Filed 12/3/19 Kramer v. Los Angeles Unified School District CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

KEITH KRAMER, Plaintiff and Respondent, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Appellant.	B288570 (Los Angeles County Super. Ct. No. BC619785)

APPEAL from an order of the Superior Court of Los Angeles County, Rita Miller, Judge. Affirmed.

Anthony J. Bejarano, Assistant General Counsel Los Angeles Unified School District; Hurrell Cantrall, Thomas C. Hurrell and Melinda Cantrall for Defendant and Appellant.

Reisner & King, Adam J. Reisner and Tessa M. King; Benedon & Serlin, Judith E. Posner and Douglas G. Benedon for Plaintiff and Respondent.

Defendant Los Angeles Unified School District (LAUSD) appeals from a judgment following a jury verdict in favor of plaintiff Keith Kramer (Kramer), a teacher and LAUSD's former employee. The jury found in favor of Kramer on causes of action under the Fair Employment and Housing Act (FEHA) for failure to accommodate his physical disabilities (Gov. Code, § 12940, subd. (m)); failure to participate in good faith in an interactive process to determine whether reasonable accommodation could be made for his disabilities (Gov. Code, § 12940, subd. (n)); and retaliation for protesting discriminatory and harassing conduct by the school's principal and an assistant principal (Gov. Code, § 12940, subd. (h)). The jury also found in Kramer's favor on his claim of retaliation in violation of Labor Code section 6310, after he complained about potentially unsafe and unhealthful working conditions in his classroom, and awarded compensatory damages of $400,000. Following entry of judgment and after denying LAUSD's motion for judgment notwithstanding the verdict, Kramer's counsels' motion for attorney fees was granted, and they were awarded $680,000 in attorney fees.

LAUSD raises multiple challenges to the judgment and fee award. LAUSD contends that: (1) Kramer failed to exhaust his administrative remedies as to his Labor Code claim; (2) there is insufficient evidence to support the judgment; (3) the trial court erroneously instructed the jury as to several matters; and (4) the trial court abused its discretion both with regard to awarding Kramer attorney fees at all, and as to the amount of that award. We conclude that none of these contentions has merit and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Kramer Transitions from a Substitute Teacher to a Probationary Contract Teacher at Byrd Middle School for the 2014/2015 School Year

Kramer, a credentialed teacher with a master's degree in education, began working for LAUSD, primarily as a substitute teacher in 1985. In 2013, Kramer was a short-term substitute teacher at LAUSD's Byrd Middle School in Sun Valley (Byrd), at which former defendant Dr. Deborah Wiltz was the Principal. After several weeks, Dr. Wiltz asked Kramer to stay on as a long-term substitute for the remainder of the school year, teaching seventh– and eighth–grade English. Kramer taught at Byrd for approximately eight months during the 2013/2014 school year. He received a "strong" performance review from Dr. Wiltz, with whom he had a good working relationship.[1]

Based on Dr. Wiltz's recommendation LAUSD hired Kramer as a contract first-year probationary teacher at Byrd for the 2014/2015 school year (July 1, 2014 through June 30, 2015).[2] Kramer, who had long dreamed of becoming a permanent, full-time teacher, was excited. Dr. Gabriella Bibian-

---

[1] Dr. Wiltz evaluated Kramer's performance as "outstanding" in one category, and "strong" in all others. Dr. Wiltz observed that Kramer had "a solid foundation" in English Language Arts, "ma[de] consistent efforts to guide students in becoming strong writers," and "develop[ed] very beneficial relationships with his students." She also stated that Kramer had shown "consistent[] . . . care and support" for Byrd's students, and she "look[ed] forward to what he [would] be able to contribute given the opportunity."

[2] Under LAUSD policy, a probationary contract teacher who successfully completes one probationary year is usually offered a contract for a second probationary year. If that second year is completed successfully, LAUSD will likely offer the teacher a permanent (tenured) position. Tenured teachers have greater job protection than non-tenured teachers.

Lopez (Dr. Bibian), an Assistant Principal at Byrd, was assigned to supervise/evaluate Kramer. Dr. Bibian, who also had supervised Kramer during the 2013/2014 school year, and had enjoyed working with him, agreed with Dr. Wiltz's assessment that Kramer would be a good candidate for a teaching position at Byrd.

Kramer's Complaints Regarding His Need for an Accommodation, Ant Infestation and Condensation in His Classroom

Kramer has chronic pain due to a hip condition and a long-term lower back injury, which make it extremely difficult and painful for him to walk up and down stairs. Kramer also has Type II diabetes, which increases the frequency with which he must use the restroom.

Classroom instruction began on August 12, 2014. Kramer was assigned to a second-floor classroom (No. A2-200). He taught five 55-minute periods. Between class periods, Kramer was expected to use the restroom, if necessary, during a five-minute passing period and return timely to teach his next class. There were no teachers' restrooms on the second floor. There was a functioning boys' restroom very close to Kramer's classroom, as well as an elevator. Kramer was not permitted to access the restroom, nor was he provided a key for the elevator. As a result, he had to negotiate two flights of stairs during the five-minute passing periods, up to eight times a day, in order to access the only available teachers' restroom on the first floor.

At the beginning of the school year, Kramer told Dr. Wiltz about his medical conditions and explained that it was difficult for him to climb stairs and that he frequently need to use the restroom. Dr. Wiltz denied Kramer permission to use the locked second-story boys' restroom near his classroom. Kramer requested that he be provided a key for the elevator so he could avoid

climbing stairs. Dr. Wiltz instructed him to talk to Dr. Bibian, who was responsible for keys. Kramer spoke to Dr. Bibian regarding his difficulty climbing stairs, and frequent need to use the restroom due to his diabetes. He followed up with an August 13, 2014 memorandum to Dr. Bibian (copied to Dr. Wiltz), explaining that he had "been dealing with a recurring hip issue, as well as chronic pain from a long-time lower-back injury[,]" and that access to "the elevator would give [him] relief on the days when the pain is most severe." Neither Dr. Bibian nor Dr. Wiltz responded to Kramer's memo, and he continued using the stairs. Neither administrator forwarded Kramer's request for an elevator key to LAUSD's Human Resources division, or its Reasonable Accommodations Units. No inquiries were made to anyone at LAUSD to ascertain whether the locked second floor restroom could be made available for a teacher's use.

Kramer sent two more memoranda to Dr. Wiltz on August 13, 2014.[3] In the first, Kramer complained of an ant infestation in his classroom. In the other, Kramer complained that condensation from the air conditioning system was dripping into his classroom through electric fixtures onto him and his students, and pooling on furniture and classroom materials. He also said there was "black mold" on some materials. He discarded those materials, but expressed concern about "the mold and other possible effects of having water 'rain' on" him and his students. He noted that he and at least

---

[3] Dr. Bibian, the plant manager at Byrd, and a representative of the teachers' union were copied on these memos.

one of his students had "health conditions," and he worried about the effects of "contact with mold, unclean water, or other toxins."[4]

On August 28, 2014, Kramer wrote again to Dr. Wiltz voicing complaints about several things, including the ongoing ant infestation. He also complained that he had been waiting three weeks for an elevator key and that, although he knew a locksmith had been at Byrd that week, no elevator key was made. He explained again that, when his "several orthopedic conditions" flare up, it is "painful for [him] to climb the stairs, especially when I am carrying additional equipment" (which was then necessary due to problems with the school's computer system). Kramer closed his August 28 memorandum saying that he certainly enjoyed working with students, but had seen no evidence that LAUSD had an "interest whatsoever in providing [him] with the tools [he] need[ed] to do [his] job in a professional, comfortable, and healthful environment."

