, " 'the employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it.' " (*Ibid.*, citing federal authority interpreting the Americans with Disabilities Act of 1990.)[12] In that sense, if an employee seeks a specific accommodation, the

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[12] Decisions interpreting the Americans with Disabilities Act of 1990 (ADA) "may be useful in deciding cases under the FEHA" to the extent FEHA was modeled on the ADA. (*Prilliman, supra*, 53 Cal.App.4th at p. 948.)

employee must first request it. (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54 [explaining the first "principle[ ] underl[ying] a cause of action for failure to provide a reasonable accommodation" is "the employee must request an accommodation"].)[13]

Here, Thompson alleged he requested a specific accommodation: time off work, i.e., medical leave. Thus, even if there were a reasonable chance that the jury believed Thompson over Walker that PCS knew he had a medical condition (high blood pressure and stress), Thompson would be unable to prove he requested time off work to care for that condition (and that the request was denied) because the jury found Thompson did not notify PCS he needed to take leave. In short, if PCS did not know Thompson needed medical leave to care for his medical condition, then by the same token PCS could not have known he needed

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[13] Section 12940, subdivision (m) explicitly requires only that the defendant knew of the employee's medical condition or disability. Respondents argue that because "the jury affirmatively found that Walker and PCS did not know that [Thompson] had a medical condition," Thompson would be unable to establish that PCS knew he had a disability, an essential element of his disability claim. Respondents' statement is inaccurate. Although Walker testified she did not know Thompson had high blood pressure or a medical condition, the jury instructions and special verdict demonstrate the jury found PCS did not know Thompson needed *medical leave*. The special verdict does not reflect an explicit finding that PCS was unaware Thompson had a *medical condition*. Regardless, PCS's lack of knowledge of Thompson's need to take medical leave also precludes Thompson from establishing his disability discrimination claim.

time off work as a reasonable accommodation for that same medical condition and could not have denied Thompson his requested accommodation. Similarly, the jury could not have found Thompson was fired in retaliation for requesting time off work as an accommodation for his medical condition. The jury's finding PCS did not discharge Thompson because he exercised his rights under the CFRA—requesting or taking medical leave—also precludes a finding PCS discharged him for seeking medical leave as a disability accommodation.[14]

Accordingly, Thompson could not have prevailed on his disability discrimination claim and therefore was not prejudiced by its dismissal. (*Cf. Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 194-195 [concluding no prejudicial error in sustaining demurrer to fraud count where summary judgment granted on remaining count eliminated basis for fraud theory]; *Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1500 [holding any error in granting nonsuit not prejudicial where jury returned verdict in defendant's favor and facts to be proven as to dismissed and tried claims were the same]; *McBride v. Paoli*

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[14] Thompson seems to contend he would have been able to present evidence his medical insurance was retroactively cancelled while he was on medical leave, excluded at trial, to demonstrate respondents' animus toward him in support of his disability discrimination claim. That evidence concerns events that occurred after Thompson was discharged and would not demonstrate PCS *knew* Thompson needed to take medical leave to accommodate his medical condition, *knew* Thompson had requested leave, or *knew* Thompson had taken time off work to care for his medical condition. It thus would not support Thompson's claim PCS discharged him in retaliation for seeking an accommodation.

(1955) 134 Cal.App.2d 783, 784, 791 [any error in sustaining demurrer on constructive trust count not prejudicial where dismissed count was based on same allegations as joint venture count requiring existence of contract that plaintiff failed to prove at trial].)

d. The alleged harassment based on disability would not reasonably be uncovered in an investigation of Thompson's CFRA claim nor does the disability harassment claim relate back to the original DFEH charge

In contrast to Thompson's disability discrimination claim, his disability harassment claim is distinct from the allegations in his original DFEH charge. The DFEH complaint alleges Walker and Aguirre "harassed him because of his engagement in protected activities, as well as because of his race and retaliated against him for having protested [respondents'] illegal activities, in the form of employment termination, both for having exercised his rights under California's Family Rights Act[,] as well as for having engaged in said protected activities." Thompson contends this allegation "clearly states, *in haec verba*, that plaintiff alleged defendants harassed him due to exercise of his CFRA rights—a clear and unmistakable statement that Thompson was advancing disability-related claims."

We disagree. Thompson's allegation is not that he was harassed for exercising his CFRA rights, but that he was *terminated* for having exercised his CFRA rights. Thompson's reference to "said protected activities" reasonably refers to

Thompson's protest of respondents' "illegal activities,"[15] rather than his exercise of his CFRA rights. He states respondents retaliated against him *both* for having exercised his CFRA rights, and for having engaged in "said protected activities." Even if his DFEH complaint could be read to refer to harassment based on his exercise of his CFRA rights, however, we do not conclude such a claim is reasonably related to or likely to uncover Thompson's allegations that he was subject to a hostile work environment based on disability harassment.

