Filed 1/17/08

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SALLIE MAE BRADLEY, Plaintiff and Appellant, v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Defendant and Appellant.	F049541 (Super. Ct. No. 01C2235) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Stephen Henry, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)

Bill Locker and Edmund G. Brown, Jr., Attorneys General, Jacob A. Appelsmith, Assistant Attorney General, Barbara J. Seidman and Susan E. Slager, Deputy Attorneys General, for Defendant and Appellant.

Law Offices of Benjamin L. Hecht and Benjamin L. Hecht; Law Offices of Bryman & Apelian and Mark D. Apelian; Law Offices of Michael F. Baltaxe and Michael F. Baltaxe, for Plaintiff and Appellant.

*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II, IV, V, VI, and VII.

In this appeal the California Department of Corrections and Rehabilitation (formerly the California Department of Corrections) (hereafter CDC) contends that Sallie Mae Bradley, an individual temporarily working at a California prison as a licensed clinical social worker and placed at the prison pursuant to a contract with the National Medical Registry, is not entitled to the protections afforded by California's Fair Employment and Housing Act (FEHA), Government Code section 12940[1] et. seq. In the published portion of this opinion, we conclude that Bradley is an employee within the meaning of the FEHA, even though she is not an official employee of the state for civil service and benefit purposes. We also hold that, regardless of the size of the state bureaucracy and the due process protections given state employees, CDC had a duty to act immediately to stop the sexual harassment directed at Bradley by a coworker and to ensure that no further harassment occurred. Referring the matter to a lengthy and complicated investigative process *alone* is insufficient to comply with the protections mandated by the FEHA when continued contact with the harasser leads to further harassment.

In the unpublished portion of the opinion, we conclude there is sufficient evidence to support the jury's conclusions that Bradley was subject to a hostile work environment and to support the jury's award of damages for lost earnings and emotional distress. We also reject CDC's claim that the trial court erred in admitting evidence that CDC knew the harasser had a criminal history when it hired him, that the harasser made threats against the prison administration, and that the harasser was given a merit increase shortly after Bradley was terminated. We also set aside the trial court's grant of judgment

[1]All further references are to the Government Code.

notwithstanding the verdict and reinstate the jury's verdict and damage award on the retaliation cause of action.

PROCEDURAL HISTORY

The complaint alleged that Bradley had been subjected to sexual harassment and a hostile work environment while working at the Substance Abuse Treatment Facility located at Corcoran State Prison. This occurred as a result of behavior by the prison's Muslim chaplain, Omar Shakir. Although Shakir initially was named as a defendant, he was dismissed from the action before trial. The complaint also alleged that when Bradley complained about Shakir's behavior, she was discharged in retaliation for voicing her complaints. The sexual harassment and retaliation causes of action were resolved in favor of Bradley by jury verdict. Three other causes of action—negligent hiring and supervision, intentional infliction of emotional distress, and assault—were resolved in favor of CDC before judgment.

The jury awarded $300,000 in non-economic damages, $87,000 in past economic damages, and $2,000 in future economic damages on the sexual harassment claim. The jury also awarded $50,000 in "non-duplicative" past economic damages on the retaliation claim. Judgment was entered on November 9, 2005.

After trial, CDC filed a motion for new trial and a motion for judgment notwithstanding the verdict. The motion for new trial was denied, but the court granted the motion for judgment notwithstanding the verdict with respect to the retaliation cause of action. In doing so, the court concluded that Bradley had no standing to assert the claim, that the damages were not supported by evidence, and that the damages were duplicative and excessive. Bradley was awarded attorney fees in the amount of $305,000.

CDC appeals the judgment on the sexual harassment claim and raises a protective challenge to the award of attorney fees. Bradley appeals the grant of judgment notwithstanding the verdict on the retaliation claim.

FACTUAL HISTORY

Bradley is a licensed clinical social worker and holds a doctorate degree in clinical psychology. She worked at the Substance Abuse Treatment Facility (facility) as a clinical social worker from August 4, 2000 to October 4, 2000. Bradley was not hired through the state civil service process and was not issued a state paycheck or provided state employment benefits. Instead, she worked at the facility as a contract worker pursuant to a contract negotiated between CDC and the National Medical Registry (registry). The registry, in turn, contracted with Bradley to work at and provide services to the facility. CDC uses contract workers on a regular basis when needed to supplement regular staff. Bradley filled out a time sheet, recording the hours she worked, which was then certified by her supervisors and forwarded to the registry. The registry billed CDC for the number of hours worked and issued a check to Bradley to compensate her for the hours she worked at the facility.

At the facility, Bradley worked under Chief Psychiatrist Dr. Brim and took direction from Brim or Chief Psychologist, Dr. Anthony. Her hours and duties were set either by Dr. Brim or Dr. Anthony. When working at the facility, Bradley assisted first in the medical surgery department and then in the psychiatric crisis unit, evaluating mental health status and helping to determine whether inmates were malingering. She never received any criticism of her work.

This was not the first time Bradley had worked at the Corcoran State Prison. She had been assigned to the prison for two to three months in the fall of 1999, although she

worked at the prison and not at the facility. After her work in 1999, Bradley received good recommendations from prison staff.

Shakir first approached Bradley in August 2000 at the facility. He asked where he knew her from. Bradley remembered that she had met him at the Department of Motor Vehicles in October 1999, when he had offered to help her put on her registration sticker and had commented on her appearance. He mentioned then that he worked at the prison and the two struck up a conversation. Shakir asked Bradley to call him, but she did not. After recognizing Bradley at the facility, Shakir commented that he had begged God to send Bradley back to him and produced a card showing that he was a chaplain at the prison. Shakir was very courteous to Bradley and asked to assist as she settled in. For example, he offered to help Bradley move in to her new apartment and invited her to the Muslim temple and showed her around. In addition, he gave Bradley a key to the temple, saying she was welcome anytime. They had several conversations about spiritual and personal matters during which Bradley told Shakir she was not interested in sexual relationships and had chosen to remain celibate since her husband had died years before. Bradley is a deeply religious person who trusted Shakir because she believed him to be a man of God.

On September 2, after helping Bradley move in to her apartment, Shakir pulled a pair of handcuffs out of his car and said, "[D]o you want these?" When Bradley said "no," Shakir responded, "what if I were to rape you? You might enjoy it." Bradley was shocked and frightened. She told Shakir she was only interested in a professional friendship. Shakir told her God would not let her stay away from him. Shakir left, only to return to the apartment at 4:00 a.m. the next morning, beginning an almost nightly

ritual of visiting Bradley in the middle of the night, chanting and pounding on the door of her apartment.

On September 6 when Bradley went to work, Shakir was waiting at the gate. He told her not to be angry, that he only wanted to have sex. He walked very close to her and hit her breast with his elbow. She told him to stay away and walked off quickly. That same day, Shakir turned up at her work station, stood within four to five feet of her, and stared at her in a "very sick manner." She was embarrassed. When she told him to leave, he commented on her dress and told her that she looked good enough to eat. She saw him in the hallway later, staring at her. He waved. The intimidating and harassing behavior continued both at home and at work. Bradley believed she could take care of the problem herself, but nothing worked.

On September 12, Bradley called the police to her home after Shakir again showed up in the middle of the night. The police talked to Shakir and then informed Bradley that Shakir seemed obsessed. She was warned to be careful, and the police suggested she obtain a restraining order.

On the morning of September 13, Shakir was waiting for her in the parking lot. He approached her and said, "don't be mad okay. If we were to lock tongues I know that you'd enjoy it." She talked about her problem with coworker Irene Ruff, who referred her to Dr. Brim. Bradley met with Brim that morning. Brim expressed concern and sent Bradley to see Bennett Ndoh, the Employee Relations Officer. Ndoh also expressed concern and sent Bradley to talk to Captain Wan and Sergeant Rocha. Bradley also talked with Dr. Anthony on at least three occasions about the harassment.

Wan and Rocha interviewed Bradley, tape-recording most of their conversation. Bradley told them about the off-prison episodes, as well as what had happened on the

grounds. While doing so, she cried and was given a tissue. She told them it was hurtful for her to have to share this problem with them. They gave her some time to compose herself, but when Bradley returned to look for them, they had left the building. Rocha and Wan denied that they ever left Bradley.