In her August 28, 2014 response to this memo, Dr. Wiltz informed Kramer that she was "very concerned regarding the volume of [his] concerns and [his] statement" attributing the problems about which he complained to an absence of caring on the part of LAUSD. Dr. Wiltz said she would get back to Kramer "[o]nce [she had] an opportunity to look into [his] statements." Kramer interpreted the tone of Dr. Wiltz's response regarding the "volume" of his complaints as threatening, was afraid to voice any further

---

[4] Dr. Wiltz testified that neither the ants nor the condensation was a new problem, and neither was limited to Kramer's classroom. Kramer's classes were moved to another location for a few days after LAUSD discovered black mold in his classroom and tried to rectify the problem. Kramer testified that the condensation problem improved but was never fully resolved.

concerns, and heard nothing more from Dr. Wiltz. At trial, Dr. Wiltz testified that she lacked the ability in August 2014 to obtain an elevator key for Kramer. However, Byrd's plant manager could obtain a key, and Dr. Bibian asked him to do so. Although she could not recall when, Dr. Wiltz said she did take "steps to check on the ability to get [Kramer] a key."[5]

LAUSD did not provide Kramer an elevator key, nor was any effort undertaken to provide him to access the locked, functioning and unused second floor restroom. In early September 2014, Kramer made his own arrangement with a special education assistant who sometimes worked in his classroom to share an elevator key. On September 3, 2014, Kramer initialed a document stating he had received a key. When Kramer told Dr. Wiltz his key-sharing arrangement, she snapped at him, saying, "that's not how it's supposed to work." In any event, the shared key arrangement did not fully resolve the problem. The aide did not always work in Kramer's classroom, so Kramer was forced to continue using the stairs two or three days a week. LAUSD did not provide an elevator key for Kramer's personal use until the 15th week of the school year, and the upstairs restroom remained locked and unused the entire year.

Kramer's Experience at Byrd From August to December 2014

During a meeting early in the fall 2014 semester—while she and he still had a good working relationship—Dr. Wiltz informed Kramer that a teacher (Ms. Park) and some staff members found him intimidating. Dr.

---

[5] Dr. Wiltz acknowledged that, as Principal, it was her responsibility to handle requests for disability accommodations on campus. If she was unable to resolve the accommodation issue, she was required to forward the request to LAUSD's Reasonable Accommodations Unit.

Wiltz told Kramer she had assured the staff that they need not worry about Kramer, who was just a "big old white boy." Kramer (a Caucasian man over age 40), was "shocked" and "insulted" by this comment. Dr. Wiltz (who is African American) acknowledged the comment was inappropriate, but said it was unrelated to Kramer's size, age or race.

Kramer had taught at Byrd for most of the 2013/2014 school year, had received positive performance reviews and had a good working relationship with Drs. Wiltz and Bibian. However, in or after August 2014, Kramer observed negative changes in the attitudes of Drs. Wiltz and Bibian toward him. He attributed those changes to his frustration regarding LAUSD's failure to provide him an elevator key or otherwise accommodate his physical disability, and the concerns he expressed about potential health hazards in his classroom. Kramer believed that Drs. Wiltz and Bibian were displeased with him. Dr. Bibian, in particular, began singling him out for frequent intense scrutiny, micro-managed his workload, and made "mean spirited" and "unwarranted" criticisms.

There was apparent confusion at the outset of the fall 2014 semester until at least the fifth week regarding the content Kramer was assigned to teach. Kramer understood that he was to teach three periods of "regular" English (period Nos. 1, 4 & 5), and two periods of Developing Readers and Writers (DRW) (periods Nos. 3 and 6). DRW is a scripted six-step curriculum taught at a structured pace, developed for the "lowest functioning" English-speaking students who struggle with reading and writing skills.[6] DRW (also

---

[6] Dr. Wiltz testified that, although the DRW curriculum is taught in two-period increments, one period is designated a DRW course, and the other is identified as a regular, "grade level" English course. All six steps are to be taught each day, and the course is ability (not grade level) specific.

known as "Language!" and "Literary Science") is taught in two-hour blocks, but not necessarily in consecutive periods. There are six class periods per day, five of which are dedicated to teaching (one period is a "conference" or free period during which the teacher may meet with parents or others).[7] Kramer never taught DRW before coming to Byrd, but did participate in a two-day DRW training program in May or June 2014.[8] He found the DRW training inadequate, confusing and too fast-paced. Kramer was confident that he had not been assigned to teach four periods of DRW because the students in his first and fourth period English classes had to check out textbooks. The DRW curriculum uses material which remains in the classroom, which was the case for Kramer's third and sixth period students, who did not receive textbooks. Dr. Bibian, Kramer's supervisor, understood that Kramer was supposed to be teaching four periods of DRW, but was aware that for the first five weeks of the fall term, Kramer had been teaching on DRW class as a standard English class. Dr. Wiltz was unsure which classes Kramer was assigned to teach. During the fifth week of school, Kramer was surprised when Dr. Bibian informed him that he was supposed to have been teaching two, two-hour blocks of DRW per day (Periods 1 and 3,

---

[7] Dr. Wiltz and Kramer each testified that an advance list identifying the courses Kramer was assigned to teach his seventh and eighth grade students beginning in August 2014 reflected the following: Period 1, English 8A; Period 2, Conference period; Period 3, DRW (Literary Success); Periods 4 and 5, English 7A/8A; and Period 6, Literary Success 1A.

[8] At least two other teachers at Byrd were teaching (or had taught) DRW, but there is no evidence that Kramer received the same amount of training. Dr. Bibian believes two days of DRW training is inadequate.

and 5 and 6) all along, and that he was significantly behind on the DRW curriculum. Dr. Bibian testified that she had no reason to believe Kramer was not "on pace" because he had not been teaching DRW to one group of students for several weeks.

Per LAUSD policy, Kramer received two formal prearranged evaluations during the 2014/2015 school year, in December 2014 and March 2015. Dr. Bibian also conducted at least 10 unannounced observations of Kramer's classes, which she followed up with 17 in-person observational conferences with Kramer.[9]

As early as November 2014, Dr. Bibian expressed concern that Kramer's performance was inadequate and his classes were behind on the DRW curriculum. She directed Kramer to prepare and submit to her lesson plans on a weekly basis for every day of the week. Kramer complied with this directive. He spent up to four hours every weekend preparing 15-page lesson plans, which he submitted to Dr. Bibian (with copies to Dr. Wiltz) for 22 weeks. After receiving most of the lesson plans, Dr. Bibian replied to Kramer's submission with a summary "thank you." She took issue with others, which she deemed too general. Dr. Wiltz provided no input or response at all. Kramer was the only teacher under Dr. Bibian's supervision in 2014/2015 whom she required to prepare weekly lesson plans.

---

[9] Dr. Bibian supervised several other teachers during the same time period, but none with the same frequency or depth of observation she devoted to Kramer, because she believed Kramer required additional support. Dr. Wiltz testified that 20 teachers at Byrd were evaluated (by Dr. Bibian and other assistant principals) during the 2014/2015 school year. She did not know whether other teachers (supervised by someone else) were scrutinized as closely or frequently as Kramer.

In a November 18, 2014 "debriefing" following her informal observations of Kramer's class on October 29 and November 12, 2014, Dr. Bibian told Kramer that he was still behind the required pace of the DRW curriculum, and she needed "to see immediate, significant and sustained improvement in [Kramer's] performance." Dr. Bibian also told Kramer that, if she "were to issue [his] final evaluation [that day], [he] would receive a below standard evaluation and [he] would not receive a contract for next year." At trial, Drs. Bibian and Wiltz each acknowledged that Dr. Bibian lacked formal authority to make the statement she had made regarding the contract offer, because the decision whether or not to recommend to LAUSD that Kramer be reelected belonged solely to Dr. Wiltz. However, Drs. Bibian and Wiltz also testified that, at some point, Dr. Wiltz told Dr. Bibian it had been alright for her to threaten Kramer with non-reelection of his contract if his performance failed to improve.

During several meetings with Dr. Bibian, Kramer explained that he had difficulty maintaining the pace of DRW's prescribed schedule because his students' behavioral problems consumed time that should be devoted to instruction. He also explained that it was not feasible to teach the DRW rubric on the expected pace because his low-functioning students required extra time and help in order to complete the lessons. In addition to the confusion regarding the number of class periods Kramer was supposed to devote to DRW, there was confusion regarding how many units of DRW had to be completed each semester. Kramer believed his students were required to complete three units. DRW materials indicated that four units were required. Dr. Bibian told Kramer he was supposed to complete five units per semester. Kramer acknowledged that he was behind pace, but assured Dr. Bibian he could complete the curriculum by the end of the semester, or at

most, would be about three weeks short. He testified that Dr. Bibian did not ask if he needed additional help.

