Filed 2/28/05 May v. Trustees of the Cal. State University CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JAMES H. MAY, Plaintiff and Appellant, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Defendant and Appellant.	H024624 (Monterey County Super. Ct. No. M51073)

Plaintiff James May (May), a former tenured professor and administrator, who is Native American, sued his employer, defendant California State University, Monterey Bay (State), for racial discrimination. A jury trial resulted in a verdict in part for May and in part for State. Specifically, the jury found State had not discriminated against or constructively discharged May because of his race/national origin or his disability. The jury also found that State harassed May because of his race/national origin, and that State retaliated against May because of his complaints of discrimination and harassment.

Following the verdict, the trial court granted State's motion for a new trial, and denied State's motion for judgment notwithstanding the verdict (JNOV).

May appeals the trial court's order granting a new trial on the ground that the order is procedurally deficient because it fails to comply with the statutory requirements

of Code of Civil Procedure sections 657 and 660. Additionally, May asserts there was not prejudicial juror misconduct to support the new trial order.

State files a cross-appeal of the trial court's denial of its motion for judgment notwithstanding the verdict, asserting there is not substantial evidence to support the jury's verdicts in May's favor.

STATEMENT OF THE FACTS AND CASE

May is a Native American who was hired in 1994 at State as the Dean of Instruction. May was the primary administrator responsible for the creation of the library and the "Center for Science Technology and Information Resource" (STIR) and the design of the "Media Learning Complex," a high-tech building of classrooms and offices.

A year after May starting working at State, Peter Smith was appointed as president. In November 1995, Smith said in May's presence that there were "too many minorities in power on this campus." May told Smith that Smith's comment was discriminatory, and Smith said, "That's your opinion." Smith then told May his intent to fire the existing provost, Steven Arvizu, who was a Latino.

Smith told Arvizu on several occasions in 1996 that he was going to remove May as dean. Arvizu testified that Smith said he was going to "level the playing field" in reference to changing May's assignment, and in reference to his plan to transfer May, Smith said "I'm going to ride a rank horse into the swamp." Smith did not explain to Arvizu what he meant by that phrase.

In August 1996, Smith removed May as dean, and reassigned him to a newly created position as assistant to the president. As part of the reassignment, May's salary of $106,000 would be maintained for two years, but thereafter, May was required to raise funds from outside sources to pay his salary. No other administrator at State was required to raise funds for his or her own salary.

During the time May was removed as dean, he observed that a dean, two professors and two staff members who were all ethnic minorities were having their

offices moved out of the "Media Learning Center Complex" (MLC), where May also had his office. The MLC was considered a desirable building on campus because it had extensive technology access. May told Smith that the moves "look[ed] like segregation, racial segregation" because only "people of color" and no Caucasians were being moved. Smith became angry with May.

Smith approached May later during the same week and accused May of using the term "ethnic cleansing." May told Smith he did not use that term, but reiterated that he believed there was racial segregation happening on campus.

Less than a week later, Smith ordered that May's office be moved out of the MLC. May was relocated to module 86D, an isolated building with no drinking water, no operational office equipment such as copiers, printers, computers, and no support staff. The building was not refurbished, lacked proper ventilation and was not seismically upgraded to meet state standards.

When May complained to Smith about the move to module 86D, Smith said that he thought May would like to be with people "of [his] own kind." At the time, three other Native Americans had been relocated to module 86D.

After the move, Smith required May to relinquish all of his technology equipment. This included the computer server that ran the Native American website. May was left with one working computer. Smith gave May one day to return the equipment, and threatened May that the police would be notified if the equipment was not returned within one day. All of the returned equipment was scrapped.

In March 1997, Smith told May, "[w]e have too many Hispanics on campus," and "We have too may Latinos here." When May told Smith that the comments were discriminatory, Smith said, "you've got to realize that you're now working for me. As an assistant to the president, you have to be loyal. You cannot be making comments like that."