Wan called the Corcoran police and Bradley's landlady to verify her story. He reported the complaint to the warden and told him a written report was coming, which he delivered early on September 15. The tape was not transcribed until March 17, 2003, after litigation began. Wan and Rocha told Bradley to prepare a written diary of what had occurred and to let them know if anything else happened. Bradley never prepared the diary, although she contends she did report further incidents to Wan.

After leaving Wan and Rocha's office, Bradley walked by herself to get donuts and coffee. Shakir walked up behind her and Bradley screamed. He told her he was going to "have" her and she might as well get used to the idea. He also said he could not believe she would report him and that the prison would not do anything to him. When Bradley called to report this incident to Wan, no one answered, so she called Corcoran police again. Officer Leach met Bradley in the prison parking lot and gave her paperwork so that she could start the process of getting a restraining order. Shakir followed her to the parking lot and when she left, he was sitting in his car and gave her a cold angry stare.

On September 14, Bradley was sent to Equal Employment Opportunities Counselor Elise Tienken. Edward Sanchez, Associate Warden, the individual in charge of the facility's equal employment opportunities program, asked Tienken to meet with Bradley. Bradley told her story again, and Tienken arranged to have Bradley file a

formal sexual harassment complaint. Bradley turned in the written formal complaint on September 15.

Tienken distinctly remembered two incidents occurring at work that Bradley mentioned in their conversation on September 14. The first was when Shakir arrived in the records area while Bradley was filing and then stared at her, making her feel uncomfortable. The second was when Shakir timed his arrival at the prison to correspond with that of Bradley, even when she tried to vary her arrival times. Bradley initially had coworker Alice King come to work with her and accompany her to Bradley's workstation; however, Dr. Anthony objected to this procedure so it was discontinued. To make matters worse, on September 14, as Bradley was leaving the facility, Shakir came from behind a prison building and said, "I don't believe you reported me to the police. I just want to take care of you. I want to have sex with you. You'll enjoy it."

Bradley also met with Edward Sanchez. She told him about Shakir's behavior at work and outside the prison. Sanchez took no notes, but told her to buy binoculars, not to go out alone, to get a restraining order, and to carry a cell phone. He said he had talked to Shakir and given him a letter on September 14; however, Shakir had not taken responsibility for his behavior, and Sanchez could not assure Bradley that Shakir would leave her alone. Further, Sanchez never listened to Wan's tape of the interview with Bradley. Sanchez told Shakir's supervisor that a complaint had been filed against Shakir but did not tell her it was a sexual harassment complaint or instruct her to restrict Shakir's movement about the prison. Shakir had free range of the prison and his supervisor had difficulty keeping track of his whereabouts.

According to Bradley, Shakir frequently came to her work area after September 15. He would stare, in a "sick way," at her breasts and "private zone." He

told her that if she did not want him, he had an attorney friend in Fresno who would have her. On two occasions, he tried to grab her or touch her and told her he always got what he wanted. He approached her when she would walk from building to building and when she was getting off work. On September 19, Shakir met Bradley in the parking lot. He was in a car that pulled up to her. He told her she looked good enough to eat. Overall, Bradley testified she had at least 10 contacts with Shakir after reporting the harassment to CDC.

According to Bradley, she reported these additional incidents to Wan and to Brim. She told them Shakir's attention made her feel frightened and uncomfortable. Bradley said after her initial meetings with Wan and Sanchez, no one ever got back to her, and she continued to see Shakir at the facility, even after September 25, when Shakir left work for a month on sick leave. She saw him on September 28 or 29 while going to the administration building. He was in the packaging area and waved. On October 4, he passed her in the hallway and said, "hey, good looking," and "don't be mad …."

On October 4, Dr. Brim called Bradley in and gave her a letter terminating her employment at the facility. Although he complemented her on her job performance, he told her the "census was down" and they had to let her go. Bradley knew the census was not down, which was confirmed at trial. In addition, Dr. Brim testified that, although he told Bradley they no longer needed her services, his real reason for terminating her was poor job performance because she simply did not have the skills needed.

After Bradley left the facility, she tried working at Valley Women's Prison in Chowchilla, but only lasted five days, finding she could not deal with the inmate population. She was diagnosed with post-traumatic stress disorder in January 2001, with the precipitating traumatic event being Shakir's conduct. She needed counseling,

suffered from headaches, bowel and urinary control problems, memory impairment, anxiety, panic attacks, depression, lack of energy, mood swings, hyper vigilance, lack of sleep, and other physical symptoms. Although she could continue to see clients in her private practice, she was limited in the number and types of clients she could see as a result of her emotional state. She lost income as a result.

Bradley continued to communicate with the CDC office in Sacramento charged with investigating her complaint. She talked to Antonio Aguilar, Marilyn Pearman, and Lisa Williams. She felt no one was taking her complaint seriously and she received no assistance from CDC on how to handle Shakir, even though the harassment was continuing, although not on prison grounds at this point because neither she nor Shakir were working at the facility. The complaint process was terminated on March 13, 2001. No investigation was actually done, other than talking with Bradley. The investigation was closed, in part because Shakir was in the process of being terminated.

In January 2001, Shakir made threats toward Warden Derral Adams and other prison officials. Shakir was immediately put on administrative leave and extra security was ordered at the prison. Due to this incident, Shakir was terminated by a notice dated June 13, 2001. There was evidence at trial that Shakir had prior criminal convictions known to CDC when they hired him and that he had been disciplined on several occasions for providing contraband to the inmates, for being rude to an officer, and for failing to inform his supervisor of his location. In spite of this, before being terminated, Shakir was given a merit salary adjustment in March 2001.

DISCUSSION

I. Bradley's employment status

A key issue during litigation and on appeal is whether Bradley had standing to assert a FEHA claim. According to CDC, because the FEHA makes it unlawful for an employer to "harass an employee, an applicant, or a person providing services pursuant to a contract," (§ 12940, subd. (j)(1)) only an employee, applicant, or person performing services pursuant to a contract has standing to sue under the FEHA. CDC asserts that Bradley does not have standing because she was never an official employee of the state hired pursuant to section 19050 et. seq., the statute governing state employment. As a result, CDC contends that she cannot be classified as an employee for FEHA purposes. In addition, CDC argues that Bradley does not meet the statutory criteria for classification as a person providing services pursuant to a contract, and she has not alleged she was an applicant. The trial court disagreed and concluded that Bradley was, as a matter of law, a special employee of the facility and entitled to the protections afforded under the FEHA even though she admittedly was not a state employee. Review of the issue requires that we interpret the meaning of the term "employee" as used in the FEHA, particularly section 12940, subdivision (j).

The FEHA establishes a comprehensive scheme for addressing employment discrimination. As a matter of fundamental public policy, the FEHA was intended to protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination. (§ 12920; *Brown v. Superior Court* (1984) 37 Cal.3d 477, 485.) A trial court's interpretation of a statute is reviewed de novo. (*Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 212.) The de novo standard of review also applies to mixed questions of law and fact when legal issues predominate. (*Crocker*

National Bank v. City and County of San Francisco (1989) 49 Cal.3d 881, 888.) Here, there is very little dispute concerning the factual nature of Bradley's employment with CDC. Instead, the dispute centers on how those facts are characterized in the context of the FEHA.

First, we agree with CDC that, as a matter of law, Bradley does not fall within the statutory definition of one who is providing services pursuant to a contract. (§ 12940, subd. (j)(5).) Bradley lacked the necessary control over her work and failed to meet the other statutory criteria. She must meet all the listed criteria to be covered by subdivision (j)(5). Bradley had no control over the means by which she provided her services and was not hired to produce an end product or for special skills beyond those normally provided by CDC employees. She was told when and where to report to work and what her job duties would be. She was not compensated for a specific result but for her time working alongside facility staff. (See Lab. Code, §§ 3353, 2750.5.) Finally, Bradley was not customarily engaged in an independently established business of providing services to inmates. (§ 12940, subd. (j)(5)(B).)

