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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RICKEY MOLAND, Plaintiff and Appellant, v. MCWANE, INC., Defendant and Appellant.	B285628 (Los Angeles County Super. Ct. No. BC559796)

APPEALS from a judgment of the Superior Court of Los Angeles County, Victor E. Chavez, Judge. Affirmed as modified.

Shegerian & Associates, Carney R. Shegerian and Jill P. McDonell for Plaintiff and Appellant.

Grignon Law Firm, Margaret M. Grignon, Anne M. Grignon; Hill, Farrer & Burrill, James A. Bowles and Elissa L. Gysi for Defendant and Appellant.

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INTRODUCTION

McWane, Inc. appeals from a judgment entered after a jury awarded Rickey Moland $2,873,514 in compensatory damages and $13.8 million in punitive damages for race discrimination and failure to prevent race discrimination in violation of the Fair Employment and Housing Act, Government Code section 12900 et seq. (FEHA),[1] and for wrongful termination in violation of public policy. McWane argues substantial evidence does not support the jury's findings on liability or the award of punitive damages. McWane also argues the punitive damages award is excessive under federal and state law, the trial court abused its discretion in denying in part a motion for discovery sanctions, and the trial court erred in denying McWane's motion for a new trial based on misconduct by Moland and his attorneys.

We conclude that substantial evidence supported the jury's verdict and that the trial court did not err in denying McWane's requests for a terminating sanction (but imposing lesser sanctions) and for a new trial. We agree with McWane, however, the award for punitive damages violated McWane's due process rights under the United States Constitution. Therefore, we modify the judgment to reduce the punitive damages award to $5,747,028, which reduces the ratio of punitive damages to compensatory damages from almost 5 to 1 to 2 to 1. As modified, we affirm the judgment.

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

FACTUAL AND PROCEDURAL BACKGROUND

A. *Clow Valve Company Hires Moland as a Supervisor*

Clow Valve Company is a division of McWane that manufactures fire hydrants and water valves and has plants in Iowa and Corona, California. In June 2010 Clow hired Moland, who is African American, through a temporary employment agency to work in Clow's Corona plant, and on October 1, 2010, Clow offered Moland a permanent position as a production supervisor. Moland supervised approximately half of the 18 to 24 employees at the Corona plant, and another supervisor, John Jackson, supervised the others. Moland and Jackson both reported to Daniel Dart, the Corona plant manager. Dart had worked at Clow for more than 30 years, during which time Clow had never hired an African American supervisor. Two African Americans worked at the Clow plant in nonsupervisory positions, but both left before Moland began working there.

Dart and David Cummins, Clow's human resource manager, interviewed Moland before hiring him. Dart and Cummins reported to James Wakefield, Clow's general manager, who approved the decision to hire Moland. Cummins and Wakefield worked in Iowa, where Clow had approximately 400 employees, and traveled to the Corona plant three or four times a year.

B. *Clow Terminates Arturo Moreno*

Moland initially got along well with everyone at the plant. Dart's daughter, Annette Ellis, helped train Moland, and she and Moland developed a cordial relationship. Several employees, however, warned Moland about a maintenance worker named

Arturo Moreno, who was on medical leave when Moland first started working at Clow, but Dart told Moland that Moreno was "a good guy." When Moreno returned to work, he reported to Moland and soon became confrontational. Moreno would tell Moland to leave the area in which he was working, throw tools and papers in Moland's direction, call Moland "boy," and repeatedly curse at and "flip off" Moland. Moreno even became angry with Moland when Moland brought Moreno his paycheck.

In August 2010 Moreno almost hit Moland while driving a golf cart outside the designated area, yelling "get the fuck out of my way." Moland reported these incidents to Dart, who told Moland to ask Moreno to "forgive [Moland] for whatever [Moland] may have said to make [Moreno] upset." When Moland attempted to speak to Moreno as Dart directed, Moreno said, "Get away from me, leave me alone. If you don't have anything to do, just leave me alone."