Thompson's claim he was harassed based on disability does not refer to Thompson's exercise of his CFRA rights, i.e., his request for medical leave, or to his alleged disability at all, for that matter. Rather, the FAC alleges Walker belittled Thompson during staff meetings, made false reports he violated PCS policy, verbally abused him, texted and emailed Thompson while he was on vacation or on days off, falsely led him to believe he was the subject of a police investigation, and caused him to wait excessively for no reason after calling him for a meeting. While Thompson's disability discrimination claim was based on the same facts as his CFRA claims—denial of medical leave and termination in retaliation for requesting and/or taking medical leave—his disability harassment claim is based on a distinct set of facts. Thompson's allegations of *harassment* based on his blood pressure and stress disability are beyond the scope of the

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[15] Thompson's FAC alleges he complained about PCS staff manipulating data that resulted in a misuse of public funds and would "defraud the city of Los Angeles and its taxpayers." (Italics omitted.) The FAC also alleges Thompson complained about racial harassment by Aguirre.

allegations in the DFEH complaint that he was denied medical leave under the CFRA and terminated in retaliation for seeking or taking that leave for his blood pressure and stress condition.

The additional allegations of disability harassment here are thus distinguishable from the allegations added to the judicial complaint in *Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057 relied on by Thompson. There, a Black college student, who worked part-time for a hospital during the school year but on-call during the summer, filed a racial discrimination charge with the DFEH alleging the hospital discriminated against him when it denied him on-call work hours in favor of a Caucasian employee with less seniority. (*Id.* at p. 1060.) The student and five other employees then sued the hospital and their supervisors under FEHA, alleging they had been harassed, subjected to differential treatment, denied opportunities on the basis of their race, were threatened with discipline if they filed a grievance, and then were retaliated against after they did. (*Id.* at pp. 1060-1061.) The trial court granted summary judgment finding the student was barred from raising claims other than those specifically identified in his DFEH complaint. (*Id.* at p. 1061.) Relying on federal courts' analyses of exhaustion of remedies in related federal employment rights cases, the appellate court concluded the student had exhausted his administrative remedies because his "allegations of harassment and differential treatment encompass the allegations of discrimination in his DFEH complaint." (*Id.* at p. 1065.) The court also concluded the student's action was not barred because it was "reasonable that an investigation of the allegations [of racial discrimination] in the original DFEH complaint would lead to the investigation of subsequent discriminatory acts

undertaken by [employer] in retaliation for [the student's] filing an internal grievance." (*Ibid.*)

Whereas an investigation into the student employee's charge the defendant denied him work hours based on race naturally would lead to an investigation of the alleged retaliatory acts the defendant took after he complained about that discrimination and harassment, the same cannot be said here. For one, the harassing conduct Thompson alleges supports his disability harassment claim occurred *before* he allegedly was denied medical leave and fired for taking it.[16] An investigation into Thompson's request for medical leave under the CFRA—and any purported harassment he endured for making the CFRA

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[16] Thompson alleges that on September 28, 2011, his physician "ordered" him "to stay away from the PCS workplace, due to stress induced by Defendants Walker and Aguirre," but does not allege he told respondents he was so ordered. He alleged only that "[i]mmediately following this meeting, Plaintiff complained to Director Parker that he was being harassed by Defendant Aguirre . . . . Plaintiff also informed Mr. Parker that, due to the constant overly aggressive actions of Defendant Aguirre, he was ill and that he was leaving early to consult with his physical health care physician." Thompson claims Aguirre harassed him based on race, not disability. Neither the above allegations, nor Thompson's allegation he told Walker about his high blood pressure in October 2010, relate to any purported harassment based on exercising his CFRA rights so that respondents would be on notice from his original DFEH complaint that it also included charges of hostile work environment based on disability harassment. (*Okoli, supra*, 36 Cal.App.4th at p. 1617.) Nor, as we have said, would the facts alleged in the original DFEH complaint support this disability harassment theory.

request—and alleged termination in November 2011 would not reasonably uncover the earlier harassing conduct alleged in the FAC based on his blood pressure and stress disability. Thompson, in essence, has alleged two different theories of liability under FEHA—one based on his CFRA rights and the other based on a hostile work environment from disability harassment. (*Okoli, supra*, 36 Cal.App.4th at p. 1615 [" 'when the difference between the charge and the complaint is a matter of adding an entirely new basis for the alleged discrimination, . . . expansion of the complaint' " is not " 'sanction[ed]' "].) Thompson's disability harassment claim, therefore, is more like that in *Wills* where the plaintiff's complaint alleging retaliation for complaining about disability harassment did not fall within the scope of the DFEH charge that her employer failed to reinstate her after she took medical leave.

Second, the discrimination described in the DFEH complaint and the harassment and differential treatment claims described in the judicial complaint in *Baker* all were grounded in the student's race and arose from his seeking additional work opportunities. Thompson's allegations of *disability* harassment, however, are not related to his allegations of *racial* harassment. (Cf. *Okoli, supra*, 36 Cal.App.4th at p. 1615 [" 'complaint alleging race discrimination is neither "like or related to" nor likely to be discovered in a "reasonable" investigation of a charge of sex discrimination' "].)