Two months later, Smith demoted May from administrator to faculty. As a result of this demotion, May's salary was reduced by $35,000, from $106,000 to $71,000. Because of Smith's agreement in August 1996 to keep May's salary at $106,000 for two years, the salary reduction did not go into effect until 1998.

After May's demotion to faculty, his office was again relocated, this time to a building on campus known as "the old DMV building." No other person had an office in that building at the time May moved there. The building had no computer connections, no business machines or supplies and no support staff. There was no security at the building, and it was dark, located on the edge of campus with no streetlights.

During his first semester back as a faculty member, May was given a full teaching load. This was against State policy. For the 1997/1998 academic year, May taught 23.1 credits, which is a much higher load than any other tenured technology professor. May's teaching load was equivalent to that of a non-tenured lecturer or a first-year tenure track professor.

After his first complaint directly to Smith about what he perceived was racially discriminatory segregation of Native Americans to module 86D in 1996, May complained to the newly-appointed campus Equal Employment Opportunity Officer, Patricia Hiramoto in August 1997. May told Hiramoto that Smith had discriminated against him and harassed him based on his Native American heritage. Hiramoto never conducted an investigation of May's allegations.

In March 1999, May complained of discrimination to the Senior Director for Employee Relations from State's Chancellor's office, Maria Santos, while she was on State's campus. May told Santos about the ongoing discrimination, harassment and retaliation against him because he was a Native American. May told Santos he was fearful of retaliation, and that he had blocked arteries and that his health had suffered because of the conditions at work.

Santos contacted both Linda Wight, the Director of Human Resources, and Hiramoto to see what if anything they knew about May's allegations. They both told Santos they were aware of May's allegations and had looked into them. Santos did not conduct an investigation or follow up to see what State had done about May's complaints.

May took early retirement in the summer of 2000, four years prior to his intended retirement date.

In October 2000, May filed this Fair Employment and Housing Act action for unlawful discrimination, harassment, retaliation and constructive discharge in violation of public policy. After a 19-day trial, the jury returned a special verdict finding that State racially harassed May and retaliated against him because of his complaints about discrimination and/or harassment. The jury also found that State did not discriminate against May or constructively discharge him. The jury awarded May $325,000 in economic damages and $50,000 in non-economic damages.

The trial court did not enter judgment on the special verdict, and instead, the court set the date for hearing post-trial motions on April 25, 2002. The court directed State to file opening papers by March 29, 2002.

On March 29, 2002, State filed and served its notice of motion for new trial and its motion for judgment notwithstanding the verdict. On May 9, 2002, the court orally announced it would grant the new trial motion and deny the motion for JNOV. The minute ordered entered May 9, 2002, did not contain any grounds or reasons for the court's grant of a new trial.

On May 29, 2002, the court filed an order granting the new trial stating the grounds and reasons as jury misconduct, insufficient evidence and excessive damages.

On June 6, 2002, May filed a notice of appeal from the new trial order and from the special verdicts in favor of State. On June 28, 2002, State filed a cross-appeal from the denial of its JNOV motion and from the jury's special verdicts in May's favor.

Subsequent to the parties' filing their notices of appeal, on July 17, 2002, the court filed two judgments. One was a judgment on special verdict, and reflected the jury's verdict. The other was a judgment on motion for new trial and JNOV. The latter judgment vacated the verdict in favor of May for retaliation and harassment, ordered a new trial on those claims, and ordered judgment entered in favor of State on the discrimination, disability harassment, and constructive discharge claims on which the jury had found in State's favor.

May filed a second notice of appeal from the judgment on motion for new trial and JNOV.

DISCUSSION

I. *May's Appeal*

May appeals the trial court's order granting a new trial on the ground that the order is procedurally deficient, because it fails to comply with the statutory requirements of Code of Civil Procedure sections 657 and 660.[1] Additionally, May asserts there was not prejudicial juror misconduct to support the new trial order.