Bradley also fails to meet the common-law and statutory definition of an independent contractor, the category of individuals the addition of this language intended to bring within the umbrella of the FEHA. (§ 12940, subd. (j)(5); see Stats. 1999, ch. 591, § 8; see also, e.g., Sen. Com. On Judiciary, Analysis of Assem. Bill No. 1670 (1999-2000 Reg. Sess.) as amended June 1, 1999, pp. 2, 7; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1670 (1999-2000 Reg. Sess.) as amended Sept. 3, 1999, p. 2.) Bradley's lack of control over the work she did for the facility defeats the claim that she is an independent contractor. (See Lab. Code, § 3353 [independent contractor provides service for specified fee and result, under control of

principal as to result of work only and not with respect to means by which result is accomplished]; *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 983 [independent contractor follows employer's desires only as to results of work and not means by which it is accomplished].) The registry is a temporary service agency whose role is to connect potential employers with potential employees outside the normal hiring practices of the employer. The registry agreed to provide CDC with individuals to meet its staffing needs. CDC reviewed Bradley's qualifications and decided whether to employ her. It exercised complete control over her work duties, hours, pay (in that it certified her hours), performance, and length of her employment. Under any definition, Bradley was *not* an independent contractor.

In light of the fact that Bradley was not an independent contractor, we next address whether she was an employee under the statutory language. The FEHA itself does not contain a precise definition of "employee." However, the statutory regulations developed by the Fair Employment and Housing Commission (the administrative agency charged with interpreting the FEHA) do define the term. (See § 12935, subds. (a), (h).) We are required to give great weight to an administrative agency's interpretation of its own regulations and the statutes under which it operates. (*Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1029.)

With these policies in mind, we look to California Code of Regulations, title 2, section 7286.5, subdivision (b), which defines "employee" as "[a]ny individual under the direction and control of an employer under *any appointment or contract of hire* or apprenticeship, express or implied, oral or written." (Italics added.) Nothing in this regulation mandates that the contract of employment be direct or that persons working for the state are only employees for purposes of the FEHA if hired pursuant to the merit

selection process. (See *Vernon v. State of California* (2004) 116 Cal.App.4th 114, 123 [FEHA requires some connection with employment relationship, but connection need not be direct]; see also *Scheidecker v. Arvig Enterprises, Inc.* (D.Minn. 2000) 122 F.Supp.2d 1031, 1038 [finding of joint employer is proper where one company has retained sufficient control of terms and conditions of employment of employees who are actually employed by another].) The regulation includes within its definition of "employee" the common-law requirement that the employer exercise direction and control over the person's work—the keystone of the employment relationship. (*Villanazul v. City of Los Angeles* (1951) 37 Cal.2d 718, 721.) Further, the existence of the right of control is often tested by determining whether, if instructions were given, they would have to be obeyed and whether there was a right to terminate the service at any time. (*Id.* at p. 721.)

California Code of Regulations, title 2, section 7286.5, subdivision (b)(5), further provides that "[a]n individual compensated by a temporary service agency *for work to be performed for an employer contracting with the temporary service agency* may be considered an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency." (Italics added.) This language reflects that the employment relationship for FEHA purposes must be tied directly to the amount of control exercised over the employee. It also defeats CDC's claim that, in order to be an employee, Bradley must be compensated directly by CDC.[2]

[2]Bradley was paid by CDC pursuant to the terms of the contract between CDC and the registry and between the registry and Bradley. Although the method of payment through the registry was indirect, the compensatory nature of the paycheck was direct. It was for the exact number of hours worked by Bradley, approved by CDC, billed by the registry, and paid by CDC. This case is distinguishable from the case relied upon by

The law has long recognized that a contracting employer acts as an "employer" for purposes of applying state and federal antidiscrimination laws. (See *Mathieu v. Norrell Corp*. (2004) 115 Cal.App.4th 1174, 1184.)

We glean no magic formula for determining whether the requisite employment relationship exists. The prevailing view is to consider the totality of the circumstances, reflecting upon the nature of the work relationship between the parties, and placing emphasis on the control exercised by the employer over the employee's performance of employment duties. (*Vernon v. State of California, supra*, 116 Cal.App.4th at pp. 124-125.) Consequently, when a statute fails to define the term "employee," courts routinely look at the common-law definition for guidance, focusing on the amount of control the employer exercises over the employee. (*Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 500-501 (*Metropolitan*).)

This approach was followed in *Metropolitan, supra*, 32 Cal.4th 491, 500-501. Although *Metropolitan* deals with the interpretation of the Public Employees' Retirement Law (§ 20000 et seq.), its analysis is helpful. There, the issue was whether employees supplied by a labor contractor to a public agency participating in the state retirement plan were participants in the state plan. The statute expressly excluded independent contractors, but the Supreme Court determined, as had the appellate court, that the workers were not independent contractors, but actually employees under the common-law definition (used because the Public Employees' Retirement Law does not define "employee"). (*Metropolitan, supra,* 32 Cal.4th at pp. 500-501.) The employing agency exercised full control over the work and the workers even though the workers were not

---

CDC, *Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, in which the person seeking relief under the FEHA was a volunteer. Bradley obviously was not a volunteer.

full-time permanent civil service employees. The agency decided whether a particular applicant would work, what jobs the person would do, his or her hours, who supervised the individual's work, and how long the person would remain working, among other factors. The court observed that, whether an agency chooses to classify an employee as eligible for benefits under civil service or merit selection rules is not controlling for purposes of classification under the Public Employees' Retirement Law. Instead, the court said it must look to the spirit and letter of the law that it was interpreting to decide whether to include the worker within the definition of an "employee." (*Metropolitan, supra,* at pp. 504-505.) The court observed that, since "the Legislature has expressly provided for separation of certain payments and benefits (workers' compensation and unemployment insurance) from employment as defined at common law, but has not done so for public retirement benefits, the court may not write such an omitted exception into the [Public Employee Retirement Law] statutes. As the Court of Appeal explained, 'such revision is a legislative, not a judicial, responsibility.'" (*Id.* at p. 506.) Likewise, in our situation, the Legislature did not tie the definition of "employee" for FEHA purposes to the merit selection process; it left the definition open to common-law principles.

This approach does not premise liability on a common-law theory as CDC claims, but instead uses common-law principles to define a statutory term where no definition is provided. Liability remains premised on a statutory cause of action and is consistent with section 815 (public entities not liable for injury unless otherwise provided by statute). Significantly, the FEHA expressly identifies the state as an employer for purposes of its protections. (§ 12940, subd. (j)(4)(A) [employer includes state or any political or civil subdivision of the state].) In addition, the regulations reflect the common-law premise that employment for purposes of the FEHA is based on the amount of control an

employer exercises over the work performed. We believe that, under either the common-law definition or the regulatory definition, Bradley was a special "employee" of CDC for FEHA purposes.

The hiring of registry employees is a common practice used by many state agencies to fill their staffing needs. Temporary workers are hired instead of initiating the lengthy and expensive process of hiring regular permanent employees. (See Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1670 (1999-2000 Reg. Sess.) as amended June 1, 1999, p. 7.) CDC regularly invokes this practice to meet its staffing needs, not only at the facility but throughout the state prison system, as evidenced by its contract with the registry. If we were to accept CDC's position that because Bradley is not a civil service employee she is not entitled to FEHA protections, there would be a large number of people working daily in our state prison system (and presumably in other state agencies) without protection under the FEHA. This is inconsistent with the legislative intent to expand FEHA protection to the largest number of individuals possible, including those who traditionally would be excluded from the employment relationship because they exercise complete control of the services provided. It is also contrary to statutory language stating that the FEHA applies to the state as an employer. In fact, CDC's own sexual harassment policy indicates that it applies to individuals who provide contract services to CDC.

Our conclusion is not undermined by language in the CDC/National Medical Registry contract asserting that Bradley is an agent or employee of the registry, and not an employee of the state, because the contract also grants all control of the employment relationship to CDC, not the registry. Bradley's contract with the registry equally asserts that she is not an employee of the registry, but an independent contractor. In spite of this,

the registry gave all control of their relationship to CDC, not Bradley. CDC's control precludes a finding that Bradley is an independent contractor or a person providing services pursuant to a contract as defined in section 12940, subdivision (j)(5). Although the language of the governing contracts is one factor to be considered in determining the nature of the employment relationship, it is not controlling. (*Metropolitan, supra,* 32 Cal.4th at p. 508 [replacing established common-law test for employment with complete deference to parties' characterization of relationship is improper, especially when issue is one of statutory interpretation]; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 951 [contractual terms not conclusive; key is right to control]; *Vernon v. State of California, supra,* 116 Cal.App.4th at pp. 124-125 [no one factor is decisive in determining nature of employment relationship under FEHA].) In this case, although Bradley is described in the contract as a non-employee/independent contractor, there are other inconsistent provisions describing Bradley's relationship to the CDC which undermine this characterization.