Thompson contends the alleged racial and disability harassment are related because Aguirre's racial harassment caused his blood pressure and stress disability. But, *additional harassment* because of that disability is another theory entirely,

separate and distinct from racial harassment.[17] Nor would an investigation into Thompson's race discrimination and harassment claims likely lead to an investigation of his disability harassment claim. The existence of a medical condition arising from harassment based on race would not reasonably uncover harassment based on that medical condition, even if some of the same witnesses were involved, as Thompson contends. The alleged facts constituting racial harassment—Aguirre's verbal abuse, racial remarks, request to have Thompson fired, and directions to police to search Thompson—are distinct from Walker's conduct described above that Thompson alleges supports his disability harassment claim. Contrary to Thompson's argument, therefore, his racial harassment and disability harassment claims are nothing like the very similar race and national origin discrimination claims at issue in *Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 849, 858-859 (concluding East Indian plaintiff who checked " 'race' " but not " 'national origin' " box on administrative charge could sue for discrimination based on national origin as court was "confident that the administrative investigation into [plaintiff's] claim of disparate treatment because he was 'Asian' would likely have encompassed both race and national origin").

Because we conclude Thompson did not exhaust his administrative remedies as to the fourth cause of action for disability harassment, we need not address the alternative

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[17] We also note Thompson stated his harassment claim was based on "[h]ostile environment racial harassment" in response to respondents' form interrogatory asking him to "identify each characteristic . . . on which you base your claim of harassment."

ground on which respondents brought their demurrer, that the FAC failed to state a cause of action for disability harassment as a matter of law.

2. *The trial court properly sustained the demurrer to the FAC's seventh cause of action for fraud*

a. *The parties' contentions*

Respondents demurred to Thompson's seventh cause of action for fraud on the ground it failed to state a claim against them under section 430.10, subdivision (e). In the trial court, respondents argued Thompson's fraud claim failed because (1) it was not pled with sufficient specificity; (2) Thompson did not and could not plead he detrimentally relied on any alleged false representation; (3) it was a "sham pleading"; and (4) statements allegedly made to Kaiser could not form the basis for Thompson's fraud claim as a matter of law. In support of their demurrer, respondents requested the trial court take judicial notice of the complaint and amended complaints Thompson filed in related case number BC483113 and the original complaint filed in the underlying case. Respondents also asked the court to take judicial notice of excerpts of Thompson's May 2013 deposition transcript. The trial court sustained respondents' demurrer to the FAC without leave to amend.

The record does not include a written decision on respondents' demurrer or a reporter's transcript of the hearing on respondents' demurrer. Nor does the record include the court's ruling on respondents' request for judicial notice. We therefore do not know whether the trial court sustained the demurrer to the fraud claim on all or only some of these asserted grounds. Nevertheless, we may affirm the decision "correct on any legal

basis, even if that basis was not invoked by the trial court." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 269.)

Thompson contends his FAC alleges sufficient facts to state a cause of action for fraud, and the trial court could not consider the excerpts of his deposition testimony respondents introduced.

b. *Standard of review*

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

c. *The FAC does not sufficiently plead facts to state a cause of action for fraud*

The elements of a fraud cause of action are: " '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*).) "These elements may not be pleaded in

a general or conclusory fashion. [Citation.] Fraud must be pled specifically—that is, a plaintiff must plead *facts* that show with particularity the elements of the cause of action." (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1090, original italics, citing *Lazar*, at pp. 638, 645.) Thus, "the policy of liberal construction of pleading will not usually be invoked to sustain a pleading that is defective in any material respect." (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331 (*Wilhelm*) ["every element of the cause of action for fraud must be alleged in full, factually and specifically"].)

i. False representation and knowledge of its falsity

The FAC alleges PCS and Walker "intentionally misrepresented to Plaintiff that 'if he paid the premiums through his payroll check that he would have insurance' during those time periods that the premiums were being paid. Defendants and Walker specifically made those statements in October 2009 then randomly through November 2011 when Plaintiff asked about benefits." The FAC also alleges Thompson "had already paid the medical insurance premium for November[ ] 2011, December[ ] 2011[,] and January 2012 through PCS withholdings of Plaintiff's money from his checks prior to his medical leave. However, Defendants kept the money and did not pay the premiums for November, December 2011, and January 2012 by instruction of Walker through PCS, which withheld Plaintiff's money from his checks . . . designated for premium payments. Defendants then misinformed Kaiser Permanente, Plaintiff's insurance carrier[,] that Plaintiff had been terminated back in or before November 1, 2011 and to cease medical coverage beginning November 1, 2011."

The FAC sufficiently states the alleged misrepresentation Walker[18] made—that Thompson would have medical insurance during the time periods he paid the premiums through deductions from his paychecks—and when that alleged misrepresentation was made—October 2009 and November 2011.

Any alleged statement Walker made to Kaiser about Thompson's insurance coverage, however, cannot form the basis of Thompson's misrepresentation claim.[19] The alleged statement about Thompson's termination date was not made to Thompson.

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[18] The FAC does not specifically allege any other individuals at PCS made any misrepresentations to Thompson. Thus, PCS's purported liability for fraud is limited to Walker's statements. (*Lazar, supra*, 12 Cal.4th at p. 645 [for fraud claim against corporation "plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written' "].)