On December 7, 2010 Moland was driving a forklift near Moreno. Moreno said, "Hit me and I swear I will kill you. . . . I'm not playing. I will kill you." Moland called Cummins to report the incident because Dart was not at work that day and Moland felt Dart had done "nothing" in response to previous incidents involving Moreno. Cummins flew to California the next day, interviewed Ellis and Moreno about the incident, and with Dart terminated Moreno's employment.

C. *Other Employees Mistreat Moland and Use Racial Slurs*

After Clow fired Moreno, several employees including Dart began treating Moland differently. Although some employees acknowledged Moreno could be difficult, and even overheard

Moreno threaten Moland, they valued Moreno's ability to fix broken or malfunctioning equipment and felt Clow had not fully investigated Moreno's conduct before terminating his employment. Dart in particular thought Moland got Moreno fired and Dart "wasn't happy about it." After Clow terminated Moreno's employment, Dart "did whatever he could to make it hard for [Moland]."

The plant became divided between employees who supported Dart and those who supported Moland. Among those who supported Dart were his daughter Ellis, an expeditor who moved inventory, Todd Little, a painter, Steve Barhorst, a machinist, and Randy Ballard, the manufacturing supervisor. These employees could "do what they want[ed] and [did not] have to take orders from [Moland,]" even though they ostensibly reported to Moland. These employees also resisted changes Moland attempted to implement to improve safety and efficiency. Among the employees who supported Moland were Connie Williams and Michael Haecker, painters, and John Bouman, who worked in assembly. Williams said that by February 2012 strife at the plant made Moland "appear[ ] to be a beaten man."

Ellis and Barhorst complained Moland was disrespectful and did not take their concerns or suggestions into consideration. Jackson said that Moland's management style was akin to a "dictatorship" and that Moland would not listen to employees who disagreed with him. Ballard agreed that Moland had an "authoritative" leadership style and stated that Moland asked employees to do tasks "just because he said so." Other employees disputed these accounts. Williams said Moland was always respectful to Ellis even when Ellis was difficult and insubordinate. Bouman said Moland "talk[ed] to everyone in a

very polite and professional manner." Even Dart admitted he never saw Moland "having friction" with anyone in the plant, and Ballard said Moland was respectful of others "without exception." Haecker said Moland always spoke to him respectfully, never talked down to him, and generally created a positive work environment.

According to Williams, the discord and divisiveness at the plant was rooted in Moland's race. In December 2011 Bouman overheard Ballard and Jackson talking about a family of raccoons living near the plant. Ballard said to Jackson, "Don't we have one 'coon' too many?" Bouman assumed Ballard's comment referenced Moland, but he did not hear Ballard mention Moland by name. In February 2012 Moland observed Little painting hydrants outside a "booth" that removed paint fumes from the surrounding area. Williams complained to Moland, and Moland politely asked Little not to paint outside the booth so that the company would not be fined for a health violation. Moland said Little "got hot quick. And he told me, you f-ing nigger." Williams witnessed the incident, which Moland reported to Dart, but Moland did not discipline Little for his behavior.

Williams and Bouman also heard Little and Barhorst use "the n-word" to refer to Moland on several occasions. Williams reported that Little said to her, "I don't have to listen to that N—, . . . that N— doesn't know what he's talking about." Williams and Bouman also said Little was disrespectful and insubordinate to Moland and yelled in Moland's face while Moland spoke in a polite and professional manner. Williams said she heard Barhorst use "the n-word" on two occasions. She said Barhorst said something to her like, "That N— doesn't know what he's talking about or doesn't know what he's doing," and she heard

from other employees that Barhorst planned to retire early because he did not want to work with Moland. Indeed, Barhorst told Bouman (or another employee who then told Bouman) he planned to retire "because he didn't want to work for that N-I-G-G-E-R anymore." In total, Williams said she heard other employees use racially derogatory terms to refer to Moland "two dozen-ish" times.

D. *Clow Decides To Terminate Moland's Employment*

In March 2011, three months after Clow terminated Moreno's employment, Dart gave Moland a positive performance review and a 3 percent raise. Dart said Moland was "a pleasure to work with. He continues to investigate procedures to improve the quality of product and the safety of our employees." In April 2011 Clow developed a succession plan to account for Dart's eventual retirement. The plan stated that, while no one was "immediately ready" to take over for Dart, Jackson and Moland were potential successors, depending on their future growth and development.