In this case, the court made two orders granting a new trial. The first was a minute order entered on May 9, 2002. The second was a written order filed on May 29, 2002. Both orders fail to meet the statutory requirements of sections 660 and 657. The May 9, 2002 minute order is procedurally deficient, because it fails to state the grounds or reasons for the trial court's grant of the new trial. A statement of grounds is mandatory whenever a new trial is ordered: "The order passing upon and determining the motion . . . must state the ground or grounds relied upon by the court . . . ." (§ 657.) As such, the May 9, 2002 minute order is procedurally defective.

[1] All further statutory references are to the Code of Civil Procedure, unless otherwise noted.

Additionally, the subsequently filed written order dated May 29, 2002, while signed by the judge, and specifying the court's grounds and reasons for granting the motion: juror misconduct, insufficient evidence and excessive damages, is procedurally deficient because it was not filed within the 60-day period proscribed by (§ 660). In a case such as this, where there was no notice of entry of judgment mailed by the clerk or served by a party, the 60-day period began to run on March 29, 2002, when State filed and served its notice of motion for a new trial. (§ 660.) Therefore, the written order must have been filed by May 28, 2002. Here, the order dated May 29, 2002, exceeds the 60-day jurisdictional time limit for ruling on a new trial motion. "[T]he power of the court to rule on a motion for a new trial shall expire 60 days from and after . . . service on the moving party by any party of written notice of the entry of the judgment . . . ." (§ 660.) Because the written order "purports to rule on the motion and state insufficient evidence as the ground therefor, it is defective as in excess of the 60-day jurisdictional period. [Citation.]" (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 903.)

While both orders were procedurally defective in this case, the minute order entered on May 9, 2002, is not void. On indistinguishable facts, the California Supreme Court found a similar timely minute order "defective (but not void) for failure to state the ground (insufficiency of the evidence) on which the motion was granted (Code Civ. Proc., § 657)" and also concluded that the subsequent written order "was invalid because it was made after expiration of the 60-day period in which the court had jurisdiction to rule on the motion (Code Civ. Proc., § 660)." (*Sanchez-Corea v. Bank of America, supra*, 38 Cal.3d at p. 898.)

In a case such as this, where the trial court failed to make a timely specification of any ground for the new trial order, "the burden is on the movant to advance any grounds stated in the motion upon which the order should be affirmed, and a record and argument to support it. [Citations.]" (*Sanchez-Corea v. Bank of America, supra*, 38 Cal.3d at

p. 906.) In this case, State asserts juror misconduct as the grounds for a new trial.[2] (§ 657, subd. (2).)[3]

Juror Misconduct

The California Supreme Court has definitively stated that in cases in which the trial court *grants* a new trial order, the standard of review is abuse of discretion. (*People v. Ault* (2004) 33 Cal.4th 1250.) This is true regardless of whether the order granting a new trial is defective, as in the case. (See *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 748.)

Proof of jury misconduct has two fundamental elements. The first is an adequate factual showing to establish the misconduct. The second is a showing of prejudice; that is, the claimed misconduct must have materially affected the party's substantial rights. (See *People v. Nesler* (1997) 16 Cal.4th 561, 580.)

It is the moving party's burden to establish the factual underpinnings of the claim by an adequate evidentiary showing of misconduct. (*Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983, 991.) Decisions concerning the weight and sufficiency of allegations of juror misconduct are for the trial court. (*Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1647; *City of Pleasant Hill v. First Baptist Church* (1969) 1 Cal.App.3d 384, 429; accord, *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 109 ["weighing the credibility of conflicting declarations on a motion for new trial is uniquely within the province of the trial court"].) The trial court's determination on the question of whether misconduct occurred will be affirmed on appeal, if supported by substantial evidence.

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[2] We cannot affirm the order based on insufficiency of the evidence or excessive damages because those grounds were not stated in the operative order of May 9, 2002. (§ 657.)

[3] Because we find the May 9, 2002 order defective, but not void, and that order fails to state any reasons or grounds for the grant of a new trial, we will not consider State's alternative argument that a new trial should be granted based on insufficiency of the evidence.

(*People v. Nesler, supra,* 16 Cal.4th at p. 582, fn. 5.)