[19] To the extent the FAC alleges Walker concealed that she had Thompson's insurance cancelled, the allegations are insufficient. The FAC does not allege when or to whom Walker misrepresented Thompson's insurance cancellation date. (*Lazar, supra*, 12 Cal.4th at p. 645.) Nor does the FAC allege Thompson would not have acted as he did—seen his healthcare providers at Kaiser—had he known his insurance had been cancelled retroactively. (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 613 [fraudulent concealment requires "the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact"].) We also note Thompson asked us to take judicial notice, albeit for a different purpose, of the Kaiser Permanente subscriber termination request form. It does not bear Walker's name.

Nor has Thompson alleged respondents intended for Thompson to rely on the representation to Kaiser that his employment ended on November 1, 2011. (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1096 ["plaintiff who hears an alleged misrepresentation indirectly must still show 'justifiable reliance upon it' "]; *Varwig v. Anderson-Behel Porsche/Audi, Inc.* (1977) 74 Cal.App.3d 578, 581 [maker of misrepresentation may be liable " 'to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct,' " quoting Rest.2d Torts, § 533].)

Additionally, as respondents argue, Thompson never alleges that Walker knew her statement that " 'if he paid the premiums through his payroll check that he would have insurance' during those time periods that the premiums were being paid" was false *at the time she made it* in October 2009 and November 2011. (*Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 151 [allegation that "defendant knew [representation] to be false at the time it was made" essential to pleading fraud action]; but see 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 726, p. 142 ["Because knowledge is a fact, it is sufficiently pleaded by the general averment that the defendant knew the representation was false, or that the falsity of the representation was known to the defendant."].)

Rather, the FAC generally alleges "[d]efendants knew these representations . . . to be false," and "had actual knowledge that the representation (and failure to tell Plaintiff that his insurance actually was being cancelled prematurely) made to Plaintiff about coverage and payments being made from his check to PCS

would be used for the premiums for health insurance was not accurate." These allegations fail "to plead with specificity a factual basis for how" Walker knew her alleged statement about Thompson's health insurance premiums was false two years before he allegedly took medical leave in 2011. (*Wilhelm, supra*, 186 Cal.App.3d at p. 1331 [demurrer proper where complaint failed to allege how defendant knew representations were false].)

Nor do these general allegations establish a factual basis for Walker's alleged knowledge the statement was false when she made it again in November 2011. The FAC alleges "[d]efendants knew these representations, however, to be false, with the intent to induce reliance, which was to be able to use medical insurance, as also admitted in [d]efendant Walker's December 2, 2011 letter." According to the FAC, that letter makes no admission Walker knew in November 2011 that Thompson's health insurance allegedly would be retroactively cancelled despite his payment of the premiums. Rather, the FAC alleges that "[o]n December 2, 2011, [d]efendant Walker communicated to Plaintiff in writing. Defendant Walker acknowledged Plaintiff's documented medical leave, through December 8, 2011. In spite of her knowledge that Plaintiff was in the midst of a medical leave of absence, necessitated by his own serious health condition, Defendant Walker specifically informed Plaintiff that his employment had been terminated as of November 23, 2011." Thus, Walker's December 2, 2011 letter admits only that Walker considered Thompson's employment terminated as of November 23, 2011.

That Thompson's health insurance premiums allegedly were not paid from his paycheck deductions contrary to Walker's statement also does not establish a factual basis for Walker's

knowledge *at the time* she made the statement that PCS would not pay the premiums in the future. (See *State Farm Fire & Casualty Co. v. Keenan* (1985) 171 Cal.App.3d 1, 29 [plaintiffs failed to sufficiently plead cause of action for fraud where they did not "specifically allege that . . . [defendants] knew their representation was false at the time it was made"].) The FAC, therefore, fails to state a claim for relief for fraud as a matter of law. (*Wilhelm, supra*, 186 Cal.App.3d at p. 1331.) Because Thompson did not demonstrate he could cure this flaw, the trial court also did not abuse its discretion in sustaining the demurrer on this cause of action without leave to amend.

ii. Reliance

The demurrer to Thompson's fraud claim also was properly sustained on the ground it did not (and could not) sufficiently allege detrimental reliance. "Actual reliance occurs when a misrepresentation is ' "an immediate cause of [a plaintiff's] conduct, which alters his legal relations," ' and when, absent such representation, ' "he would not, in all reasonable probability, have entered into the contract or other transaction." ' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976.)

The FAC alleges Walker "knew that Plaintiff would rely on the misrepresentation of his insurance and thereby use the insurance, accruing medical bills not being covered by the insurance." The FAC also alleges Walker and PCS knew Walker's representation about Thompson's health insurance premiums "(and failure to tell Plaintiff that his insurance actually was being cancelled prematurely) . . . could induce reliance (use of the medical insurance) and cause further injury to Plaintiff." The FAC then alleges Thompson's reliance on the alleged misrepresentation: "relying that Plaintiff had insurance,

Plaintiff was seeing his medical providers for his medical needs and incurring medical bills without insurance." The FAC further alleges Thompson "relied, to his detriment by seeking medical attention while on medical leave."

In other words, Thompson alleges that Walker and PCS falsely told Thompson his health insurance premiums would be paid when really PCS was cancelling his insurance to induce Thompson to use his health insurance and incur medical bills not covered by his insurance. Thompson then relied on that alleged misrepresentation by seeing his medical providers under his Kaiser insurance. As respondents argue, he does not allege that he would not have seen his medical providers if he had known his payments had not gone to his premiums.