By mid-2011, however, Moland's relationship with Dart began to deteriorate. Around this time Dart's daughter, Ellis, had an accident driving a forklift, and Moland took away her driving privileges for three months. Ellis complained to Dart that Moland demeaned and "nitpick[ed]" her and made her feel "inadequate." During this time, Ellis and several other employees who reported to Moland began going to Jackson for direction instead. Moland raised his concerns with Dart, and when Dart failed to resolve the situation to Moland's satisfaction, Moland called Cummins and Wakefield.

In late 2011 or early 2012 Dart learned Moland was "going above [his] head" to air his grievances. For example, on January 30, 2012 Moland called Cummins and told him Dart was not listening to him and was taking Ellis's word over Moland's. Cummins "could tell" Moland and Dart were not "getting along," and Wakefield met with them to "make sure they were communicating with one another."

On February 13, 2012 Dart sent Wakefield an email informing him Barhorst had requested early retirement because he "[d]oesn't get along with [Moland]." Dart said, "This doesn't appear to be one person[']s opinion." Wakefield responded and copied Cummins: "Definitely need to review management issue. Sounds like need change or we will have other issues." One of those "other issues" was that Barhorst was the only employee at the Corona plant who knew how to operate certain machinery, which according to Jackson made Barhorst "feel[ ] he has the company over a barrel" and can ignore Moland. Cummins responded to Wakefield, "I would agree there is a management problem but I'm not ready to totally blame [Moland]. From my experience, he gets no support on any decisions. In fact, [Dart] will back his hourly guys before . . . [Moland]."

That night Dart spoke with Cummins for an hour. Cummins's notes of the call stated that Barhorst told Dart that Moland does not listen to his concerns. Cummins asked Dart if Moland ever refused to do something Dart directed him to do, and Dart said that Moland "ha[d] done what [he] was told," but that Moland did not spend enough time with his employees to establish effective communications with them. Cummins told Dart that, when he discussed Moland with Corona employees, the employees could not tell him "why they dislike[d] [Moland]."

Cummins asked Dart, "Is this a racial issue?" Dart said that he did not believe race was "a problem" and that Moland did not give his employees "the respect they need." Cummins recommended Dart "do more documentation when there is a problem with [Moland]."

Cummins reported to Wakefield the next morning by email: "My take is [Moland] (for whatever reason) doesn't communicate well with others. I get the idea he is impatient and doesn't listen to what they have to say. You know [Dart]. He wants everyone to get along but really doesn't know how to make that happen in situations like this one. As far as I can tell [Dart's] only management training is in the field. I tried to coach him but that doesn't work well over the phone. I suggested he take [Moland] aside and let him know that his communication needs work. Go over specifics and suggest better ways of doing things. And of co[u]rse document everything. I told him the bottom line was, California is a right to work state and we could let [Moland] go even though he didn't do anything illegal. I don't know if the situation can be corrected to [Dart's] satisfaction. If we let [Moland] go I would strongly suggest we put [Ballard] back into the supervisor on the floor position. That would at least be a reason for reduction in force besides the fact that we don't like the way [Moland] manages his people." Wakefield told Cummins his report was "similar" to what he had been hearing from Dart.

Wakefield and Cummins met two days later, February 16, 2012, in Wakefield's office. They concluded that, without "removing" Moland, the situation between him and Dart "probably never would get satisfied . . . to [Dart's] satisfaction" and Dart might retire. Wakefield and Cummins concluded "a series of write-ups and all of that" would never return the plant

to its previous "smooth operation" because Moland's and Dart's "management styles would never jell." Cummins agreed to research a separation package for Moland that included a severance agreement.