As a general rule, adequate proof of jury misconduct raises a presumption of prejudice. (*In re Hitchings* (1993) 6 Cal.4th 97, 118.) That presumption may be rebutted, however, by evidence that no prejudice exists. (*Id.* at p. 119.) The presumption also may be overcome by a determination on appeal that the misconduct resulted in no reasonable probability of actual harm. (*Ibid.*) Denial of a new trial motion grounded on jury misconduct implies a determination by the trial court that no prejudice resulted from the misconduct. (*English v. Lin* (1994) 26 Cal.App.4th 1358, 1364.) Conversely, the grant of a new trial motion on the ground of juror misconduct implies a determination by the trial court that prejudice did result from the misconduct. "Since the trial judge had all the evidence before him on the merits of the case, and as well the conflicting affidavits, he was in the best position to evaluate the prejudicial effect of the alleged misconduct." (*City of Pleasant Hill v. First Baptist Church, supra,* 1 Cal.App.3d at p. 430.)

Here, State asserts three different jurors committed misconduct during the trial. Specifically, juror R.K concealed her bias during voir dire, juror C.B. communicated information he received from outside sources to the jury regarding evidence related to May's racial harassment claim, and juror L.N. brought in outside information regarding her own retirement benefits and shared that information with the jury regarding economic damages. Each of the jurors is discussed below.

Juror R.K.

State asserts that juror R.K. concealed the material fact that she was of Native American heritage during voir dire, and that such concealment constituted misconduct. Unquestionably, concealed bias, if established, is misconduct. "The concealment during voir dire of a bias, belief or state of mind which prevents a juror from following the court's instructions and acting in an impartial manner constitutes misconduct. [Citations.]" (*Tapia v. Barker* (1984) 160 Cal.App.3d 761, 765; accord, *In re Hitchings, supra,* 6 Cal.4th at p. 111; see Code of Civil Procedure, §§ 225, subds. (b) (1) (B), (C);

229, subd. (f).)

During voir dire, counsel for State asked the following question of the jury pool: "As you know, Dr. May is Native American. Do any of you have any affiliations, with the Native American community, either in your job, in your personal life? Any affiliation at all with the *American Native* community? No. Okay."[4] ((Italics added.)

At the time the question was posed, juror R.K. was sitting in the front row of the pool of potential jurors. Juror R.K. made no response to the question posed by State's counsel.

In support of its assertion of juror misconduct, State submitted the declaration of juror D.B. According to D.B.'s declaration, during deliberations, R.K. disclosed to the jury that she is part Native American, and, referring to May's discrimination and harassment complaints, states: " 'I have been through things like this.' "

May submitted R.K.'s declaration to counter these allegations. Specifically, juror R.K. stated she "[did] not recall" hearing the question about Native American affiliations. R.K. also stated she considers herself Caucasian, but that she told the jury during deliberations that she might be considered "part Indian" because of a Mexican relative. R.K. also denied that she stated, " 'I have been though things like this.' "

In addition to R.K.'s declaration, May submitted the declarations of six other jurors, who all stated they did "not recall" the question about Native American affiliation, nor did they recall the alleged statements by R.K. during deliberations.

We defer to the trial court's determination regarding the credibility of the conflicting declarations in this case, and find that R.K.'s actions did constitute

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[4] It should be noted that the text of the question posed to the jury pool is different in the reporter's transcript and the clerks' transcript. The reporter's transcript states the question as it is above. In the clerks' transcript, attached to State's motion for a new trial, the question reads: "Any affiliation at all with the *Native American* community?" (Italics added.)

misconduct in this case. Moreover, the determination that R.K.'s actions prejudiced State is ultimately for the trial judge, who is in the best position to consider the impact misconduct has on a particular case. (See, e.g., *Estate of Mesner* (1947) 77 Cal.App.2d 667, 677 ["[T]he atmosphere of the courtroom during trial . . . cannot be adequately reflected in [the] . . . record"].)