Nevertheless, the FAC does allege Thompson saw his medical providers in reliance on Walker's representation about his premiums and "incur[red] medical bills without insurance" and "had to facilitate those premium payments again in order to reinstate coverage and avoid the thousands of dollars in medical bills which had accrued against him." These statements allege how Thompson relied on Walker's representation to his detriment: he incurred bills and had to repay premiums. Respondents contend this new allegation and the new allegation Thompson paid the insurance premium for January 2012 must be ignored because they contradict Thompson's undisputed deposition testimony and are inconsistent with his prior pleadings. Because we conclude the policy against sham pleadings applies here, we need not determine whether the court could consider Thompson's deposition testimony in sustaining the demurrer.

d. *The FAC is inconsistent with Thompson's prior pleadings*

Respondents contend Thompson's FAC is inconsistent with his earlier pleadings. Thompson's earlier pleadings are not necessarily contradictory to the allegations in the FAC. Rather, the FAC adds new facts never alleged in Thompson's previous four pleadings. These new facts are sufficiently inconsistent, however, to invoke the policy against sham pleadings.

Generally, we must assume the truth of factual allegations of a complaint when determining whether a court erred in sustaining a demurrer without leave to amend. "However, an exception exists where a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citations.] In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency." (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384 (*Owens*).)

In *Owens*, the plaintiff twice alleged he was injured on a roadway adjacent to the supermarket he had sued. After the supermarket's second demurrer again was sustained on the ground the supermarket owed no duty to persons injured on a public street, the plaintiff filed a second amended complaint alleging he was on the supermarket's premises when injured. The trial court dismissed the action against the supermarket. (*Owens, supra*, 198 Cal.App.3d at pp. 382-383.) The appellate court concluded the plaintiff's second amended complaint was a sham pleading: the allegations in the second amended complaint

were inconsistent with plaintiff's prior pleadings, and plaintiff offered no explanation for the inconsistency. (*Id.* at p. 384.) Thus, the trial court properly disregarded plaintiff's new allegation that he was on the supermarket's premises when ruling on the demurrer. (*Ibid.*)

Although not quite as blatant as in *Owens*, after having filed four different complaints, three in the earlier action, Thompson decided to add brand new allegations in his FAC—his fifth complaint—that he paid premiums in January 2012, was promised corresponding health coverage in January 2012, and had to "facilitate" premium payments again to reinstate his insurance.[20] Thompson filed his FAC in September 2013. He filed his first complaint in the prior action in April 2012, almost a year and half earlier. He has presented no explanation for this

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[20] In his complaint filed in the underlying action, Thompson alleged he paid medical insurance premiums for November and December 2011 through withholdings from his paychecks. He alleged respondents misrepresented to him that he had medical insurance coverage through December 31, 2011, when they had caused his insurance to be terminated effective November 1, 2011. In his complaint, first amended complaint, and second amended complaint filed in case number BC483113, Thompson also alleged he had paid medical insurance premiums for November and December 2011 through his paycheck withholdings. Thompson's FAC, however, newly alleges he paid medical insurance premiums for November 2011, December 2011, *and January 2012* through paycheck withholdings. More significantly, it also newly alleges that Thompson "had to facilitate those premium payments again in order to reinstate coverage and avoid the thousands of dollars in medical bills which had accrued against him."

late inclusion of new facts that certainly would have been within his knowledge when he filed his first complaint in 2012 given the allegations concern payments he made.

Thompson's prior pleadings did not allege reliance connected to any detriment or damage and thus could not survive a demurrer. (*Glaski v. Bank of America, supra*, 218 Cal.App.4th at p. 1092 [fraud allegation not "connected to any detriment or damage" "does not withstand scrutiny"].) The complaint filed in the underlying action alleges generally that Thompson "relied, to his detriment" on respondents' representations and that he was "suddenly without medical [insurance], in the midst of his medical leave of absence and treatment." Although Thompson alleged he was without medical insurance, he did not allege he was denied medical care or that he incurred additional costs as a result of his reliance on Walker's representation that he had medical coverage through his payroll deductions. His complaint, first amended complaint, and second amended complaint filed in the earlier action are similar. Thus, none alleged reliance with the required specificity. (See *id.* at p. 1091 [allegation in foreclosure case that defendants caused plaintiff to rely on forged recorded documents and lost residence was insufficient allegation of reliance due to lack of specificity because allegation did not identify the particular acts plaintiff took or did not take in reliance on the alleged forgeries].)

The court reasonably could conclude that the FAC's new allegation of the specific act Thompson took to his detriment in reliance on Walker's alleged misrepresentation—the need to "facilitate" the premium payments again—was added to avoid demurrer, as was his new allegation he paid for insurance in January 2012 and did not receive coverage. The court was

permitted, therefore, to take judicial notice of Thompson's prior pleadings and require him to explain their inconsistency with the FAC. (*Owens, supra*, 198 Cal.App.3d at p. 384.) Thompson having offered no explanation, the trial court could "disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint." (*Ibid.*)

The minute order sustaining respondents' demurrer does not articulate the trial court's reasoning and no reporter was present at the hearing. We assume the court considered the FAC a sham pleading and applied this exception to assuming the truth of the FAC's factual allegations. We find no error.