By contrast, Dr. Bibian testified that she made significant efforts to provide assistance to Kramer to teach DRW successfully. Dr. Bibian said she told Kramer to speak with Ms. Park, a Byrd teacher who previously had taught DRW. She also had Dr. Neka Fabienke, a trainer for the DRW curriculum, go to Kramer's classroom to model how to teach a DRW lesson, and she put Kramer in touch with Hali Matelak, an English Language Arts expert at LAUSD. Dr. Bibian believed Kramer was unreceptive to these efforts. Kramer testified that none of these individuals provided useful assistance. He spoke with Park, who was willing, but unable to help him because the DRW curriculum had changed since she had taught it. Matelak visited Kramer's class in early 2015. She had been kind and enthusiastic, but Kramer testified he did not need her expertise. Rather, he needed help with behavioral problems and counseling support for his students. And Dr. Fabienke, the expert sent to demonstrate how to teach a DRW lesson, was unable to complete the lesson within the allotted time and offered no useful advice on how to help or approach his struggling students.

In January 2015, Kramer told Drs. Wiltz and Bibian that he believed they were harassing him. He felt that Dr. Bibian was unfairly critical, and treated him with malice. Kramer requested that he be assigned to a different supervisor. During the meeting, Dr. Bibian told Kramer "that if [he] didn't like it, [he] should go someplace else." Kramer did request to transfer to another school, but Dr. Wiltz denied the request. By the end of January 2015, Dr. Wiltz—with input from Dr. Bibian—decided not to recommend Kramer for reelection for the 2015/2016 school year.

In February 2015, after Kramer complained to his union representative about the treatment he was receiving, Dr. Bibian responded to an inquiry from Andres Chait, Field Director of Staff Relations, in LAUSD's Human Resources Division. Dr. Bibian told Chait that Kramer believed Drs. Wiltz and Bibian, mostly Dr. Bibian, were harassing him, "[b]ut at this point, [they were] looking at Non Re-elect[ion]" for Kramer for the 2015/2016 school year. On February 18, 2015, Dr. Wiltz sent a formal recommendation to not reelect Kramer for the 2015/2016 school year to LAUSD's Human Resources Division.[10] No one informed Kramer about this recommendation.

Dr. Bibian maintained her intense scrutiny of Kramer. During one informal observation in February 2015, Kramer told Dr. Bibian he intended to permit a few students who needed to do so to take home practice materials to prepare for an upcoming assessment test. Dr. Bibian told Kramer it would be impermissible for him to do so, because the test was "secure" and had to be completed during class. Kramer said he was unaware of that fact (there was none of the usual language on the packet cover indicating the test was "confidential" or "secure"). He told her he already had let a few students from an earlier period take the materials outside the classroom. Dr. Bibian believed that Kramer had violated protocol. She contacted Matelak to ascertain whether the test was secure. Matelak told Dr. Bibian that, although the instructions did not state that the interim assessment test could not be taken outside the classroom, that was LAUSD's "expectation." In addition to Kramer, another DRW teacher had allowed students to take home

---

10 Meanwhile, in February 2015, Dr. Wiltz informed Kramer she had opened an administrative investigation after receiving student complaints about his teaching. Dr. Wiltz instructed Kramer not to discuss the investigation with students, a directive he violated.

the same preparatory materials every day for five weeks. Kramer testified that he had let students take home only preparatory materials, not the secure test, and said Dr. Bibian had falsely accused him of doing the latter.

Based on this incident regarding the test, coupled with Dr. Bibian's concern about Kramer's sub-par performance, Dr. Wiltz subjected Kramer to an investigation which ultimately resulted in Kramer receiving a "below standard" evaluation on his final formal performance review. According to Dr. Wiltz, the primary reasons for this poor evaluation were Kramer's failure to adhere to the DRW curriculum and the fact that Dr. Bibian found him difficult to work with. No investigation was conducted of the other teacher at Byrd who permitted DRW students to take assessment materials home.

On April 10, 2015, Dr. Wiltz informed Kramer she was recommending that LAUSD not reelect him for the 2015/2016 school year. She informed him that, if LAUSD adopted her recommendation (which it almost certainly would do), his employment would be terminated on June 30, 2015. He could avoid that result by submitting his resignation no later than April 13, 2015, which he did. Despite her knowledge that Kramer would not receive another contract offer from LAUSD, Dr. Bibian continued to submit memoranda critical of many aspects of his performance. Kramer responded to these memoranda, defending his conduct and criticizing Dr. Bibian for purposefully choosing to observe his lowest performing students.

Kramer Files Formal Complaints of Discrimination and Retaliation

In early April 2015, Kramer filed claims of discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC) and California Department of Fair Employment and Housing (DFEH). Kramer alleged that he had suffered retaliation by being subjected to harsher

ratings and treatment than other teachers, and assigned an unequal distribution of work, by being subjected to verbal abuse, falsely being accused of misconduct for permitting students to take home an interim assessment test, and by the decision not to reelect him for the 2015/2016 school year. Among other things, Kramer alleged that LAUSD violated FEHA based on his physical disability and had failed to provide reasonable accommodation. On May 4, 2015, in a last ditch effort to preserve his job, Kramer wrote to Justo Avila, LAUSD's Chief Human Resources Officer, detailing the discriminatory conduct and unwarranted criticism to which he believed he had been subjected by Drs. Bibian and Wiltz. Avila did not respond.

On May 7, 2015, after learning that Kramer had violated her instruction not to discuss her investigation with students, Dr. Wiltz informed Kramer it was his last day at Byrd. He was directed to return keys and his roll book and told to leave immediately, which he did. Kramer returned to LAUSD's substitute pool for a short time to avoid forfeiting his health benefits and resigned on June 5, 2015.

Jury Trial is Conducted

In May 2016, Kramer filed the instant action against LAUSD and several individuals. As pertinent here, the operative second amended complaint (SAC), alleged causes of action under FEHA for disability discrimination, failure to provide reasonable accommodation, failure to engage in the interactive process, and unlawful retaliation, and a claim for

retaliation in violation of Labor Code section 6310 based on his complaints about an unsafe workplace.[11]

A three-week jury trial was conducted in November 2017. Kramer testified that he was devastated by LAUSD's treatment of him. He was humiliated, suffered from depression and felt like he was being mistreated all the time. He had pain in his chest and a knot in his stomach from worry that Drs. Wiltz or Bibian would accuse him of something else. As a result, he suffered stomach and intestinal problems, and had difficulty sleeping. He grew increasingly reclusive, withdrawing from his friends and family. Kramer came from a family of teachers and felt like a failure. After his resignation and through trial, he continued, unsuccessfully, to seek work. A forensic economic expert testified that Kramer's past loss of earnings (with an offset for his pension) amounted to $149,198.

The jury found against Kramer on his claim of disability discrimination. It found in Kramer's favor on his causes of action for (1) failure to provide reasonable accommodation (Gov. Code, § 12940, subd. (m)); (2) failure to engage in the interactive process (Gov. Code, § 12940, subd. (n)); and (3) retaliation in violation of Labor Code section 6310. Kramer was awarded $150,000 for lost earnings, nothing for future earnings, and $250,000 for pain and suffering, a total compensatory damages award of $400,000. The jury also found that LAUSD had committed unlawful retaliation (Gov. Code, § 12940, subd. (h)), but awarded no damages, finding that LAUSD would have taken the same adverse employment action based on Kramer's job performance.

---

[11] The individual defendants and remaining causes of action were dismissed at trial.

Judgment was entered on the jury's verdict. LAUSD timely appealed from the judgment and an order denying its JNOV motion. The trial court subsequently granted Kramer's counsel's motion for attorney fees, awarded attorney fees of $689,552. LAUSD appealed from that order. We agreed to consolidate the matters for purposes of briefing, oral argument and decision.