We are not persuaded by May's argument that juror R.K.'s failure to respond to "generalized inquiries asked of a group of jurors" does not amount to "concealment of bias. [Citation.]" (See *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 408.) In *Hasson*, the jurors were asked general questions including whether any had been involved in lawsuits and whether any had " 'dealt with brain injuries.' " (*Ibid*.) One juror remained silent even though he had been a defendant in several lawsuits, and another said nothing even though he had a son who died as a result of brain damage from a car accident. The Supreme Court held that these incidents did not amount to concealment of bias, stating, "It is difficult to see how either of these incidents involving failure to affirmatively respond to such generalized inquiries asked of a group of jurors can be thought to amount to concealment of bias. [Citation.]" (*Ibid*.) However, an important distinction between *Hasson* and the present case is that in *Hasson*, the trial court denied a request for a new trial, mandating a more exacting de novo standard of review on appeal. Additionally, here, unlike *Hasson*, State submitted additional evidence to demonstrate R.K.'s bias in the form of statements she made during deliberations. We will not disturb the trial court's determination that R.K. committed misconduct that was prejudicial to State.

Jurors C.B. and L.N.

State asserts jurors C.B. and L.N. committed misconduct by bringing outside information on matters material to the trial into deliberations and sharing them with other jurors. The law is clear that it is misconduct for jurors to receive or communicate to

fellow jurors information from outside the evidence in the case. (*Walter v. Ayvazian* (1933) 134 Cal.App. 360, 363.)

With regard to juror C.B., at trial, a witness testified that Smith referred to dealing with May as riding "a rank horse into a swamp." Smith testified he never made the comment, and May did not learn about the remark until trial. No explanation of the meaning of the phrase was introduced at trial, and there was no implication that the phrase had racial overtones.

In her declaration, D.B. asserts juror C.B. talked to his mother, who was knowledgeable about the Cherokee community, about the phrase, "riding a rank horse into a swamp," and reported to the jurors her opinion that the phrase had particularly negative connotations to Cherokees.

In response to D.B.'s declaration, May submitted the declarations of seven jurors who stated that during deliberations juror C.B. gave his own, not his mother's, understanding of the phrase.

Because this involves conflicting declarations, we defer to the trial court's evaluation of the credibility of the evidence and the determination that misconduct occurred. (*Weathers v. Kaiser Foundation Hospitals, supra*, 5 Cal.3d at p. 109; *Fredrics v. Paige*, *supra*, 29 Cal.App.4th at p. 1647; *City of Pleasant Hill v. First Baptist Church*, *supra,* 1 Cal.App.3d at p. 429.)

We are not persuaded by May's argument that juror C.B.'s misconduct in sharing outside information with fellow jurors during deliberations did not prejudice State. Although there was strong and clear evidence of Barry's discriminatory animus toward May presented at trial in the form of specific statements made directly to May, such as an expression of his opinion that there were "too may minorities in power on this campus," and that "[w]e have too may Hispanics on campus," and that May would like to be with "people of [your] own kind," juror C.B.'s description of the meaning of "rank horse,"

was directly relevant to the racially motivated harassment claim. We defer to the trial court's conclusion that juror C.B.'s conduct prejudiced State.

With regard to juror L.N., State asserts she brought a paper that contained information about her retirement benefits into the jury room and wrote several numbers on the board during the discussion of May's economic damages.

May submitted counter declarations that confirmed that L.N. did bring a paper into the jury room and wrote several numbers on the board, but that no one read the paper, knew its contents or knew whether the numbers on the board came from the paper.

Essentially, the evidence regarding L.N.'s conduct is not in conflict—all the juror's declarations, including D.B.'s, agree that L.N. brought in a paper and wrote numbers on the board from the paper. However, we may not consider the fact that the jurors stated they did not rely on anything L.N. said or wrote about economic damages, because information about a juror's mental processes is inadmissible to prove misconduct. (*Sanchez-Corea v. Bank of America, supra*, 38 Cal.3d at pp. 909-910.) D.B.'s declaration stated that L.N. wrote information on the board relevant to retirement issues. State asserts a reasonable inference from the evidence that the information on the board was directly from her employer's retirement benefits, and that she used the information to calculate damages for May. Certainly, this view of the evidence of L.N.'s conduct is not beyond the scope of reason. We find no reason to conclude that the trial court abused its discretion in determining that juror L.N. committed prejudicial misconduct in this case.