3. ***The trial court's evidentiary rulings were not an abuse of discretion; even if they were, Thompson was not prejudiced***

a. *Standard of review*

"We review a trial court's ruling on a motion in limine to exclude evidence for an abuse of discretion. [Citations.] The trial court's authority is particularly broad 'with respect to rulings that turn on the relevance of the proffered evidence.' [Citation.] Furthermore, '[i]t is for the trial court, in its discretion, to determine whether the probative value of relevant evidence is outweighed by a substantial danger of undue prejudice. The appellate court may not interfere with the trial court's determination . . . unless the trial court's determination was beyond the bounds of reason and resulted in a manifest miscarriage of justice.' [Citation.]" (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 295-296.)

To warrant reversal, therefore, the appellant must do more than "merely argu[e] that a different ruling would have been better." (*Shaw v. County of Santa Cruz, supra,* 170 Cal.App.4th

at p. 281.) Rather, as we have said, to find a miscarriage of justice we must be of the opinion that Thompson had a reasonable chance of obtaining a more favorable result had the evidence not been excluded. (*Cassim v. Allstate Ins. Co., supra*, 33 Cal.4th at p. 800.)

b. *The trial court did not abuse its discretion in excluding evidence regarding PCS's alleged retroactive cancellation of Thompson's medical insurance*

Respondents' motion in limine number three asked the court to preclude Thompson from introducing evidence PCS allegedly retroactively cancelled his medical insurance coverage purposefully after Thompson's employment ended. Respondents argued evidence that PCS terminated his medical insurance as of November 1, 2011, even though he worked at the company through November 23 and had paid his premiums through the end of the year, was irrelevant because the court had dismissed Thompson's fraud claim, requiring its exclusion under Evidence Code section 350. Respondents also argued the evidence was inadmissible character evidence under Evidence Code section 1101, subdivision (a) and should be excluded under Evidence Code section 352 as well because its probative value was substantially outweighed by the probability its admission would create undue prejudice, confuse the issues, mislead the jury, and necessitate an undue consumption of time.

Thompson opposed the motion. He argued "the facts and circumstances surrounding the early cancellation of [his] insurance coverage [was] highly relevant and applicable to [his] punitive damage claim . . . as well as the remaining causes of action for wrongful termination, violation of protected activity

under the [CFRA], harassment based on disability, retaliation, failure to prevent retaliation and harassment, retaliation, and disability discrimination."[21] Thompson argued he was not introducing the evidence to attack Walker's character, but to show Walker's animus toward him, as well as motive and intent for respondents' retaliatory conduct toward him. He contended Walker's retroactive cancellation of his medical insurance was "telling of [respondents'] objective to retaliate against [him] for exercising his protected rights."

Thompson sought to introduce, and question witnesses about, a Kaiser Permanente Subscriber Termination and Transfer Form (termination form) and a January 2, 2012 letter from Kaiser notifying him that his health insurance had been terminated (Kaiser notice). The termination form, sent by PCS to request termination of Thompson's Kaiser medical coverage, is dated December 12, 2011. Jeffrey Caperton is identified as the designated contact at PCS. The form states Thompson's effective termination date is October 22, 2011. The January 2, 2012 Kaiser notice states, "Your employer [PCS] has directed us to end your group sponsored health plan coverage effective on November 1, 2011." Thompson attached those exhibits and excerpts from Caperton's deposition in his opposition to respondents' motion.

The trial court granted the motion in limine, finding the evidence related to the dismissed fraud claim. It also concluded Thompson's argument that the evidence showed posttermination animus was not an appropriate basis for its admission.

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[21] Thompson's disability discrimination and disability harassment claims were not before the jury.

i. The insurance evidence was not probative of Walker's animus

On appeal, Thompson contends the trial court erred because it concluded posttermination conduct was inadmissible to prove retaliatory intent, citing *Robinson v. Shell Oil Co.* (1997) 519 U.S. 337, 345-346 (holding former employee may sue for postemployment acts taken in retaliation for former employee's filing discrimination charge). We disagree with Thompson's characterization of the court's ruling. The trial court's brief comments indicate it concluded the proffered evidence should not be admitted to prove respondents' animus, not that posttermination conduct is never admissible. Nevertheless, we will not disturb a decision correct in the law " 'merely because given for a wrong reason.' " (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.) We conclude the insurance evidence was not probative for the purposes Thompson sought to introduce it and thus would have confused the issues to respondents' prejudice had it been admitted.

Posttermination conduct can be relevant to establish retaliation as Thompson argues. We agree with the trial court and respondents, however, that the termination form and the Kaiser notice are not probative of Thompson's retaliation claims. Thompson argues *Walker* caused his medical insurance to be retroactively cancelled with knowledge he was on medical leave and had paid his premiums. He contends evidence of his insurance cancellation demonstrates *Walker's* animus[22] toward

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[22] Thompson argues the evidence shows PCS's and Walker's animus toward him, but PCS's liability is predicated on only Walker's conduct.

him and is circumstantial evidence of her retaliatory state of mind. Yet, the evidence Thompson presented in support of his opposition to the motion in limine establishes Walker did not participate in completing the termination form.