DISCUSSION

LAUSD raises four principal challenges to the judgment. It argues the judgment must be reversed because: (1) Kramer failed to exhaust administrative remedies as to his claim of retaliation in violation of Labor Code 6310; (2) instructional error requires reversal; (3) there is insufficient evidence to support the jury's verdict and damages award; and (4) the trial court abused its discretion both in awarding attorney fees and in the amount awarded.

I. *Failure to Exhaust Administrative Remedy as to Labor Code section 6310 Claim*

Labor Code section 6310 (section 6310) provides a civil cause of action for individuals who suffer retaliation for making complaints of unsafe working conditions. In the SAC, Kramer alleged that he frequently complained to LAUSD and his supervisors regarding unsafe workplace conditions including, among other things, an ant infestation and dripping condensation from the air conditioning system in his classroom that caused the growth of dangerous mold and created an unhealthful, potentially toxic workplace environment. He claimed these unsafe or unhealthful conditions were not remedied. Instead, he was criticized, reprimanded and retaliated

against for escalating his concerns, forced to continue to work in an unsafe environment, and suffered damage as a result.

LAUSD contends here, as it did below, that Kramer's section 6310 claim was barred due to his failure to exhaust his administrative remedies before initiating this action. The Government Claims Act requires that a plaintiff present a tort claim for money or damages within six months before filing a lawsuit against some public entities, including school districts. (Gov. Code, §§ 900.4, 905, 911.2; see *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 991.) Failure to present a timely claim will bar litigation against the public entity. (Gov. Code, § 945.4.)

Kramer alleged that he was excused from exhausting the requirements of the Government Claims Act due to LAUSD's failure to comply with Government Code section 53051. Government Code section 53051 requires a public entity to file a statement containing specific information with the Secretary of State and county clerk (the names and addresses of the governing board members and officers) in an indexed Roster of Public Agencies. In the event any of this information changes, the entity must file an amended statement within 10 days. "The purpose of the statute [is] to provide a means for identifying public agencies and the names and addresses of designated officers needed to enable or assist a person to comply with any applicable claims procedure." (*Tubbs v. Southern Cal. Rapid Transit Dist.* (1967) 67 Cal.2d 671, 676.) An agency's failure to comply with section 53051 "unconditionally excuses the claimant from filing a claim." (*Wilson v. San Francisco Redevelopment Agency* (1977) 19 Cal.3d 555, 560 (*Wilson*); Gov. Code, § 946.4,subd. (a); see 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 236, p. 314 ["Public agencies must furnish information for a public 'Roster

of Public Agencies,' designed to facilitate service of process, and where an agency has failed to do so, no claim need be presented"].)

LAUSD does not dispute that it is required to comply with Government Code section 53051. Rather, in connection with a demurrer to the SAC, LAUSD filed a request for judicial notice (RJN) of unauthenticated documents from 2013, claiming they constituted the requisite statement of information provided to the Secretary of State. The trial court denied LAUSD's RJN. The court found that the documents for which LAUSD sought judicial notice were "not authenticated in any way, [were] not certified and [did] not establish compliance for the relevant period." LAUSD's demurrer was overruled as to section 6310, although the court noted LAUSD remained free to file a motion for summary judgment. LAUSD did not challenge that ruling, did not seek summary judgment, and did not raise the issue at trial. LAUSD revived the exhaustion argument as to Kramer's section 6310 claim in its JNOV motion. The trial court again rejected the argument, noting that LAUSD's failure to raise this factual issue at trial constituted a "waive[r of] the issue of [Kramer's] compliance with claims presentation requirements."[12]

---

[12] In its reply brief and at oral argument LAUSD argued extensively that the judgment as to the section 6310 claim requires reversal because its obligation to demonstrate compliance with Government Code section 53051 was never "triggered." Purportedly, this is so because Kramer failed to prove each element of his section 6310 claim by his failure to *present evidence* either that he filed a timely government tort claim, or that he was excused from doing so because LAUSD failed to comply with Government Code section 53051. This theory, tangentially raised—then abandoned—below, was not advanced in LAUSD's opening brief, supported with appropriate citation to the record and legal authority. We deem the argument waived. Points raised for the first time in a reply brief on appeal will not be considered, absent good cause for failure to present them earlier. (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 583; *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134

LAUSD attempted again to revive the issue by filing a new RJN on appeal. We denied the RJN. LAUSD has not explained why it did or could not present the certified copies of documents presented to the Court—which were clearly in existence—at the time of trial. It is not our practice to take judicial notice of evidence that could have been, but inexplicably was not, presented at trial. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Absent exceptional circumstances (not shown here), we "'consider only matters which were part of the record at the time the judgment was entered.'" (*Ibid.*; *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325–326 [appellate court declines "to take judicial notice . . . of a matter which should have been presented to the trial court"].) In the absence of evidence that LAUSD satisfied the requirements of Government Code section 53051, Kramer was excused from exhaustion requirements of the Government Claims Act. (*Wilson, supra*, 19 Cal.3d at p. 561; Gov. Code, § 946.4, subd. (a).)[13]

II. *No Instructional Error as to Retaliation Claim Under Labor Code Section 6310*

A. *Forfeiture*

Pursuant to CACI No. 4605, the jury was instructed that, to prevail on his section 6310 cause of action, Kramer had to prove that "[his] complaints

---

Cal.App.4th 997, 1022 [fairness militates against consideration of an issue not raised until an appellant's reply brief].) LAUSD has not shown good cause for failing to articulate this argument earlier.

[13] Our conclusion makes it unnecessary to address the parties' arguments whether Kramer's EEOC/DFEH complaints or letters to LAUSD constitute substantial compliance with the Government Code Claims Act.

of unsafe or unhealthy work conditions [were] a substantial motivating reason for LAUSD subjecting [him] to an adverse employment action." Unanimously, the jury found in favor of Kramer on this question.

LAUSD contends the judgment as to the section 6310 claim must be reversed because the trial court failed to instruct the jury that the "but for" standard of causation, not the "substantial motivating reason" standard, applies to such claims. LAUSD ignores the fact that, during the conference between court and counsel to address jury instructions, counsel for LAUSD expressly stated he had no objection to CACI No. 4605. During the conference regarding jury instructions, the following colloquy took place as to whether CACI No. 4603 or CACI No. 4605 was the appropriate instruction:

> "THE COURT: These are different parts of the [Labor] Code, so you have to tell me, [LAUSD] is not objecting to 4605 . . . , right?
>
> "MR. HURRELL [LAUSD's counsel]: Correct."

Kramer's counsel then withdrew CACI No. 4603 in favor of CACI No. 4605. Accordingly, LAUSD forfeited its assertion of error on appeal.

LAUSD relies on the general proposition that a party is deemed to have objected to an erroneous jury instruction, even in the absence of an objection at trial. (See *Brown v. Smith* (1997) 55 Cal.App.4th 767, 783, fn. 11.) However, the doctrines of forfeiture and invited error provide that a party who or which acquiesces in the giving of an instruction may not later appeal the giving of that instruction. (See *People v. Bolin* (1998) 18 Cal.4th 297, 326 (*Bolin*).) "Under the doctrine of waiver, a party loses the right to appeal an issue caused by affirmative conduct or by failing to take the proper steps at trial to avoid or correct the error. [Citation.] Similarly, under the doctrine of invited error, a party is estopped from asserting prejudicial error where his

own conduct caused or induced the commission of the wrong. [Citation.]" (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1167.)