In sum, we will not disturb the trial court's conclusion that three jurors committed prejudicial misconduct in this case. Therefore, we will affirm the order of the trial court granting a new trial.

May requests in the event of a new trial, we order the trial to be on all claims, not just the claims where the jury delivered verdicts in his favor. Specifically, May requests

a new trial on his race/national origin and disability discrimination claims, his disability harassment claim, and his constructive discharge claim on the basis of instructional error.

By requesting a new trial on all of his claims, May is asking that we reverse the judgment on the claims in which the jury found in favor of State. "A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.) . . . [¶] Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict. [Citations.]' " (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) Factors to be evaluated in assessing the prejudicial effect of an erroneous instruction are: " '(1) [T]he degree of conflict in the evidence on critical issues [citations]; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect [citation]; (3) whether the jury requested a rereading of the erroneous instruction [citation] or of related evidence [citation]; (4) the closeness of the jury's verdict [citation]; and (5) the effect of other instructions in remedying the error [citations].' [Citations.]" (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069-1070, quoting *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876.)

May asserts instructional error with regard to two sets of instructions: the motivating factor for the discrimination claims, as well as the failure to accommodate instruction. As to both instructions, May fails to demonstrate either that the instructions were themselves erroneous, or that any potential error was prejudicial.

The Motivating Factor Instruction

May does not dispute the content of the instructions regarding motivating factor in the discrimination claim; rather, May disputes an answer the court gave to the jurors when questioned about the motivating factor. Specifically, after a few hours of deliberations, the jury submitted the following question: "Does the motivating factor have to be 51 percent of the total factors?" The court answered as follows: "The answer

to that is that all elements of the plaintiff's case, since they have the burden of proof, have to be proved by a preponderance of the evidence. That phrase, preponderance of the evidence, is defined in the instruction that you have."

May asserts the court's answer erroneously provided a "yes" to the jury's question, defining the standard of proof for the motivating factor as a preponderance of the evidence, and that such error prejudiced him. However, the court's answer did no such thing. The court's statement that "all elements of the plaintiff's case . . . have to be proved by a preponderance of the evidence," is an accurate statement of the law. Moreover, when viewed in light of the entire case, including the other instructions the court gave to the jury, it is clear the jury was properly instructed that May had to prove that his race/national origin was a motivating factor in State's employment decisions that were adverse to May, not that May had to prove that his race/national origin was 51 percent of the total factors State used in making its decisions. We find no error in the court's answer regarding the motivation factor instruction.

The Failure to Accommodate Instruction

May asserts that two specific portions of the failure to accommodate instruction were erroneous. Specifically, the court instructed the jury: "[i]f the employee fails to request an accommodation, the employer cannot be held liable for failing to provide one," and "[a]n employer is not required to provide a stress-free environment. Thus, a request for a less stressful position is not a reasonable accommodation." May contents that both of these portions of the instruction are incorrect statements of the law.

May argues that the first statement regarding the request for accommodation is incorrect, because there is no requirement that the employee request an accommodation. However, the statement in the instruction regarding the employee's burden to request an accommodation reflects the position that an employee must give notice to his employer regarding his disability, and only after the employer is given notice, either actual or constructive does an employer have the duty to provide an accommodation. (See, e.g.,

Spitzer v. Good Guys, Inc. (2000) 80 Cal.App.4th 1376, 1384-1385; *Prillman v. United Airlines, Inc.* (1997) 53 Cal.App.4th 935, 954.)