CDC argues that, if Bradley is a special employee, employed by both it and the registry,[3] then the registry is an indispensable party under Code of Civil Procedure section 389, subdivision (a). We disagree. The controlling test for determining whether

---

[3]Given our conclusions that common-law principles apply for FEHA purposes in defining the term "employee," we question whether the registry has sufficient control over Bradley's work to be a joint employer under the statute. The registry had no control over Bradley's work environment while she was placed at CDC and asserted very little control over the hiring process. (See *Astrowsky v. First Portland Mortg. Corp., Inc.* (D.Me. 1995) 887 F.Supp. 332, 337 [in absence of any control, there is no meaningful employment relationship].) At best, it exercised only limited control over compensation and initial communication between Bradley and CDC. In any event, for reasons we address, we need not consider whether the registry is technically a joint employer given the lack of any evidence that it is liable for the harassment Bradley suffered at the facility.

a person is an indispensable party is whether, if the affirmative relief sought by a plaintiff is granted, the relief granted would injure or affect the interest of a third person not joined. (*Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686, 692.) There is no basis alleged or proven for holding the registry liable for any part of the harassment. In fact, there is no evidence that the registry had *any* notice that Shakir was harassing Bradley or that CDC had failed to respond to her complaint.

CDC also argues that California Code of Regulations, title 2, section 7286.5, subdivision (b)(5), requires allocation of liability between the temporary agency and the contracting employer. We disagree with CDC's characterization of this section. To the contrary, it states that an employee may be considered an employee of the contracting employer for "such terms, conditions and privileges of employment under the control of that employer." Similarly, the temporary service agency may be considered the employer "with regard to such terms, conditions and privileges of employment under the control of the temporary service agency." (*Ibid.*) The key is that liability is predicated on the allegations of harassment or discrimination involving the terms, conditions, or privileges of employment *under the control of the employer*, and that the employment relationship exists for FEHA purposes within the context of the control retained. There are no allegations in the complaint nor is there any evidence to suggest that liability might rest on terms, conditions, or privileges of employment under the control of the registry. To the contrary, all of the allegations relate to matters under CDC's control.

We recognize that Bradley's claim of harassment extends beyond the workplace; however, CDC's liability is not predicated on preventing the off-work harassment, but in failing to consider Shakir's entire behavior when evaluating the need for prompt and immediate action. There are no allegations involving any harassment originating from or

relating to the relationship Bradley had with the registry. The statutory allocation is predicated on control, consistent with the common-law principles we have discussed governing the employment relationship. This regulation confirms that it is the entity exercising control over the employment relationship that is the employer for purposes of FEHA liability.

Since we agree based on undisputed facts that, as a matter of law, Bradley was a special employee of CDC for purposes of the FEHA, we need not address CDC's contention that the trial court erred in failing to instruct the jury that Bradley was required to prove her employment status. We also do not need to address the contention that a jury finding was required on the issue.

II. Substantial evidence to prove hostile workplace

CDC claims there is insufficient evidence to prove that the alleged harassment was severe or pervasive. When a judgment is challenged on the ground that there is no substantial evidence to sustain it, the power of an appellate court's review is extremely limited. When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury. It does not matter whether the jury could have believed other evidence or drawn different inferences to reach another result. (*Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 143.) We mention these basic appellate principles, in part, because CDC implies in its briefing that Bradley should not have been believed. As we have already mentioned, as a reviewing court, we do not reweigh the evidence or pass upon the credibility of witnesses. (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 409.)

CDC's contention rests on the fact that the contact between Bradley and Shakir, which occurred on CDC premises, was limited and not physical in nature. It cites *Capitol City Foods, Inc. v. Superior Court* (1992) 5 Cal.App.4th 1042 (employee raped on date with night supervisor); *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 620, and several Federal Employment and Housing Commission decisions, all of which recognize that an employer is only liable for risks inherent in or created by the employing enterprise. According to CDC, because Shakir and Bradley's acquaintance stemmed from interaction primarily outside the context of employment, and because the more serious harassment occurred off the facility's property and outside work hours, the bulk of the alleged harassment was irrelevant to the sexual harassment cause of action. We agree with CDC's assertion that it is not liable for Shakir's off-site behavior. Even so, simply because the bulk of the harassing behavior occurred off-site does not mean it was irrelevant when evaluating whether Shakir's on-site behavior required a response from CDC in compliance with the FEHA. The sexual conduct need not be committed while at work in order to have consequences to the workplace. (*Doe v. Oberweis Dairy* (7th Cir. 2006) 456 F.3d 704, 715 [rape of employee occurred outside workplace, but relationship began at work].)

Sex-based hostile or abusive-environment claims arise when "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' … that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment ….'" (*Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21; *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 608.) Further, "'[s]exual harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives its victim of [his or her] statutory right to work in a place free of discrimination, when the sexually harassing

conduct sufficiently offends, humiliates, distresses or intrudes upon its victim, so as to disrupt [his or her] emotional tranquility in the workplace, affect [the] ability to perform [the] job as usual, or otherwise interferes with and undermines [the victim's] personal sense of well-being.'" (*Fisher v. San Pedro Peninsula Hosp., supra,* at p. 608, citing *DFEH v. Bee Hive Answering Service* (1984) No. 84-16 FEHC Precedential Decs. 1984-1985, CEB 8, pp. 18-19.) The key is whether the conduct changes the terms and conditions of employment. (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 787.)

Whether the conduct complained of rises to the level of actionable sexual harassment is generally a question of fact for the jury and includes consideration of a number of factors, no single one being required. (*Harris v. Forklift Systems, Inc., supra,* 510 U.S. at pp. 22-23.) Factors include frequency, severity, whether conduct is physically threatening or humiliating, and whether it unreasonably interferes with work performance. (*Id*. at p. 23.)

Bradley testified that Shakir threatened to rape her, continually made sexual propositions that were rejected, showed up at her house numerous times in the middle of the night demanding she give in to his advances, and ignored police requests to stay away from her. In addition, Bradley said someone intentionally rammed the rear of her car, and her home was vandalized by some sort of Molotov cocktail. She believed Shakir was responsible for both acts. While this conduct occurred outside of work, it set the backdrop for what occurred at the workplace.

Shakir's behavior at the workplace was significant. He positioned himself at the front gate when Bradley arrived for work. When she left, he was there waiting. Shakir showed up at Bradley's work site, staring at her in a sick way, embarrassing her in front of coworkers. He made sexual comments, saying she looked good enough to eat, and, if

they were to lock tongues, she would enjoy it. He physically touched or grabbed her on at least two occasions in an attempt to get her to be his sexual partner. He trailed her out to the parking lot when she went to talk to Corcoran police. He told her he would have her and there was nothing she could do about it. Shakir continued to approach her after he was told to stay away. This is typical stalking behavior and unquestionably changed the work environment, creating an atmosphere of fear and intimidation, especially when considered in the context of his off-site behavior.

CDC attempts to minimize the on-site behavior and isolate each incident from the others. This is not the test for determining whether a hostile work environment exists. To the contrary, each action must be considered in the totality of the circumstances. (*Faragher v. City of Boca Raton*, *supra*, 524 U.S. at pp. 787-788.) The physical and sexual threats made by Shakir off-site were carried into the workplace by his continued intimidation on-site. Once the stage was set, it was easy for Shakir to intimidate Bradley, given his easy access to her at the facility. For example, Bradley testified that, after she reported the harassment, Shakir confronted her in the break room where she went to get coffee and a donut. He told her that he was going to have her and she should get used to it. He also grabbed her arm and said he could not believe she would report him. He finished his intimidation by saying that CDC would do nothing to him, a prediction that proved to be true. On September 29, Shakir accosted Bradley in the parking lot and said "you ain't fat nowhere, you look good enough to eat." Considering this was said during three weeks of sexual intimidation, and *after* Shakir had been advised to avoid contact with Bradley, any reasonable person would have been frightened by his behavior. Significantly, Sergeant Rocha testified that Bradley did tell him Shakir was bothering her

at work. In addition, Dr. Brim testified that he remembered Bradley saying Shakir was approaching her in the parking lot.