"[F]airness is at the heart of a waiver claim. Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. . . . Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier." (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.) Similarly, the purpose of the doctrine of invited error doctrine "is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court." (*Munoz v. City of Union City* (2007) 148 Cal.App.4th 173, 178.) This doctrine "'applies "with particular force in the area of jury instructions."'" (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1000 (*Transport Ins.*).) Case law is replete with courts' adherence to the principle that a party who acquiesces in the giving of a jury instruction may not later appeal the giving of that instruction. (See, e.g., *Bolin, supra,* 18 Cal.4th at p. 326 [when defense counsel agrees, without objection, that a proposed instruction is proper, claims of error are waived on appeal]; *Scott v. C. R. Bard, Inc*. (2014) 231 Cal.App.4th 763, 787 [defendants were estopped from asserting instructional error on appeal after acquiescing in the trial court's giving of the instruction]; *Transport Ins., supra*, 202 Cal.App.4th at pp. 1000, 1005; *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 856-857 (*Electronic Equipment).*) LAUSD agreed unequivocally that CACI No. 4605 should be given. LAUSD forfeited any assertion of instructional error.

B. *No Instructional Error*

In any event, LAUSD's assertion of instructional error lacks merit.

We review the propriety of a jury instruction de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.) We will not reverse a civil judgment, even where instructional error is shown, unless, after examining the entire record, we conclude the error complained of resulted in a miscarriage of justice. (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 580–581.) "Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.'" (*Id*. at p. 580.) Here, pursuant to CACI No. 4605, the jury was instructed that to prevail on his section 6310 claim, Kramer had to show that "[his] complaints of unsafe or unhealthy work conditions was a substantial motivating reason for LAUSD subjecting [him] to an adverse employment action." The jury unanimously found in Kramer's favor on this question.

Relying on a Use Note to CACI No. 4605, LAUSD now contends the jury should have been instructed that the standard of causation was "but for," not merely a "substantial motivating reason." Based on this Use Note, LAUSD argues that our decision in *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 681–682 (*Touchstone*), held that a "'but-for' causation standard must be satisfied, in order for a plaintiff to prevail on a Labor Code section 6310 claim." LAUSD goes too far. *Touchstone* did not address the causation standard for a section 6310 claim. Thus, that opinion is not the authority LAUSD seeks. (See *California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1043 (*California Building*) [a case is not authority for propositions not considered].)

In *Touchstone,* an actress sued for wrongful termination, alleging that her employer retaliated by refusing to renew her contract after she complained a battery was committed by the show's creator. The trial court denied defendant's motion for a directed verdict. (*Touchstone, supra*, 208 Cal.App.4th at p. 678.) We granted a writ directing vacation of that order because "[a] cause of action for wrongful termination in violation of public policy does not lie if an employer decides simply not to exercise an option to renew a contract." (*Ibid*.) We concluded the plaintiff should be permitted an opportunity to amend her complaint to allege retaliation under section 6310 for complaining about an unsafe workplace condition. (*Id*. at pp. 678, 684.) Our decision in *Touchstone* relied on the holding in *Daly v. Exxon Corp*. (1997) 55 Cal.App.4th 39 (*Daly*), where the court concluded the plaintiff failed to allege wrongful termination in violation of public policy where she was not "fired, discharged or terminated." Rather, her contract expired, and no cause of action existed for "'tortious nonrenewal of an employment contract in violation of public policy.'" (*Id*. at pp. 45-46.) Nevertheless, the court found that the plaintiff could amend her complaint to state a cause of action under section 6310. To prevail, the plaintiff would have to show that, but for her complaints about unsafe work conditions, her employment contract would have been renewed. (*Id.* at p. 44.) Because no section 6310 claim was pled in *Touchstone* or *Daly*, neither case had occasion directly to address whether the "but for" standard of causation applies to a section 6310 claim. Neither case may be or (except for the Use Note) has been cited as authority for that proposition. (*California Building, supra*, 4 Cal.5th at p. 1043.)

Moreover, *Touchstone* and *Daly* were decided before the Supreme Court's decision in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203

(*Harris*) which rejected the "but for" standard LAUSD urges us to adopt. In *Harris,* the Court held that a plaintiff in a FEHA discrimination action need not prove "but for" causation to establish liability. (*Id*. at pp. 230–232.) Rather, it is sufficient to show by a preponderance of evidence that discrimination was a "substantial motivating factor" in the adverse employment action. (*Ibid*.) In rejecting the "but for" causation standard, the Supreme Court reasoned that "discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause." (*Id*. at p. 229.)

Relying on *Reeves v. Safeway Stores, Inc*. (2004) 121 Cal.App.4th 95, a case decided almost a decade before *Harris*, LAUSD argues that *Harris's* "substantial motivating factor" standard does not apply in cases of retaliation. On the contrary, our colleagues in Division Seven found that the "substantial motivating factor" standard applies in discrimination and retaliation actions decided after *Harris*. (See e.g., *Alamo v. Practice Management Information Corp*. (2013) 219 Cal.App.4th 466, 469-470, 480 [under *Harris*, the proper causation standard for FEHA discrimination or retaliation claims is a substantial motivating reason].)

Second, LAUSD argues that the policy reasons underlying FEHA discrimination actions do not apply in a retaliation action under Labor Code section 6310. We disagree. Both statutes advance significant, interrelated public policy interests. (See *Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1350 ["Section 6310 . . . reflects a significant public policy interest in encouraging employees to report health and safety hazards in the workplace without fear of discrimination or reprisal"]; cf. *Daly, supra*, 55 Cal.App.4th at p. 44 [section 6310 is remedial legislation and must "'be liberally construed "to effectuate its object and purpose, and to suppress the

mischief at which it is directed""].) Public policy is not served by deeming lawful retaliatory conduct simply because no direct "but for" line of causation can be drawn to show it was the reason for an employer's adverse action against an employee who engaged in protected activity. CACI No. 4605 correctly states that the standard of causation for a section 6310 cause of action is a "substantial motivating reason."

Finally, LAUSD ignores that FEHA retaliation and section 6310 retaliation are different causes of action with different elements and may be supported by different evidence. The jury seemed to understand this, voting 10-2 that Kramer's protestations of discriminatory treatment was a substantial motivating factor for LAUSD's conduct, but unanimously determined that his protestations regarding what he believed, rightly or wrongly, were unsafe workplace conditions were a substantial motivating reason for LAUSD's adverse employment actions. In short, the jury found the evidence of the section 6310 retaliation more persuasive than any evidence that Kramer suffered retaliation as defined by FEHA. We are not free to speculate how it would have voted had it been instructed differently. LAUSD has not met its burden as appellant to demonstrate error, much less prejudicial error. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) We find no instructional error as to the section 6310 claim.

III. *Invited Error as to LAUSD's Affirmative "Same-Decision" Defense For CACI No. 4602*

LAUSD contends the trial court committed reversible instructional error by giving CACI No. 4602 on its affirmative defense that it would have made the same employment decision based on Kramer's job performance. Under CACI No. 4602, the jury was instructed: "If Keith Kramer proves that

his protesting unsafe working conditions was a contributing factor to an adverse employment action taken against him by LAUSD, LAUSD is not liable if they prove by *clear and convincing evidence* that they would have taken the same adverse employment actions against him anyway at that time, for legitimate, independent reasons." (Italics added.)

LAUSD expressly requested the giving of this instruction.[14] As discussed above, a claim of that an erroneous jury instruction was given is not reviewable when the party making that assertion requested the instruction. In such a circumstance, the party is deemed to have invited the error and is estopped from asserting instructional error. (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653-1655.) LAUSD requested the instruction on its affirmative defense. Accordingly, it may not now complain that the trial court acceded to its request.

In any event, the court did not err in giving CACI No. 4602. The instruction is appropriate "in a so-called same-decision or mixed motive case under the California Whistleblower Protection Act. (See Gov. Code, § 8547.)" (CACI No. 4602 (March 2019) Directions for Use.) Under that Act, if a jury

---

14 This exchange occurred between the court and counsel:
"MR. HURRELL [LAUSD's counsel]: And I think we need—I don't think we had a 'clear and convincing' instruction.
"MR. REISNER [Kramer's counsel]: You don't need it anymore because the individuals are out, and the punitive damages was only against the individuals.
"MR. HURRELL: No, for the defense. 4602.
. . . .
"THE COURT: I'm confused. Why do you need 'clear and convincing'?
"MR. HURRELL: That's the standard on the defense, the affirmative defense. I'll go with 'preponderance.' [¶] . . . . [¶]
"MR. REISNER: That's your version. I misunderstood. Thank you.
"THE COURT: So that was probably why we had it in the beginning.
"MR. HURRELL: Yes."

finds that retaliation was a contributing reason for the employer's conduct, the employer may avoid liability only if it can prove by clear and convincing evidence that it would have made the same decision for a legitimate reason. (Gov. Code, § 8547.8, subd. (d).) CACI No. 4602 correctly states the law. LAUSD has not shown otherwise, nor has it demonstrated how it was prejudiced because the court gave an instruction it requested.