May also asserts the second portion of the instruction regarding providing a less stressful work environment as an accommodation is also incorrect. However, there is significant case authority reflecting the position that an employer is not obligated to provide a "stress-free" work environment, or provide a less stressful position as an accommodation. (See, e.g., *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 191 [a stress-free work environment is not a reasonable accommodation]; *Gaul v. Lucent Technologies, Inc.* (3rd Cir. 1998) 134 F.3d 576, 581 [proposed accommodation of only working in low stress positions is unreasonable as a matter of law].)

Moreover, even if the instruction were misleading in either the request for an accommodation or the duty to provide a less stressful work environment, any error was not prejudicial. May admitted at trial that his physical condition did not impact his ability to teach and perform his other job duties. If May's disability did not impact the essential functions of his job, he was not entitled to an accommodation from his employer. (See Govt. Code § 12940, subds. (a)(1), (m).) Therefore, any error in the accommodation instruction was harmless.

II. *State's Cross-Appeal*

On cross-appeal, State asserts the trial court erred in denying its motion for JNOV, because there is insufficient evidence to support the jury's verdict in May's favor on his race/national origin harassment claims and his retaliation claims, because most of the evidence of harassment and retaliation cannot be considered because it is barred by the statute of limitations. Additionally, State asserts that even considering Smith's conduct that occurred outside the limitations period, the evidence was insufficient to establish claims for harassment or retaliation.

In reviewing a denial of a motion for JNOV, we review the evidence in the light most favorable to May to determine whether substantial evidence supports the jury

verdict. (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 769.) We review questions of law de novo. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284.)

Race/National Origin Harassment Claim

State asserts that the bulk of the evidence May relies upon to support his harassment claim is from a time period more than one year prior to the filing of his complaint with the Equal Employment Opportunity Commission (EEOC) in June 1999. As such, State asserts the one-year statute of limitations under the Fair Employment and Housing Act (FEHA) precludes consideration of Smith's remarks prior to June 1998.[5]

We note at the outset that we do not find State waived its claim that May's actions are barred by the statute of limitations in Government Code section 12960. The record is replete with instances of State asserting the statute of limitations defense, including its answer to the complaint, its trial brief and in three motions in limine to exclude evidence. As such, we consider the merits of State's claim.

Although May's claim of harassment is based in part on conduct that occurred outside the limitations period, the jury may consider that conduct under the continuing violation doctrine. "[T]he continuing violation doctrine comes into play when an employee raises a claim based on conduct that occurred in part outside the limitations period." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812 (*Richards*).) In *Richards*, the court set forth a test for when the continuing violation doctrine applies, concluding that "an employer's series of unlawful actions in a case of failure to reasonably accommodate an employee's disability, or disability harassment, should be viewed as a single, actionable course of conduct if (1) the actions are sufficiently similar in kind; (2) they occur with sufficient frequency; and (3) they have not acquired a degree of 'permanence' so that employees are on notice that further efforts at informal

[5] Government Code section 12960 provides, in relevant part: "[n]o complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice . . . occurred. . . ."

conciliation with the employer to obtain accommodation or end harassment would be futile." (*Id*. at p. 803.)

State asserts the doctrine does not apply, because the act of harassment that occurred within the statutory period, the reduction of email capacity, was completely different from the acts that occurred before June 1998. However, State ignores the fact that May's salary was reduced by $35,000 on July 1, 1998, as a result of his demotion to faculty status. Moreover, the fact that May was notified of the salary reduction and demotion in May 1997 does not preclude consideration of the act, because the actual reduction in salary occurred in 1998. For the purpose of the FEHA, the statute of limitations begins to run from the date of the adverse action, not when the employee is notified. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479.)

In addition, other acts of harassment, including May's demotion to faculty status and office assignments continued into the limitations period. As a result, under *Richards, supra,* 26 Cal.4th 798, the previous conduct when combined with the conduct that occurred during the limitations period can be seen as a single, actionable course of conduct.