CDC also contends there is insufficient evidence to support a finding that Bradley found the harassment to be offensive. Bradley testified that she was frightened and humiliated by Shakir's conduct. This clearly is sufficient evidence to support a finding that Bradley found Shakir's conduct to be pervasive and severe. (*In re Marriage of Birnbaum* (1989) 211 Cal.App.3d 1508, 1513 [testimony of one witness is sufficient to support finding].) She testified that, when she spoke to CDC personnel about the incidents, she cried and told them how hurt, embarrassed, and frightened she felt. She arranged for another employee, Alice King, to walk with her from the parking lot in the mornings because she was afraid of Shakir.

The jury's verdict is supported by sufficient evidence.

III. Substantial evidence to prove failure to take prompt corrective action

It is undisputed that Bradley did not report the harassment to CDC until September 13, 2000. CDC correctly argues that, because Shakir was not a management employee, CDC can only be held liable for its actions after September 13. (*Burlington Industries Inc. v. Ellerth* (1998) 524 U.S. 742, 759.) It does not necessarily mean, however, that the conduct occurring before September 13 is irrelevant when evaluating CDC's response to Bradley's complaint.

It is undisputed that Dr. Brim referred Bradley immediately to the warden's office where she met with Ndoh. From there, the formal complaint process was initiated. The issue is whether what followed was sufficient to comply with the statutory mandate that an employer learning of harassment "take immediate and appropriate corrective action." (§ 12940, subd. (j)(1).) Whether CDC's response was sufficient is a question of fact.

(*Reitter v. City of Sacramento* (E.D.Cal. 2000) 87 F.Supp.2d 1040, 1046 [jury to resolve whether employer's response adequate under all circumstances].) The jury found that CDC failed to take immediate corrective action designed to end the harassment. CDC claims there is insufficient evidence to support this finding. Given the applicable standard of review, CDC has a difficult burden to overcome since we must view the evidence in the light most favorable to Bradley, giving her the benefit of every reasonable inference and resolving all conflicts in her favor. (*Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 589.)

Once an employer is informed of the sexual harassment, the employer must take adequate remedial measures. The measures need to include immediate corrective action that is reasonably calculated to 1) end the current harassment and 2) to deter future harassment. (*Sarro v. City of Sacramento* (E.D.Cal. 1999) 78 F.Supp.2d 1057, 1061-1062.) The employer's obligation to take prompt corrective action requires 1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified and 2) that permanent remedial steps be implemented by the employer to prevent future harassment once the investigation is completed. (*Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1192.) An employer has wide discretion in choosing how to minimize contact between the two employees, so long as it acts to stop the harassment. (*Id*. at pp. 1194-1195.) "[T]he reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment." (*Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882.)

CDC correctly observes that it did not have control over Shakir's behavior when he was not at work and is not liable for these actions. (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1419-1421 [no liability where incidents took place outside

workplace and not related to employer's interests].) As we have stated, when harassment is by a non-supervisory employee, an employer's liability is predicated not on the conduct itself, but on the employer's response once it learns of the conduct. (*Ibid.*)

We also agree with CDC that the "most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified. An investigation is a key step in the employer's response …." (*Swenson v. Potter, supra,* 271 F.3d at p. 1193.) However, initiating an investigation, especially one as removed and bureaucratic as the one here, cannot be the only step taken. An employer is required to take remedial action designed to stop the harassment, even where a complaint is uncorroborated or where the coworker denies the harassment. (See *Hathaway v. Runyon* (8th Cir. 1997) 132 F.3d 1214, 1224; *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1529.)

CDC's investigation was a fact-finding undertaking. No component was designed to protect Bradley from harassment. As part of the investigation, Bradley talked to many individuals, but none of them saw it as their responsibility to 1) determine fault, 2) ensure Bradley was safe from harassment, or 3) determine if there were steps CDC needed to take to stop the harassment. In most cases, other than listening to Bradley and referring Bradley to yet another individual, the person hearing Bradley's complaint did nothing. There was no follow-up, no evaluation of the need for protection, and no further investigation.

Dr. Brim referred Bradley to the warden's office because he believed he could not do anything else. Brim knew Bradley was having a "tough time" with Shakir, but made no effort to assist her in preventing contact in the workplace. At the warden's office, Ndoh interviewed Bradley. He referred the matter to Captain Wan because Bradley had

contacted an outside law enforcement agency when she called the Corcoran police for assistance. Ndoh did not follow-up with Bradley or Wan because he did not want to interfere in the investigation. Wan testified that his function was to investigate minor state employee misconduct and that he was not trained to handle sexual harassment complaints. He did not believe he had been charged with investigating a sexual harassment complaint. Wan prepared a careful report and tape-recorded his interview with Bradley, forwarding both to the warden's office. Even though Bradley expressed a concern for her safety and complained of harassment on and off prison grounds, Wan took no steps to protect Bradley because he believed she was protected while on the prison grounds. He believed Associate Warden Sanchez would handle the complaint once the interview was completed.

The matter was also referred to Sanchez, who read Wan's report but did not listen to the tape. He acknowledged that he needed to stop the harassment and get the other side of the story. Sanchez asked Equal Employment Office counselor Elise Tienken to interview Bradley. Tienken said her role was to listen and make a report. She gave her report to the warden, but did nothing else.

Sanchez did not interview Shakir or order him interviewed. He did not review Shakir's personnel file. Sanchez said he did talk to Shakir for seven to 10 minutes and personally handed Shakir a letter informing him that a complaint had been made and asked Shakir to refrain from contacting Bradley. The letter stated, "Your cooperation is expected and appreciated." Sanchez told Shakir's supervisor there was a complaint but did not say it was a sexual harassment complaint or give the supervisor any instructions on how to address the situation. The record does not reflect what was said in the short conversation, but there was no threat of discipline for noncompliance with the no-contact

directive. Sanchez made no attempt to determine whether Shakir was complying with the directive given, even though Sanchez, himself, did not believe Shakir would abide by any directive he was given. Sanchez told Bradley he could not assure her that Shakir would leave her alone. Sanchez took no further action because, on authority of the warden, he referred the matter to Sacramento for additional investigation. Ironically, CDC's own sexual harassment training manual instructs its management-level employees that telling the harasser to leave the employee alone is insufficient to meet the statutory requirement of remedial action. In spite of all this, CDC did nothing to ensure that, while on prison grounds, Bradley would be free of harassment by Shakir.

Warden Adams testified that the employee relations officer deals with labor issues but does not do sexual harassment investigations. Yet, this is where Bradley was first referred by Brim. Adams also said Captain Wan's office does not do sexual harassment investigations, yet that is where Ndoh referred Bradley. Adams admitted that the Equal Employment Opportunity office does deal with discrimination claims, including harassment, but said that most of these functions occur in Sacramento. Adams also said that if an employee had threatened another employee, that employee would be placed on administrative leave until an investigation could be completed. Yet, this did not happen in Bradley's case. Adams said he was unaware of the rape threat, even though it was recorded in Wan's report and in the taped interview of Bradley.

Once Bradley's complaint found its way to Sacramento, it faced the same bureaucratic morass. Anthony Aguilar reviewed the complaint to determine whether a formal investigation should occur. Aguilar received the intake assignment on September 15. He did nothing until October 13 because Sanchez had not forwarded official authority from the warden to process the intake. Consequently, it took nearly a

month in Sacramento for Aguilar to determine whether the complaint warranted a complete formal Equal Employment Opportunity investigation. He was to make no determination of fault and to take no remedial action to protect Bradley. Aguilar concluded that, because the harassment posed a safety threat to Bradley, the complaint could not be resolved at the local level and he referred it to yet one more office within the CDC bureaucracy for a formal investigation. This is especially incongruous because, despite recognition that Bradley's safety was at risk, no one at CDC thought to implement any means of protecting Bradley from Shakir. The only action Aguilar took was to remind Sanchez of his duty to monitor the situation, which Sanchez did not do because he did not want to interfere with Sacramento's investigation. Aguilar admitted that any immediate and appropriate response would normally have to be at the local level.

Lastly, investigator Lisa Williams testified that her job was to investigate complaints and determine whether the complaint had merit. She said her role was not to protect Bradley from harassment. She called Bradley, who expressed understandable frustration with the lack of assistance she received from CDC. By this time, Bradley had been terminated from CDC. Despite her job as a neutral investigator, Williams did not interview Shakir, look at the job site, speak to Shakir's supervisor, or interview any of the other witnesses.