IV. *Substantial Evidence Supports the Judgment In Favor of Kramer on His FEHA Claims for LAUSD's Failure to Accommodate His Physical Disabilities, Failure to Engage in Good Faith in an Interactive Process, and for Retaliation*

A. *The Standard of Review*

On appeal from a judgment in a civil action challenging a jury's factual findings, we apply the substantial evidence standard of review. Our power begins and ends with a determination as to whether the record contains any substantial evidence, contradicted or not, to support the jury's factual findings. (*Pope v. Babick* (2014) 22 Cal.App.4th 1238, 1245–1246 (*Pope*).) We must view the evidence in the light most favorable to the prevailing party, resolve evidentiary conflicts in its favor and give it the benefit of every reasonable inference. (*Ibid.*)[15]

---

[15] Kramer correctly observes that, as appellant, LAUSD has ignored an important component of this standard of review: "[W]hen a losing party challenges the verdict for a lack of substantial evidence, [it] 'must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable. . . . [The appellant's] 'fundamental obligation to this court, and a prerequisite to our consideration of [appellant's] challenge' [citation], is to 'set forth the version of events most favorable to [the respondent]' [citation]. 'Accordingly, if, as [LAUSD] here contend[s], "some particular issue of fact is not sustained, [it is] required to set forth in [its] brief all the material evidence on the point and not merely [its] own evidence."'" (*Pope, supra*, 229

B. *FEHA Claims for Failure to Accommodate or to Engage in Good Faith in an Interactive Dialog*

The jury found that LAUSD (Drs. Wiltz and Bibian) knew "Kramer [had] physical disabilities that limited him in climbing the stairs." It also found that Kramer was or would have been "able to perform [his] essential job duties" with "reasonable accommodation" for those disabilities, that LAUSD failed to provide such accommodation, and that LAUSD's failure to do so was a substantial factor in Kramer's harm. In addition, the jury found that Kramer had requested LAUSD to provide him a reasonable accommodation to permit him to perform his job duties, and had been "willing to participate in an interactive process to determine whether reasonable accommodation could be made so that he" could perform those essential job requirements. Notwithstanding Kramer's attempts to invoke and willingness to engage in such a discourse, the jury further found that LAUSD "fail[ed] to participate in a timely, good-faith interactive process with [Kramer] to determine whether reasonable accommodation could be made," and its failure to do so was another substantial factor in causing Kramer's harm.

An employer's failure to provide a reasonable accommodation for an individual's known disability, where the employee is able to or could perform the essential functions of his or her job if afforded such an accommodation, violates FEHA. (Gov. Code, § 12940, subds. (a), (m); *Gelfo v. Lockheed Martin Corp*. (2006) 140 Cal.App.4th 34, 54 (*Gelfo*).) This claim is independent of FEHA's general prohibition against disability discrimination. FEHA

Cal.App.4th at p. 1246.) LAUSD's recitation of the evidence at trial falls short of this requirement.

expressly provides that an "employer's failure to reasonably accommodate a disabled individual" is an independent violation of the statute. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256; *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 357.) Generally, what constitutes a "reasonable accommodation" is a question of fact, and it is not necessary for the plaintiff to demonstrate repeated failed attempts at obtaining reasonable accommodation. (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 374.)

An employer also commits an independent FEHA violation if it fails to engage in good faith in an interactive process or dialog to determine an effective accommodation for an employee's disability. (Gov. Code, § 12940, subd. (n) [it is an unlawful employment practice for an employer to "fail to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for . . . accommodation by an employee . . . with a known . . . disability"]; *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243.) The claims are independent of but necessarily implicate one another. (*Gelfo, supra*, 140 Cal.App.4th at p. 54.) If the parties engage in a failed discussion or negotiation as to reasonable accommodation, "responsibility for the failure rests with the party who failed to participate in good faith." (*Ibid.*)

LAUSD maintains there is insufficient evidence to support the jury's verdict in favor of Kramer as to either the cause of action for failure to provide reasonable accommodation, or the claim for failure to engage in an interactive process because "undisputed evidence established [Kramer] checked out and was in possession of an elevator key three weeks after

requesting same [citation], which was a reasonable accommodation." The evidentiary record reflects otherwise.

Kramer's diabetes necessitates frequent trips to the restroom. He also has a hip problem, chronic pain and a lower back injury which make it difficult and painful for him to climb stairs. From August 2014 through June 2015, Kramer was assigned to the same second floor classroom. The only teachers' restroom in the building is on the first floor. There is functioning second floor boys' restroom a few feet from Kramer's classroom, but that restroom is always locked. There is also a locked elevator, to which Kramer was not provided a key. As a result, Kramer had to go up and down two flights of stairs within five minutes, in order to access a restroom and get back in time to teach his next class. When school began in mid-August 2014, Kramer discussed his medical conditions with Drs. Wiltz and Bibian, and requested the accommodation of a key either for the elevator or the locked upstairs bathroom. Neither administrator made an effort to provide Kramer an elevator key, and Dr. Wiltz refused Kramer permission to access the locked, unused, but fully functioning boys' restroom upstairs.[16]

Kramer reiterated his request for accommodation in a memorandum to Dr. Bibian (copied to Dr. Wiltz) shortly thereafter but received no response. At one point in August, Kramer learned a locksmith had just been on campus and, presumably, could have made an elevator key, but did not. Kramer complained about this fact, among others, reiterating his need for an accommodation to enable him to avoid using the stairs when his pain was

---

16 Dr. Wiltz testified that teachers may not use student restrooms. However, she also acknowledged that she made no effort to contact anyone at LAUSD to ascertain whether the locked, unused second-floor restroom could be converted (e.g., re-signed) or made available for Kramer's use.

severe, in a memo to Dr. Wiltz on August 28, 2014. Dr. Wiltz did not directly address Kramer's request for an elevator key, but said only that she was "very concerned" by the sheer volume of Kramer's complaints, and promised to get back to him. Neither Dr. Wiltz nor Dr. Bibian (who was in charge of keys) "[got] back" to Kramer regarding his request for an elevator key, and no one discussed with Kramer whether another accommodation reasonably could be fashioned to help him access a restroom.

After three weeks during which he heard nothing from LAUSD, and continued painfully to climb the stairs as often as eight times each day, Kramer took matters into his own hands. He made arrangements with an assistant who sometimes worked in his classroom to share an elevator key. Based on this agreement (which displeased Dr. Wiltz), on September 3, 2014, Kramer initialed a document saying he had an elevator key. Viewing the evidence in the light most favorable to Kramer, the jury could determine that LAUSD did not provide the key to Kramer. Moreover, Kramer testified that the arrangement only partially alleviated the problem, because the assistant (and his key) was not in his classroom at all times. Kramer was still forced to climb stairs several times a day, two or three days a week. LAUSD did not provide Kramer his own key for the elevator until the 15th week of school. No effort was ever made to provide an alternative accommodation and give Kramer access to the upstairs restroom, which remained locked all year.

Based on this evidence, we conclude that the record contains sufficient evidence to support the jury's verdicts that LAUSD both failed to provide a reasonable accommodation for Kramer, and failed to engage in good faith in an interactive process to discuss such an accommodation.