E. *Moland, Williams, and Bouman Report Racially Motivated Remarks to Management*

In the last week of February 2012, before Clow terminated Moland's employment, Little told Bouman, referring to Moland, he "would like to shoot the son of a bitch and bury him out in the desert." Bouman told Moland what Little said, that Ballard referred to Moland as a "coon," and that Barhorst used the "n-word" to refer to Moland. Moland asked Bouman to report the incidents to McWane's "access line" through which employees could lodge confidential complaints or concerns. Moland also asked Williams to report to the access line the racially motivated remarks and the behavior she witnessed.

Meanwhile, Moland called Cummins the morning of February 27, 2012 to report a number of incidents. Moland first told Cummins that Dart "has a drinking problem and drives drunk." Cummins had known Dart for 11 years and never saw him drink on the job or drunk anywhere, and Cummins assumed Moland was trying to get Dart in trouble. Moland told Cummins that Barhorst uses the "N-word" and "doesn't like his skin color." Moland also told Cummins that Ballard used a racial slur to refer to him. Cummins said Barhorst's use of a racial slur "concerned [him] a lot," but in his notes of the call he wrote that Moland "complained about things I considered management issues [and] [w]ays he was treated he didn't like but were not illegal." Cummins's notes stated that he told Moland he "needed to go up

the chain of command" and that Moland responded Dart "was the problem." Cummins told Moland to speak with Wakefield. Later that day, Cummins informed Wakefield of Moland's allegations, and they agreed Cummins would travel to Corona to investigate.

As Cummins suggested, Moland called Wakefield that same day. Moland complained to Wakefield about his relationship with Dart and said their communication "wasn't very good." According to Wakefield, Moland did not repeat the allegations against Barhorst and Ballard regarding their use of racial slurs.

The next morning, February 28, 2012, Bouman and Williams reported several racially motivated incidents to the confidential employee access line. Bouman reported that, since Moreno's termination, Dart, Barhorst, Ellis, and Little treated Moland "unfairly and [spoke] about him in a negative manner . . . . [Dart] attempts to make [Moland's] job miserable, and [Ellis, Barhorst, and Little] fail to comply with [Moland's] orders. Daily since June 2011, [Ellis] reports any behaviors from [Bouman] and Employees which she deems inappropriate to [Dart]. [Bouman] said [Ellis] records conversations between [him, Moland], and other Employees in order to get them in trouble." Bouman further reported that, also since Moreno's termination, Little spoke to Moland in "an angry manner and uses profanity when he speaks with [Moland]. When [Moland] gives [Little] directions on how to paint an item, [Little] responds with phrases such as, 'What the f-ck are you doing over here?' or 'Why are you telling me how to f-ck-ng do my job?' Three times since June 2011, [Little] kicked and shoved equipment and threw equipment around in front of [Bouman] and Employees. In December 2011 (exact day unknown) in an office, [Bouman], John

Jackson, and [Ballard] spoke about how some raccoons entered the facility. [Ballard] asked [Jackson and Bouman], 'Don't we have one coon too many in this place?' [Ballard's] comment referred to [Moland], who is African American. During the week of February 12 (exact day unknown), [Barhorst] told [Little], 'I am not going to work for this n-gg-r anymore,' in reference to [Moland]. [Bouman] heard [Barhorst's] statement. During the week of February 26 (exact day unknown) during a break outside the plant, [Little] told [Bouman] about [Moland], 'I would like to shoot the s-n of a b-tch and bury him out in the desert.' [Bouman] said [he] and the Employees cannot properly perform their jobs with the constant negative comments about [Moland] and the fear that [Ellis] will report them. [Bouman] said [he] and many of the Employees are miserable and ready to resign." Bouman also said Dart, Barhorst, Ellis, Ballard, and Little "behave in this manner because they are all friends and they want to get [Moland] terminated or force him to resign." Bouman requested that a company representative visit the plant and interview him and other employees about their concerns. He said he did not report his concerns to management or human resources.