At trial, CDC attempted to establish that Bradley would not have been harmed while at the facility because it was guarded heavily by armed security. This is contrary to the evidence, which established that Shakir did accost Bradley while she was on prison grounds, even *after* she reported the harassment.

While we recognize that things move slowly in state government, the lack of action in this case is startling. Numerous people heard Bradley's complaints yet did

nothing to protect her or to stop the harassment. Very little investigation was done, even though CDC claims it took immediate action by initiating the investigation. No one gathered any evidence other than Bradley's statement, which she was required to repeat numerous times. Each person she contacted acted like it was someone else's job to take immediate and corrective action. *Nothing* happened locally to ensure that Shakir would stop harassing Bradley, despite evidence that the harassment was severe, that Shakir was able to move freely around the institution, that physical threats had been made, and that Shakir had a known history for breaking rules and ignoring supervisorial direction.

CDC cannot rest on its complex investigation process since the statute mandates remedial action designed to *end* the harassment. (See *Faragher v. City of Boca Raton, supra,* 524 U.S. at p. 806 [antidiscrimination statute's primary objective is not to provide redress but to avoid harm].) CDC may not wait to act until it decides whether the complaint is valid. (*Hope v. California Youth Authority, supra,* 134 Cal.App.4th at p. 594 [agency did too little when it failed to stop harassment because alleged perpetrator denied it]; *Hathaway v. Runyon, supra,* 132 F.3d at p. 1224 [employer may be required to take remedial action even when harassment is not corroborated].)

CDC urges us to dissect the parties' overall behavior and argues that, because the more serious behavior happened off-premises, it was not required to address what it classified as insignificant behavior on-site. We disagree with this view of the evidence. Shakir was engaged in classic stalking behavior, terrorizing, intimidating, and humiliating Bradley and taking full advantage of his free access to her at work to accomplish his inappropriate goals. The sum total of CDC's response was to refer the complaint to a bogged-down investigative process and to caution Bradley to protect herself. CDC failed even to advise Bradley about what was happening to her complaint.

In addition, Bradley asked CDC to help her serve on Shakir the restraining order recommended by CDC personnel, but received no help in doing so. Finally, the evidence does not support CDC's claim that Bradley was told to report any further harassment and never did.

For all these reasons, we conclude that ample evidence supports the jury's finding that CDC failed to take immediate and appropriate action as required by law.

IV. Evidentiary issues

CDC raises three contentions of error relating to evidence that was admitted and with respect to argument that it claims was irrelevant and prejudicial. First, CDC contends it was error to allow evidence and argument about the threats made by Shakir against the warden and other prison officials in January 2001 and CDC's response to them. Second, CDC argues it was error to allow evidence that Shakir received a merit salary adjustment in March 2001. Third, CDC claims it was error to allow references to Shakir's felony record allegedly known to CDC when it hired Shakir. We address all three contentions for an abuse of discretion. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122.)

A. Terrorist threats

The evidence concerning the terrorist threats made by Shakir in January 2001, and CDC's response, is relevant to 1) whether CDC's assertion that it did all it could was credible; 2) whether CDC's lack of response to Bradley's complaint was evidence of a failure to treat her complaints seriously; and 3) whether CDC's failure to respond to Bradley's complaint in a like manner is evidence of an intention to eliminate the problem by discharging Bradley rather than addressing her claim. Ironically, for all of CDC's

insistence that it could do nothing more without a full investigation of Bradley's complaint, when Shakir turned his ill will toward the warden and other prison officials, immediate protective action was taken. Adams testified that when he learned of Shakir's threats toward the prison administration, Adams obtained permission from Sacramento to put Shakir on administrative leave and immediately barred Shakir from the prison grounds. Adams explained that he did this because the threat was a criminal act. Rocha testified that extra manpower was assigned to the towers for a short time as a precautionary measure. Sanchez testified that several women asked for and received escorts to their vehicles. No similar steps were taken when Bradley informed CDC that Shakir had threatened to rape her, that she was concerned for her safety, and that Shakir was continuing to stalk her on prison grounds.

Shakir was no less a public employee when he made the threats against the warden than he was when he threatened Bradley. Any restrictions imposed on CDC as a public employer were present in both situations. CDC claimed Bradley was safe at the facility, even though Shakir had the run of the grounds, because the prison was heavily guarded and secure. The jury was free to evaluate the credibility of this assertion in light of CDC's response to the threats against the warden. (*In re Marianne R.* (1980) 113 Cal.App.3d 423, 428 [where testimony is highly probative on critical issue, it must be received over an Evid. Code, § 352 objection absent highly unusual circumstances].) It was not error to admit it.

B. Merit salary adjustment

Similarly, evidence was presented that Shakir received a merit salary adjustment in March 2001. This was relevant to a determination of how seriously CDC considered Bradley's complaint. It also arguably supported Bradley's theory that CDC intended to

protect Shakir regardless of the seriousness of his misbehavior. The raise was initially processed in January 2001 at the height of Williams' formal investigation of Bradley's complaints and was reviewed and approved by Ndoh's office in March 2001. Other personnel decisions related to Shakir and made during this critical period are relevant for determining the appropriateness of CDC's response to Bradley's complaint. In any event, the evidence was not prejudicial in light of the whole record.

C. Felony convictions

Prior to trial, the litigants disputed whether evidence of Shakir's prior felony convictions would be admitted. The court found the evidence to be relevant and ruled that it was admissible. It did so after an offer of proof was made that the 1974 and 1975 felony convictions, both committed in Alabama, were in the probation report prepared for an unrelated criminal trial (arising out of the threats made against the warden). CDC successfully objected on hearsay grounds to the introduction of the probation report, and the convictions were not presented to the jury. Although no admissible evidence was presented at trial to establish that Shakir had prior *felony* convictions, there was evidence that, to be hired by CDC, a background check was required. Christy Keaton, who worked as an office assistant to the warden, had seen a criminal index report on Shakir with negative information, which she provided to the warden. CDC raises several contentions of error related to this evidence.

First, CDC contends that the trial court abused its discretion because it failed to perform the required weighing function in determining whether this evidence was more probative than prejudicial. We reject this contention outright. There is no requirement that a trial court recite its weighing process as long as the record demonstrates that the

court understood and undertook the process. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 599.) This issue was heavily litigated before Judge Golden and Judge Henry. Both parties had ample opportunity to present their argument orally and in writing. Judge Golden issued a well-reasoned pretrial decision. When the issue was renewed at trial, Judge Henry heard the parties' arguments anew and reviewed the briefing and the prior ruling. Finding the prior ruling to be well-reasoned, Judge Henry agreed with it. There is nothing in the record to support CDC's assertion that the trial court failed to meet its responsibility under Evidence Code section 352.

Second, CDC argues that the trial court's ruling, which allowed Bradley to ask questions and argue that Shakir was a "bad guy," was prejudicial. We disagree. Bradley's theory of the case was that CDC should have known that its mere verbal directive to Shakir to stay away from Bradley, without more, was insufficient to protect Bradley from further harassment. CDC witnesses admitted that Shakir had been disciplined on more than one occasion for violations of prison rules, including a serious breach of prison security; providing contraband to inmates; showing disrespect to authority; and ignoring directives from his supervisor (he was counseled for failing to report his location to his supervisor, but continued that behavior). Yet, when CDC found out that Shakir had threatened to rape Bradley, it did nothing but tell Shakir to stay away from her.

Evidence of Shakir's past criminal convictions was directly relevant to this issue as one more example of Shakir's unwillingness to follow direction and to submit to lawful authority. Although we agree that Christy Keaton's testimony does not prove prior *felony* convictions, CDC ignores the reasonable inferences allowed by Keaton's testimony and their relevance to Bradley's case. Keaton said that, although she does not

remember exactly what she saw, she reviewed criminal index information on Shakir while working for the warden, "something like a rap sheet." She remembers seeing "negative stuff." When asked if the index contained a number of felonies, she testified, "To be honest with you, I couldn't tell you if they were felonies [or] misdemeanor[s]." The jury could infer from this testimony that Shakir had criminal convictions of some kind, either felonies or misdemeanors. In light of this evidence, and the evidence that Shakir had violated prison rules on more than one occasion, Bradley's argument that CDC knew Shakir was a "bad guy" is fair comment on the evidence and relevant to the issues presented to the jury. (See *People v. Ward* (2005) 36 Cal.4th 186, 215 [fair comment on evidence includes reasonable inferences or deductions to be drawn].) Although undoubtedly damaging to CDC, it arguably proved that CDC's response to Bradley's complaint was inadequate under the circumstances. The prejudice which Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. Instead, it is to avoid evidence that would pre-judge a person based on extraneous factors, rather than on relevant evidence. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.)