C. *FEHA Retaliation Claim*[17]

Under FEHA, it is unlawful "[f]or any employer [to] discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint . . . or assisted in any proceeding under this part." (Gov. Code, § 12940, subd. (h).) LAUSD insists the record does not support the jury's finding in Kramer's favor on the FEHA retaliation claim because no direct causal connection was established between any retaliatory action—Dr. Wiltz's January 2015 decision not to recommend Kramer for reelection—and Kramer's formal complaints of harassment and discrimination to the EEOC or DFEH. Rather, LAUSD argues that reversal is required because Kramer's claims of "discrimination [were] not a substantial motivating reason for Dr. Wiltz's decision to refrain from recommending Plaintiff for reelection[,]" and "substantial evidence established [Kramer] was not recommended for reelection due to his performance . . . and not for any protest of discrimination."

LAUSD's focus on Dr. Wiltz's ultimate decision is misplaced. As discussed above, the record contains substantial evidence that, despite its knowledge of his physical disability and need for accommodation (to avoid the stairs as much as possible and for ready access to a restroom during the short passing period between class), LAUSD did not provide Kramer any accommodation. Similarly, the evidence shows that LAUSD failed to engage in good faith in the requisite interactive process in an effort to alleviate Kramer's difficulty in frequently negotiating the stairs between his second-

---

[17] To the extent LAUSD argues that this claim must be reversed because the trial court committed instructional error in the standard of causation, we reject the assertion for the same reasons discussed in Section IIA above with regard to the section 6310 claim.

floor classroom and the only teachers' restroom located a floor below. After weeks without progress, Kramer made his own arrangement to share an aide's elevator key part time. It took LAUSD 15 weeks to accomplish the straightforward task of obtaining an elevator key for Kramer. There was evidence the key could easily have been obtained much sooner (i.e., while a locksmith was on campus in August 2014), or that Dr. Wiltz could have arranged to give a key to Kramer for the locked second floor restroom (at least until his elevator key was made). If that decision was not within her purview, Dr. Wiltz acknowledged that it was her responsibility to pass along the accommodation request to the appropriate LAUSD office. Dr. Wiltz did none of these things, nor did she maintain contact with Kramer to discuss the matter.

Moreover, viewed in the light most favorable to Kramer, the record also contains substantial evidence to support the jury's determination that he suffered retaliation for reporting his health and safety concerns regarding the consistent condensation and potentially toxic mold in his classroom. After making that complaint, Kramer, who had a positive working relationship with and received positive reviews from Drs. Wiltz and Bibian during his preceding year at Byrd, lost all positive contact with Dr. Wiltz, and began to receive complaints of unacceptable job performance, and was subjected to extensive scrutiny and oversight by Dr. Bibian, who threatened nonrenewal of his contract. Kramer was the only teacher under Dr. Bibian's supervision whom she required to perform additional, extensive work preparing lesson plans for her review (and which rarely seemed to satisfy her). Kramer was also the only DRW teacher criticized and subjected to an investigation for permitting students to take home an assessment he had not known was (and

which was not labelled as) secure, even though another DRW teacher had made the very same mistake.

Adverse employment action, encompasses "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054 (*Yanowitz*).) Unlawful discrimination relates not solely to "ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Ibid*.) Actions "that threaten to derail an employee's career are objectively adverse" and may constitute adverse employment action. (*Id*. at p. 1060; see *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 374 ["There is no requirement that an employer's [discriminatory] acts constitute one swift blow, rather than a series of subtle, yet damaging injuries"].)

Also, by focusing on Kramer's EEOC charge, LAUSD ignores his employee's complaints about mistreatment by his supervisors, and his perception that he was being harassed for requesting an accommodation for a known disability, and because he expressed concerns regarding the unsafe or unhealthful concerns cause by constant condensation in his classroom. Despite the fact that it was easily within her power to make an accommodation, or to pass on Kramer's request to someone who could, Dr. Wiltz responded only by expressing concern about the volume of Kramer's legitimate complaints. It is a violation of FEHA for an employer to "retaliate or otherwise discriminate against a person for requesting accommodation." (Gov. Code, § 12940, subd. (m)(2).)

Thus, despite LAUSD's effort to narrow the focus, Dr. Wiltz's early decision not to recommend Kramer for reelection was not the only adverse consequence to which Kramer was subjected. The jury could reasonably find that Dr. Wiltz found Kramer to be a troublesome complainer. It also could conclude that Dr. Bibian (with Dr. Wiltz's implicit encouragement and permission) subjected Kramer to intense, unparalleled scrutiny to build a case for termination. These adverse employment actions, which followed directly on the heels of Kramer's protected activity, and continued while he remained at Byrd for months after the decision not to recommend him for reelection was made, are sufficient to establish the requisite causal connection. (*Yanowitz, supra*, 36 Cal.4th at pp. 1053–1054; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1020 ["'Close proximity in time of an adverse action to an employee's [protected activity] is often strong evidence of'" a causal connection]; *Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 ["Circumstantial evidence [of causation] typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers"].)

V. *Damages Award*

A. *Award for $150,000 for Economic Damages*

Returning to its assertion that the verdict in Kramer's favor on the section 6310 claim requires reversal, LAUSD argues that the jury's award of $150,000 for Kramer's past loss of earnings on that claim must also be reversed. LAUSD does not take issue with the amount of the lost earnings award. Rather, it argues only that, because the judgment for violation of section 6310 should be reversed, so too should the award for past loss of earnings. Our conclusion in Sections I and II above to affirm the judgment

for violation of section 6310, also requires that we affirm the award for $150,000 in economic damages.

B. *$250,000 Award for Non-Economic Damages Need Not be Vacated*

Our review of the correctness of a special verdict is de novo. (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 148.) If the trial court failed properly to vet a special verdict form, or made an erroneous interpretation, we make every effort to interpret the verdict correctly and avoid reversal. (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 542.)

Recognizing that it was "crucial" to do so, the trial court devoted several hours, working with counsel to ensure the jury received a concise, structurally sound special verdict form that tracked the instructions.

Nevertheless, during its deliberations, the jury asked the following question about the special verdict form: "If we answer yes to questions 7 [disability discrimination], 25 [retaliation under FEHA], 30 [Retaliation under section 6310], 13 [failure to accommodate] & 19 [failure to engage in the interactive process], how do we proceed on determining the damages?" After conferring with, and obtaining agreement from all counsel, the trial court responded: "If you answer all of those questions 'yes' then answer 31 but not 32."[18] LAUSD now asserts that the court erred, because its response conflicted with the instructions when it advised the jury to respond only to

---

[18] During conference on this question, the following colloquy transpired:
"THE COURT: I think the answer is, tell me if I'm wrong, is that if you answer all of those questions yes, then just answer 31.
"MS. BIANCO [LAUSD's counsel]: That's correct.
"MR. REISNER [Kramer's counsel]: That's correct."

question 31 regarding damages if it answered yes to the questions it mentioned.[19]

Once again, LAUSD ignores the fact that its counsel expressly agreed to the trial court's instruction. LAUSD is estopped from raising the instructional error issue on appeal. *Electronic Equipment, supra,* 122 Cal.App.3d at pages 856-857 is illustrative. There, during deliberations, the jury asked that the word "appreciable" on a special verdict form be defined. (*Id*. at p. 856.) When asked by the court whether he had any objection to the definition the trial court intended to give the jury, appellant's counsel said "No, I guess not." (*Ibid*.) On appeal, appellant argued that the jury could have been misled by the court's definition of "appreciable." (*Ibid*.) The appellate court found that any contention of error had been waived by appellant's acquiescence in the trial court's definition. (*Id*. at pp. 856-857.) As the court explained, "appellants did not formally make an objection . . . and they ultimately and expressly stated that they had no objection to the court's definition." (*Id*. at p. 857.)