First, the termination form itself does not include Walker's name; only Caperton's name is listed. Second, at his deposition Caperton testified he inserted the effective termination date on the termination form. He testified he would not have asked for Walker's approval before doing so.

He also testified December insurance premiums were paid through deductions from the November paycheck. Thus, if Thompson's employment ended at the end of November, with the December premium paid, Caperton testified he would have provided January 1 or December 31 as the effective date to end the insurance plan. He testified he would not have put an earlier date.

Moreover, Caperton could not think of a reason why an earlier termination date would have been provided. He did not realize the mistake on the date until he was presented with the documents at his deposition. It was Caperton's understanding that Thompson's health benefits ended on December 31, 2011.

Thompson contends Caperton and Walker should have been subject to cross-examination before a jury, but Thompson has presented no evidence to suggest Caperton's testimony on this subject would have been any different from his deposition testimony, had he been questioned at trial. And, Thompson's attorney effectively cross-examined Caperton by taking his deposition.

Caperton's deposition testimony demonstrates he, not Walker, provided the too-early termination date. The

termination form, coupled with Caperton's deposition testimony, establishes Caperton acted on his own, without input or direction from Walker. Moreover, as respondents argue, Thompson has presented no evidence to suggest Walker directed Caperton to insert the earlier date on the termination form or knew Caperton had done so.[23] Nor has Thompson contended that Caperton participated in the decision to end Thompson's employment or that *Caperton* had a retaliatory animus against him. In any event, the record does not support such contentions.

At trial, Caperton testified he was at a meeting in mid-November 2011 with Thompson and Walker where Walker told Thompson he was being transferred to a different youth program. He recalled Thompson said he did not accept the transfer and told Walker she would have to fire him. He further testified Walker told Thompson that if he did not accept the transfer, she would construe his refusal as his resignation. He testified he learned Thompson was no longer employed from Walker. Walker in turn testified she made the decision to transfer Thompson. She testified she did not terminate his employment, but accepted his resignation when he did not report to his new position.

Accordingly, the termination form and subsequent Kaiser notice do not demonstrate *Walker's* animus toward Thompson and her desire to retaliate against him by ending his employment. Thus, the evidence not only was irrelevant, but its

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[23] In a footnote in Thompson's reply brief and at oral argument, Thompson's counsel argued a jury could infer Walker ordered Caperton to cancel Thompson's insurance retroactively because Walker received an email from Thompson on December 12, 2011, and the insurance termination form also was dated December 12, 2011. We are not persuaded.

admission also would result in a confusion of the issues for the jury, prejudice respondents, and take unnecessary time, under Evidence Code section 352.

ii. Thompson failed to demonstrate prejudice

Even if the evidence were somehow probative of Walker's animus toward Thompson, he has not met his burden to demonstrate he was prejudiced by its exclusion. Thompson contends exclusion of the insurance evidence was "prejudicial" because it was relevant to prove malice and animus. But, Thompson has not demonstrated how exclusion of the evidence resulted in a miscarriage of justice; Thompson has not cited to any testimony or any other evidence in the record, other than his opposition to the motion in limine and its supporting exhibits, to demonstrate a reasonable probability that had the jury heard evidence PCS allegedly tried to terminate his insurance early, it would have returned a verdict more favorable to him.[24] (See *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 308-309 [concluding appellant failed to meet burden to prove prejudicial error based on exclusion of documents from administrative record where appellant argued the incomplete record itself was prejudicial without providing proof of prejudice].)

By the special verdict form, the jury found Thompson did not notify PCS of his need to take medical leave, did not in fact take medical leave, and was not terminated for exercising his

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[24] And, unless Thompson reasonably could have obtained a verdict in his favor, no basis existed for his punitive damages claim. Thompson's request for punitive damages also is based on Walker's conduct, in any event.

CFRA rights or complaining about harassment against Aguirre. In essence, the jury found Thompson did not exercise his CFRA rights; thus, he could not have been retaliated against for doing so even if PCS retroactively cancelled his medical insurance on purpose.[25] Thompson did not allege PCS retaliated against him by cancelling his insurance, though. Rather, Thompson alleged PCS terminated his employment in retaliation for his taking medical leave and complaining about Aguirre's racial harassment. Thompson has not demonstrated how evidence that Caperton told Kaiser that Thompson's employment, and thus medical coverage, ended October 22, 2011, reasonably would have affected the verdict in Thompson's favor given his retaliation claim was based on Walker's conduct. Moreover, Thompson has not demonstrated how admission of that evidence would have created a more favorable result on his racial discrimination claims.