Bradley did refer to Shakir as an ex-felon in argument and implied in questioning that Shakir had prior *felony* convictions. This was improper because there was no proof that the prior convictions were felonies. These improprieties do not require reversal, however. CDC cites to three instances where Bradley referred to the prior convictions as felonies. Two of the references were in argument and the third was in a question asked of Darlene Long. CDC objected to the question to Long, which was whether, if Shakir had lied about "his felony convictions," he would have been terminated. The trial court sustained the objection and the jury was given proper instruction. CDC failed, however,

to object to the other instances of impropriety and therefore has waived the issue. (See *People v. Medina* (1995) 11 Cal.4th 694, 778 [failure to object to improper argument waives issue].)

CDC also failed to object to the argument made by counsel that Shakir should not have been hired as a spiritual advisor because of his criminal past or that he should have been fired for lying about his prior convictions. The negligent-hiring cause of action had been resolved against Bradley before trial and, as a result, this was not a proper argument. Even so, the failure to object waives the issue. In any event, the jury was instructed that what the attorneys said during trial was not evidence.

CDC claims it did not object to every instance of misconduct because the trial court had already ruled that the evidence was relevant. The evidence of Shakir's prior criminal history *was* relevant and the questions or argument were not objectionable on this ground. However, that does not mean these references were not objectionable on other grounds, for example, that the questions or arguments implied facts not in evidence. (Evid. Code, § 353.) As the trial court pointed out in considering the motion for new trial, CDC could also have asked for a limiting instruction on the issue. The trial court said it would have given one had CDC simply asked for it. (See *Dincau v. Tamayose* (1982) 131 Cal.App.3d 780, 792 [failure to ask for limiting instruction waives any error].)

Even if not waived, given the context of the references, the nature of Bradley's argument, and the overall record, we do not find references to Shakir as a felon, as opposed to a person with a criminal past, to be prejudicial. Bradley did not argue, as CDC contends, that Shakir was a violent criminal with a history of sex offenses that CDC knew about and tried to hide. Bradley does suggest that Shakir was a sexual predator, but

a fair reading of this argument is that Bradley was characterizing Shakir as a predator based on his behavior toward Bradley. She also argued that Shakir was a "bad guy" based on his past behavior (the criminal convictions and violations of prison rules). Bradley argued that CDC had knowledge of Shakir's character and failed to take appropriate action to protect her. This is all fair argument supported by the evidence.

V. Substantial evidence of damages

CDC contends there is insufficient evidence to support the jury's damage award, or, in the alternative, that the damages awarded are excessive. We reject this contention.

A. Economic damages

CDC's argument that there is insufficient evidence to support the award of $89,000 in economic damages ($87,000 in past, $2,000 in future) is based primarily on discrediting Bradley's testimony as "self-serving," and noting that she failed to provide documentary evidence to support her claim. CDC also argues that Bradley's evidence is contradictory. This type of argument is inappropriate for an appellate court and suggests a misunderstanding of the substantial evidence standard of review. Whether to believe or disbelieve a witness in the absence of extraneous proof is the role of the jury. (*People v. Panah* (2005) 35 Cal.4th 395, 488 [appellate court resolves neither credibility issues nor evidentiary conflicts].) We look only for substantial evidence to support the jury verdict. (*Ibid*.)

Bradley's testimony is sufficient to prove damages. (*Kelly-Zurian v. Wohl Shoe Co., supra,* 22 Cal.App.4th at p. 409 [jury entitled to accept or reject all or any part of testimony of any witness].) She testified she made $17,205 while working at the facility

for three months. CDC claims there is no proof this job would have continued. The evidence is to the contrary as there is evidence that other temporary employees in similar positions worked for CDC for the long term, ultimately being hired as state employees. There was evidence the facility was always understaffed and the census remained high. Even in the absence of this evidence, Bradley established that, had she not been suffering from the effects of Shakir's harassment, she would have found similar employment at the other prisons. She was hired almost immediately after leaving the facility by the Valley Women's Prison. However, Bradley worked there for only a week because she found she could not work with the aggressive prison population given her fragile emotional state.

Bradley also testified that, while working at the facility she was able to see 10 clients on Mondays, her day off. She charged $125 an hour, but was actually reimbursed for about one-half of that amount. Therefore, she was earning approximately $2,500 a month in her private practice while working at the facility (($125 ÷ 2) x 10 x 4 months).

From this testimony, the jury could deduce that, while working at the facility, between Bradley's salary and her private practice, she made approximately $98,820 a year or $8,235 a month.[4] Bradley testified that, for the first six months after leaving the facility, her income dropped to between $1,400 and $2,000 per month, or a loss of between $6,235 and $6,835 per month. She also testified that, during the next six months, she was doing better emotionally and able to increase her earnings to between $4,200 and $6,000 per month, a loss of between $2,235 and $4,035. Taking the maximum loss here, which the jury is permitted to do, the first year's loss could have

[4]Calculated as $17,205 divided by three months ($5,735), multiplied by 12 months ($68,820), from the facility, plus $30,000, for a total annual salary of $98,820 divided by 12 months, or $8,235 a month.

been as high as $65,220 ($6,835 x 6 months = $41,010 + $4,035 x 6 months = $24,210; $41,010 + 24,210 = $65,200).

In addition, Bradley testified that she continued to earn between $4,200 and $6,000 a month for the next few years (2002, 2003, 2004) for an annual loss of between $26,820 and $48,420 for three years. At trial, Bradley said she was doing better in 2005, earning $7,000 a month, for a loss of $1,235 per month or $11,115 for the year through October ($8,235 - $7,000 x 9 months). Bradley and Dr. Hedberg's testimony establishes out-of-pocket expenses for therapy totaling $12,127.97 ($2,700 for future sessions, $450 for future medications, $9,027.97 for past treatment). These figures support an award of past economic damages substantially higher than those actually awarded. They also support the award of $2,000 for future damages in light of Bradley's testimony that she had not yet returned to her normal earning potential. (See *Hope v. California Youth Authority, supra*, 134 Cal.App.4th at p. 596.) Further, the award is not excessive; it does not shock the conscience or suggest the jury was anything other than objective in considering the evidence. We will not disturb the jury's award. (*Ibid*.)

B. Non-economic damages

CDC also attacks the non-economic damage award, claiming that it is "particularly outrageous given the brief period of time that Bradley worked at [the facility] and the few and minor incidents occurring on prison grounds after September 13 …." We disagree.

There is no fixed or absolute standard by which to compute the monetary value of emotional distress. As a reviewing court, we must give deference to the jury's verdict and to the trial court, which reviews the award in the context of a motion for new trial. (*Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, 17; *Kelly-Zurian v. Wohl Shoe Co., supra*, 22 Cal.App.4th at p. 410 [appellate court declines to interfere with

jury damage award, left undisturbed on motion for new trial by trial court].) The fixing of damages to intangible interests, including emotional well-being, has long been vested in the sound discretion of the trier of fact. It is subject only to a determination of whether the award is so grossly disproportionate to the evidence that the award would raise a presumption that it resulted from passion or prejudice. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64; see also *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 820-821.) Bradley testified about her frustration and hurt when CDC failed to assist her and with respect to its lax treatment of her complaint. She described how uncomfortable and frightening it was *at work* because of Shakir's behavior from September 13 until she was terminated. Bradley testified that Shakir repeatedly approached her at work even after she reported the harassment. She described her need for therapy and her slow progress of recovery. She suffered the humiliation of losing control of her bowel and urinary functions, of having crying bouts, episodes of depression, anxiety, panic attacks, lack of energy, and memory difficulties. Bradley was a professional woman who had, before September 2000, taken care of herself and proceeded well in the world. After September 2000, she was forced to seek therapy and rebuild her self-confidence and her personal and professional world. (See *Kelly-Zurian v. Wohl Shoe Co., supra,* 22 Cal.App.4th at p. 410 [substantial evidence of significant emotional distress included evidence of panic attacks, anxiety, depression, inability to sleep, diagnosis of posttraumatic stress disorder].)