In any event, we find no error as to the trial court's response to the jury's question. The jury found that LAUSD's violations of FEHA and the Labor Code caused Kramer harm and awarded him $250,000 in non-economic damages, and LAUSD does not take issue with the amount of the award. The

---

[19] LAUSD notes that the jury did answer "yes" to question 30, regarding section 6310. Accordingly, LAUSD asserts that (1) if the judgment as to the section 6310 claims is reversed, the non-economic damages must also be reversed, because (2) it cannot be determined with reasonable certainty that the jury meant to award $250,000 in noneconomic damages on any other claim other than the section 6310 retaliation claim. Our affirmance of the judgment on the section 6310 claim makes it unnecessary to address this issue.

jury also found that LAUSD's failure to provide reasonable accommodation or to participate in the interactive process were substantial factors in causing Kramer to suffer harm. Setting aside the section 6310 claim for a moment, the jury's findings as to the FEHA claims (considered individually or collectively) are sufficient to support the award of non-economic damages. (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 221 [in FEHA action, "all relief generally available in noncontractual actions, including punitive damages, may be obtained"]). LAUSD has waived its contention of error as to the special verdict form and, even if it had not done so, no error occurred.

C. *The Award and Amount of Attorney Fees was Proper*

Following trial, Kramer filed a motion seeking an attorney fees award of $1,546,495,[20] under FEHA (Gov Code, § 12965) and the Private Attorney General Act, Code of Civil Procedure section 1021.5 (PAGA).[21] The trial court denied any attorney fees award under PAGA. It found that, although the working conditions about which Kramer complained may have posed

---

[20] The requested amount consisted of a lodestar of $773,247.50, plus a multiplier of two. The requested amount did not include a fee request for work related solely to individual defendants who had been dismissed.

[21] PAGA permits an award of attorney fees "'in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.' [Citation.]" (*Riverside Sheriffs' Assn. v. County of Riverside* (2007) 152 Cal.App.4th 414, 421.)

some health or safety risks, Kramer filed this action primarily to recover damages for personal harm. It was not the sort of whistle blower action envisioned by PAGA, i.e., one brought to enforce—and which confers—a significant public benefit.

However, the trial court found that, as the prevailing party, Kramer was entitled to an attorney fees award under FEHA for $689,552 (an amount that reduced the lodestar by $83,695 for duplicative or otherwise nonrecoverable tasks and declined any multiplier). LAUSD filed an appeal from that order.

We review a trial court's award of attorney fees under FEHA for abuse of discretion. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (*PLCM*).) We "defer to the trial court's discretion 'because of its "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters."'" (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 418.) Ordinarily, a prevailing plaintiff in a FEHA action should recover attorney fees, unless special circumstances make a few awards unjust. (*Young v. Exxon Mobil Corp*. (2008) 168 Cal.App.4th 1467, 1474.) Accordingly, the "'"discretion to deny a fee award to a prevailing plaintiff is narrow."'" (*Steele v. Jensen Instrument Co.* (1997) 59 Cal.App.4th 326, 331.) The jury found in Kramer's favor on his FEHA claims for LAUSD's failure to accommodate, and its failure to engage in good faith in the interactive process. He also prevailed on a FEHA claim for retaliation, by virtue of the jury's conclusion that his protected activities were a substantial motivating reason for LAUSD's adverse employment actions.

LAUSD does not take issue with an attorney fees award on the causes of action for failure to accommodate or to engage in the interactive process

claims. Rather, LAUSD argues that Kramer is not entitled to fees for the FEHA retaliation for two reasons.[22] First, LAUSD contends that a fee award is not warranted because the jury found LAUSD would have taken the same adverse action based on his poor performance, and the court found he was not entitled to fees under PAGA. However, a prevailing party need not receive a fee award under PAGA in order to recover attorney fees under FEHA. (Gov. Code, § 12965, subd. (b); *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 637–638 [because FEHA provides an independent mechanism authorizing an award of attorney fees to a prevailing plaintiff in an action for violation of a fundamental public policy, and plaintiff need not also resort to PAGA to recover attorney fees]; see *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1171 [fees were unavailable under PAGA were recoverable under FEHA].) Trial courts often look to authorities interpreting PAGA in cases such as this. But they do so not to determine whether attorney fees should be awarded to a prevailing plaintiff under FEHA, but for

---

[22] Actually, there are four reasons, but two require only a brief mention: first, LAUSD's argument that the fee award must be vacated because there is insufficient evidence to support the jury's verdict against LAUSD on the retaliation—indeed, any—claim fails, in light of our rejection of the underlying predicate.

Second, LAUSD maintains that it suffered prejudicial error when the trial court failed properly to instruct the jury that Kramer's FEHA retaliation claim required the "but for" standard of causation, not merely that Kramer's protestations of harassment and discrimination based on a protected category, was a "substantial motivating reason" for LAUSD's adverse employment action. However, as with its other claims of instructional error, LAUSD forfeited any argument the jury was erroneously instructed. In any event, we would not find that LAUSD was unfairly prejudiced as a result of this error, because we affirm the fee award for independent reasons delineated above.

guidance regarding how to compute the amount of a fee award. (See *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985.)

Second, LAUSD argues that Kramer was not entitled to an award of attorney fees for LAUSD's harassment and retaliation, because those claims were not "inextricably intertwined" with his claims that LAUSD failed to accommodate his disabilities and failed to engage in the interactive process. In LAUSD's view, the fee award should have been limited to Kramer's attorneys' work on the failure to accommodate and failure to engage in the interactive process claims, which "relate only to the fact that [Kramer] did not have his own elevator key for three weeks." As discussed above, we reject LAUSD's assertion that the fact that Kramer was able to make his own arrangements to share a key in late August absolves LAUSD of liability. There is evidence in that, notwithstanding their knowledge that negotiating stairs was difficult and painful for Kramer and that he was forced to make that trek multiple times a day, neither Dr. Wiltz nor Dr. Bibian took steps to facilitate providing Kramer an elevator key for 15 weeks, and no one ever inquired of the appropriate LAUSD authorities whether Kramer could access the unused student restroom (at least until his elevator key was ready), or some other accommodation was possible. Moreover, when Kramer told Dr. Wiltz about his key sharing arrangement, Dr. Wiltz was displeased, and snapped "that's not how it's supposed to work."

Based on evidence at trial, the jury concluded that Kramer was subjected to harassment and retaliation for the "volume" of his complaints, and that harassment and retaliation continued throughout his tenure at Byrd. The finding that, notwithstanding its campaign of harassment and retaliation, LAUSD would still not have renewed his employment contract based on his sub-par performance does not mandate a reduction in fees. That

is particularly true here, where Kramer's theory was that he received a poor performance rating because of a semester-long harassment and retaliation by Drs. Bibian and Wiltz. By its very nature, an employment discrimination action will involve several causes of action arising from the same set of facts. (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 431.) The very reason for the "high threshold for triggering decreases due to limited success reflects the values underlying the award of attorneys' fees in FEHA and other civil rights cases." (*Beaty v. BET Holdings, Inc.* (9th Cir. 2000) 222 F.3d 607, 612 [court did not abuse its discretion in fee award that did not reduce lodestar amount because plaintiff did not prevail on some causes of action].) On this evidentiary record, the court could conclude that the efforts of Kramer's attorneys devoted to demonstrating LAUSD's harassment and retaliation were inextricably linked to their efforts to demonstrate LAUSD's term-long failure either to accommodate Kramer or to engage in a dialog with him in an effort to reach an accommodation.

Finally, we reject LAUSD's invitation to reduce the amount of the attorney fees award, because it believes the billing rates for Kramer's counsel were too high and the trial court insufficiently scrutinized evidence submitted in support of Kramer's fee motion, resulting in an excessive fee award. The record reflects that the court thoroughly reviewed the evidentiary arguments made by the parties and found that the rates charged by Kramer's counsel in this fact-intensive case were reasonable. The court also reviewed the evidence submitted in connection with the attorney fees motion, and substantially reduced the amount requested by Kramer's counsel, clearly articulating its reasons for doing so. We find no abuse of discretion. (*PLCM, supra*, 22 Cal.4th at p. 1096; see *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 155 [determining an award of

attorney fees is a highly fact–specific task best left to discretion of the trial judge, familiar with the matter and with the expertise to determine the value of the legal services performed in the case].)

DISPOSITION

The judgment is affirmed. Kramer shall recover costs and reasonable attorney fees on appeal in an amount to be determined by the trial court on noticed motion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.