Finally, the third element of the continuing violation doctrine is also present here, because the discriminatory harassment had not reached a level of permanence. The court in *Richards* stated that the statute of limitations begins to run when the "course of conduct is brought to an end," or the employer "mak[es] clear to the employee in a definitive manner that it will not be granting any such requests" to end the complained of conduct. (*Richards, supra,* 26 Cal.4th at pp. 823-824.) Here, there is substantial evidence that State did not inform May "in a definitive manner" that further attempts at conciliation would be futile. May continued to make complaints and to have discussions with State's management about his complaints regarding his demotion and office locations well into the limitations period.

In sum, we do not find the evidence of harassment that occurred prior to June 1998 cannot be considered due to the statute of limitations. The evidence demonstrates State engaged in a continuing course of conduct that extended into the limitations period about which May and State continued to engage in discussions. As a result, the continuing violations doctrine from *Richards* applies to May's claims.

State asserts that even considering the remarks Smith made prior to June 1998, the evidence was insufficient to show that May was harassed because of his race or national origin, or that State's actions were sufficiently severe or pervasive to constitute actionable harassment. Initially, with regard to racial motivation for the harassment, we find the evidence sufficient for a jury to conclude that Smith was against minorities at State. Smith's comment to May that there were "too may minorities in power on this campus," is a clear indication that he was racially biased. Additionally, State's action of relocating May's office to module 86D where three other Native Americans had been moved, and Smith's statement that he thought May would like to be with "people of [his] own kind," is sufficient evidence for the jury to conclude that May was subjected to racially-motivated harassment.

In addition to the racial motivation for the harassment, we also find that there is sufficient evidence to support a finding that the harassment was severe or pervasive. In considering whether harassing conduct is sufficiently severe or pervasive, the jury must look at the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." (BAJI 12.05)

Here, the jury was presented with evidence of Smith's racially discriminatory comments to May, his act of twice demoting May, resulting in a significant decrease in May's salary as well as an increase in his teaching load, Smith's relocation of May's office to isolated and inadequate facilities, and at least one of those offices was racially segregated. This evidence is sufficient to support a conclusion that the Smith's

discriminatory conduct was frequent, and humiliating, and that May suffered severe or pervasive harassment.

In sum, we find the trial court did not err in denying State's motion for judgment notwithstanding the verdict on the harassment claim. We find substantial evidence to support May's race/ national origin harassment claim.

Race/National Origin Retaliation Claim

The elements of a claim for retaliation are: (1) the plaintiff engaged in activity protected by the FEHA; (2) he suffered adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455.)

Like the harassment claim discussed above, State asserts that much of the evidence May uses in support of his retaliation claim is barred by the FEHA's statute of limitations. We find the continuing violation doctrine from *Richards* applies to the retaliation claims as well, and allows consideration of the conduct that occurred prior to June 1998.

In addition to the statute of limitations claim, State asserts that although May did engage in protected activity, he did not suffer an adverse employment action, and there was no causal link between his protected activity and any adverse action. However, State again ignores the fact that May suffered a materially adverse employment action in the reduction of his salary by $35,000 as a result of his demotion from administrator to faculty. (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511 [a demotion is a materially adverse employment action].) Additionally, May's relocation to remote and undesirable office locations amounted to a materially adverse employment action. (*Id.* at p. 511.) These actions provide substantial evidence that May suffered an adverse employment action for the purpose of a retaliation claim.

We also find substantial evidence that there was a causal nexus between May's complaints of discrimination and the materially adverse employment actions. The

evidence presented at trial demonstrates that May made numerous complaints regarding his treatment to State beginning in 1996 through 1999. Moreover, May offered evidence of a pattern of discriminatory conduct that occurred throughout the time period during which he complained. Contrary to State's assertion, there were no multi-year gaps between May's complaints and the discriminatory conduct. As such, there is substantial evidence of a causal connection between May's protected activity and the materially adverse employment actions he suffered.

In sum, we find substantial evidence to support the jury's verdict on May's race/ national origin retaliation claim.

DISPOSITION

The order granting a new trial is affirmed. State is awarded costs for this appeal. The order denying the judgment notwithstanding the verdict is affirmed. May is awarded costs for this cross-appeal.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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MIHARA, J.