CDC claims the jury was confused because Dr. Hedberg, when testifying about the traumatic events causing Bradley to suffer post-traumatic stress disorder, listed events occurring off prison grounds. It argues that it can only be held liable for events caused by Shakir at CDC. The Department of Corrections and Rehabilitation, Juvenile Justice

(formerly the California Youth Authority), made a similar argument in *Hope v. California Youth Authority, supra,* 134 Cal.App.4th 577, 596, and it was rejected. As the court stated there, "[e]ven though the jury heard about a number of factors that could have contributed to [the plaintiff's] emotional distress, there is no basis for concluding the jury could not separate the actionable harassment from the nonactionable and the harm caused by the former." The jury was properly instructed at trial that it could award damages for harm caused by CDC's conduct. We see no reason to interfere with the jury's damage award.

VI. Cumulative error/attorney fees

Since we have determined no error on the appeal, we need not address CDC's claim of cumulative error. We also do not need to address CDC's protective appeal of the attorney fee award. Bradley remains the prevailing plaintiff on appeal. There is no other challenge to the fee award.

VII. Judgment notwithstanding the verdict on retaliation claim

Bradley cross-appeals, challenging the trial court's grant of judgment not withstanding the verdict (JNOV) on the retaliation claim. The jury found that CDC's termination of Bradley was in retaliation for her pursuit of her sexual harassment claim and awarded $50,000 in non-economic damages. The trial court granted CDC's motion for JNOV on three bases: 1) that as a matter of law Bradley did not fall within the class of persons protected from retaliation under the FEHA; 2) that the damage award was duplicative, at best, and speculative or punitive, at worst; and 3) that the award was not supported by substantial evidence.

"'A motion for [JNOV] of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that

there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.'" (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 878.) On appeal, the standard is the same. (*Ibid*.)

We examine each of the trial court's reasons for granting JNOV. First, we do not agree that, as a special employee, Bradley lacks standing as a matter of law to seek redress for retaliation. As we have stated, the FEHA was intended to protect and safeguard the right and opportunity of all persons to *seek and hold* employment free from discrimination. (§ 12920.) Section 12940, subdivision (h), makes it unlawful for any employer, labor organization, or employment agency to harass, discharge, expel, or discriminate against *any person* because the person has exposed any practices forbidden under the antidiscrimination statute. Even though Bradley was not an official state employee, CDC was her employer for purposes of the FEHA. We disagree with the trial court's position that Bradley is entitled to the protections of the FEHA for purposes of her sexual harassment claim, but not with respect to those provisions of the FEHA preventing retaliation when an employee reports a violation of the act. We are aware of no authority supporting this conclusion and nothing in the statutory language to suggest this was the legislative intent. Retaliation threatens the very heart of the antidiscrimination statutes, for it may well dissuade employees from reporting violations. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 475-476 [both state and federal statutes designed to foster open communication between employer and employees regarding perceived misconduct, encouraging employees to call employers' attention to unlawful practices].) If an employee is protected under the FEHA, there is no reason to allow retaliation by the employer to go unredressed.

We also find no support in the record for the trial court's conclusion that the damages awarded for the rehabilitation claim were duplicative of the damages awarded for the sexual harassment claim or that they were punitive in nature. The jury was asked if any of the damages it awarded on the first claim were duplicative of its award on the latter claim. The answer given was no. The jury was free to conclude from the evidence that Bradley suffered additionally when CDC fired her because she reported the harassment and pursued her complaint. Bradley's testimony established the fact that she took pride in her work and the contribution she felt she made to the facility. She also testified that many of her emotional problems would be helped if she could start working again. This evidence supports an inference that she would have faired better in dealing with the stress if she had not lost her job. Lastly, there was nothing in the award on the retaliation claim that would raise a presumption that the amount awarded resulted from passion or prejudice or was intended to punish CDC. (See *Iwekaogwu v. City of Los Angeles, supra,* 75 Cal.App.4th at pp. 820-821.)

Finally, we also disagree with the trial court's conclusion that the evidence does not support the jury's finding of retaliation. To establish a prima facie case of retaliation, Bradley must show that she was engaged in protected activity, her employer subjected her to an adverse employment action, and there is a causal link between the protected activity and the employer's action. (*Flait v. North American Watch Corp., supra,* 3 Cal.App.4th at p. 476.) Bradley's report of sexual harassment is, without question, protected activity. Termination is, without question, an adverse employment action expressly identified in the statute. (§ 12940, subd. (h).) CDC retained the right to terminate Bradley in its contract with the registry and did so 21 days after reporting the harassment to Brim.

Bradley proved that, although she was a special employee serving at the will of CDC and, unlike a state employee, had no property interest in her employment at CDC, she had a reasonable expectation that her contract employment would continue for some time. She presented evidence that other contract mental health professionals stayed at CDC for a number of years and ultimately were hired as permanent employees when positions came open. She offered evidence that, if believed, showed that CDC hired a mental health professional within a week of firing Bradley and he ultimately became a permanent employee. Bradley was told she was terminated because the census was low and she was no longer needed, but she offered evidence that the census was not low, that the unit was understaffed, and that this remained the case between Bradley's termination and trial. Warden Adams testified that there was often a shortage of medical staff, and contract workers regularly were needed. The jury was free to believe this evidence and reject CDC's evidence to the contrary. (*Mosesian v. Bagdasarian* (1968) 260 Cal.App.2d 361, 368 [reviewing court may not reweigh evidence; credibility is issue for fact-finder].)

Rarely is there direct evidence of retaliatory motive to prove a causal connection between the protected activity and the adverse employment action. (*U.S. Postal Service Bd. of Govs. v. Aikens* (1983) 460 U.S. 711, 714, fn. 3, 717 [direct evidence of illegal intent not required so long as improper motive can be inferred from circumstantial evidence]; *Flait v. North American Watch Corp.*, *supra*, 3 Cal.App.4th at p. 478 [same].) Here, there are two pieces of evidence that are circumstantial evidence of retaliatory motive, which provided the necessary causal link, if believed by the jury. First, Bradley's termination came shortly after her complaint and during her continued attempts to get assistance. (*Miller v. Fairchild Industries, Inc.* (9th Cir. 1989) 885 F.2d 498, 506 [timing of complaints relative to adverse employment action is relevant in retaliation

inquiry to prove causal link].) Second, there is evidence that Bradley's direct supervisor, Dr. Anthony, was not pleased at the time she was taking from her duties to meet CDC's demands for repeated interviews about the complaint. Anthony yelled at Bradley, telling her he wanted her at the site and if this was the way it was going to be, he did not want her there at all. He also required that she sign in and out before leaving the work area, something that was not required of other employees and not required of Bradley before she complained of being harassed. This is potential evidence of animus.

Once an employee proves a prima facie case of retaliatory motive, the employer may articulate a legitimate, nonretaliatory reason for the action taken, and the employee must then prove that the employer's reason is pretextual. (*Flait v. North American Watch Corp., supra,* 3 Cal.App.4th at pp. 475-476.) In this case, CDC claims that, although it told Bradley she was being terminated because the census was low and she was no longer needed, she was actually terminated because of poor work performance—her skill set was not what was needed. Bradley provided compelling evidence to refute this testimony. She testified she had never been told her performance was lacking; she had been told just the opposite. Her supervisors signed her time sheet each week acknowledging that she performed as required. The registry was never informed in writing that Bradley's performance was unsatisfactory, even though its contract with the CDC requires that CDC do so when assigned personnel fail to meet the qualifications of the job. Bradley said Dr. Brim told her she was doing a good job and invited her to apply for a permanent position. Again, it was for the jury to resolve this conflict in evidence, and it did so in favor of Bradley. (*Id.* at pp. 479-480.)

We conclude it was error for the trial court to grant JNOV. Our decision is compelled by the record because substantial evidence supports the jury's conclusion that

CDC terminated Bradley in retaliation for her complaint of sexual harassment, there is substantial evidence to support the non-economic damage award of $50,000, and the award is not duplicative of the damages awarded on the sexual harassment claim or so grossly disproportionate to require a conclusion that it is punitive.

DISPOSITION

The judgment is affirmed. The order granting judgment notwithstanding the verdict is reversed and the jury verdict on the retaliation claim is reinstated. Costs are awarded to Bradley.

_____
Wiseman, J.

WE CONCUR:

_____
Vartabedian, Acting P.J.

_____
Levy, J.