The cases on which Thompson relies to argue the exclusion of the evidence was prejudicial are inapposite. In *Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1535, the trial court excluded evidence of sexual harassment after granting judgment on the pleadings on plaintiff's harassment claim. The appellate court concluded the trial court erred because the evidence of sexual harassment was relevant to the plaintiff's remaining

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[25] PCS does not make such a concession. It argues Caperton's deposition testimony establishes Caperton wrote the wrong termination date on the termination form and was unaware of his mistake. And, at his deposition Thompson testified he received medical coverage in November and December 2011—the months his October and November premium payroll deductions would have covered.

retaliation claim. (*Ibid.*) The court concluded the harassing conduct was probative of whether the plaintiff reasonably believed the harassing conduct about which he complained was discriminatory and whether the subsequent adverse employment action was motivated by the plaintiff's complaints—elements of plaintiff's retaliation claim. (*Ibid.* [proof of retaliation required evidence plaintiff engaged in protected activity (opposed conduct he reasonably believed was discriminatory); adverse employment action against plaintiff because of protected activity; and harm].) Here, in contrast, evidence Thompson's insurance was cancelled is not probative of whether he was engaging in a protected activity—exercising his CFRA rights or complaining about racial discrimination. And, as we have said, the cancellation of his insurance based on evidence that *Caperton* submitted the inaccurate termination form does not provide evidence *Walker* intended to retaliate against Thompson for taking medical leave or complaining about Aguirre's conduct.

Hashimoto v. Dalton (9th Cir. 1997) 118 F.3d 671 (*Hashimoto*) also does not support Thompson's argument. There, the court rejected the employer's argument that its negative job reference could not constitute retaliation where the reference was not the reason the employee was not hired. (*Id.* at pp. 674-675.) Explaining that a "plaintiff may seek relief for retaliatory actions taken after her employment ends if 'the alleged discrimination is related to or arises out of the employment relationship,' " the court held a retaliatory negative reference violated Title VII regardless of whether the negative reference affected a "prospective employer's decision not to hire the victim of the discriminatory action." (*Hashimoto*, at p. 676.) There, the trial court had found the employer gave the negative reference in

retaliation for the employee's complaint of discrimination, and the employer did not challenge that finding on appeal. (*Id.* at p. 674.)

Here, as respondents note, respondents do not concede they engaged in retaliatory conduct. They are not making the " 'no harm, no foul' " argument made by the employer in *Hashimoto*. (*Hashimoto, supra*, 118 F.3d at p. 675.) Rather, they contend the evidence Thompson's insurance was cancelled as of November 1, 2011, based on the termination date provided by Caperton is not probative of Walker's animus and does not provide evidence of Walker's retaliatory intent when she ended Thompson's employment before the termination form was sent. In contrast, in *Hashimoto* the negative reference letter was sent by the individual whom the employee contended retaliated against her, and the government conceded the sender had a retaliatory motive. (*Hashimoto,* at p. 673.)

On this record, we cannot conclude the trial court's evidentiary ruling was "beyond the bounds of reason" or resulted in a miscarriage of justice to justify the reversal of the judgment.

c. *The trial court did not err in deferring testimony that Thompson's documents from his personnel file were missing*

The trial court also did not err when it preliminarily excluded testimony that positive personnel documents, helpful to Thompson's employment search, were missing from his employment file.

Near the end of his case-in-chief, Thompson sought to call Hilda Machada; respondents' counsel requested an offer of proof as to the relevance of her testimony. Thompson's counsel asserted Machada had custody of Thompson's LAUSD

employment file and would testify that in 2012 after Thompson's employment ended, Aguirre took the file and returned it empty. The file had performance reviews, medical forms, and the like. Thompson's counsel argued the testimony was relevant to respondents' failure to mitigate defense because "Mr. Thompson has encountered difficulties because his employment file is empty, missing employment reviews, very positive performance reviews in his LAUSD file, and that has adversely affected his ability to find substitute employment." Respondents' counsel objected that Thompson had not testified to any difficulties he has had in finding employment and thus the testimony would be prejudicial. The court replied, "I was thinking back on Mr. Thompson's testimony regarding work, and I hadn't heard that as being a problem. . . . Perhaps you can reserve it for rebuttal . . . . So let's hold off on that one and save it for rebuttal then."

We find no abuse of discretion in the trial court's decision to have Thompson wait until his rebuttal case to call Machada. Thompson had not testified that the missing file made it difficult for him to find work; thus, Machada's testimony about the file was not relevant to any issue raised to that point. As respondents argue, the trial court did not preclude her testimony. If respondents presented evidence of Thompson's failure to mitigate his damages, then, based on the court's ruling, Thompson presumably would have been able to call Machada in his rebuttal case. At the close of the defense case, when asked if he wished to call any witnesses in rebuttal, however, Thompson's counsel responded, "No." He thus waived his right to call Machada.

On appeal, Thompson contends Machada's testimony "was also going to be used to prove the animus of Respondents." He

asserts he was unable to do so because the trial court "made a specific MIL [motion in limine] ruling that post-termination conduct was not admissible to show animus and [Thompson] was not able to call Machada without violating the court's specific ruling, which was contrary to California law." Thompson does not cite to the record for the "specific ruling" he contends the court made. To the extent he refers to the court's ruling granting respondents' motion in limine number three, we disagree with this characterization of the trial court's ruling, as we have said.

Moreover, at trial Thompson never argued his intent to introduce evidence of the missing employment files to demonstrate animus. He has thus forfeited any argument now that the trial court erred in excluding her testimony from his case-in-chief. (*Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 853 [" 'Points not raised in the trial court will not be considered on appeal.' "].)

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.