Williams reported that she overheard Little and Ellis call Moland a "'n-gg-r'" and that Ellis takes pictures of Moland and secretly records conversations with him "to catch him doing something wrong." Williams said Little and Ellis tell Dart about Moland's actions "because [Dart] is [Ellis's] father and [Little's] friend." Williams said Dart's "behavior toward [Moland] has changed since [Little] and [Ellis] began discussing [Moland's] actions with him." Williams also reported that Little and Ellis were "attempting to have [Moland] terminated." She said Dart's

and Ellis's "discriminatory behavior toward [Moland] [have] lowered . . . morale and caused an uncomfortable work environment."

Wakefield and Cummins received notification of the access line calls that same morning (February 28, 2012). They decided to put Moland's termination "on hold" while they investigated the allegations in the calls. They also agreed to have an "independent person" conduct the investigation because Cummins "was already pretty close to the situation" and they "were planning on terminating [Moland]."

F. *McWane Investigates the Access Line Allegations*

Wakefield and Cummins asked Wanda Hendrix, who was McWane's group human resources director and outside Wakefield and Cummins's line of command, to conduct the investigation. Hendrix had 44 years of experience in human resources and had conducted "more than five or 10" investigations of workplace discrimination or harassment. Hendrix travelled to Corona and interviewed 22 employees on March 7 and 8, 2012.

Hendrix generally spoke with each employee for 15 to 20 minutes. She read each employee the transcripts of the access line calls without identifying the callers and asked the employees to tell her what they knew, if anything, about the content of the calls. If the employees had relevant information, she wrote it in her notes and typed up her notes in her hotel room that evening. She said her role was only to confirm, if possible, the information provided in the access line calls. To the extent Moland alleged incidents other than those reported in the access line calls, Hendrix did not investigate them.

Hendrix spoke first with Dart who told her Moland talked down to his employees and "must have some personal issues that he is bringing to work." Dart said that he and Moland got along fine at the beginning, but that Moland began "taking parts of [Ellis's] job away from her" and "he got an employee fired that had been with the Company a long time." Dart said he had known Moreno a long time and did not believe he would ever threaten anyone. Dart also complained Moland "goes over his head and speaks to [Cummins] or [Wakefield] and [Dart] has no idea what [Moland] is saying to them." Dart said Moland tried to change the way things were done at the plant and was a "bully." Hendrix noted Dart "harbor[ed] some resentment in his voice for how [Moland] [was] treating his daughter" and believed Moland was "out to get him fired."

Ballard told Hendrix that Moland was "condescending" and "look[ed] down" on the employees, some of whom considered quitting because of the way Moland spoke to them. He said he heard Moland yell at Dart "in a way that no employee should speak to their manager." He denied referring to Moland as a "coon." Hendrix's notes stated Ballard spoke about Moland "the same as [Dart], as if they have had verbatim conversations about [Moland]."

Jackson said he too heard Moland yell at Dart, but he also heard Barhorst and other employees "talk negatively to [Moland]." Hendrix did not ask Jackson what "negative" things he heard about Moland, even though she knew from one of the access line calls that Barhorst reportedly used the word "n-gg-r," but Jackson told Hendrix more generally he had not heard employees use racial slurs or discriminatory language to refer to Moland. Jackson also told Hendrix that Ellis did not "act in the

best interest of [Moland] because [s]he feels she can go to her dad . . . and he will take up for her." Jackson said there was "too much drama" and "favoritism" at the plant. With regard to the termination of Moreno's employment, Jackson said several employees heard Moreno threaten Moland, but he did not believe the company investigated the incident properly.

Hendrix's notes of her conversation with Moland did not include any references to racial slurs or the incidents with Little. Instead, they indicated Moland complained to Hendrix about Dart and his preferential treatment of Ellis and about Jackson taking over his job. Moland did tell Hendrix he wanted to give her a document containing notes he had taken regarding various incidents, but Hendrix's notes did not indicate whether Moland ever gave her the document or whether she ever read it. Hendrix said Moland never told her anyone had harassed or discriminated against him based on his race.

Hendrix spoke with Williams, who acknowledged she was one of the access line callers. Williams told Hendrix that Ellis had asked her the previous week whether she was one of the callers and that she assumed Ellis's father had disclosed Williams's identity to her. Williams said she did not confirm Ellis's suspicion. Williams told Hendrix "she has personally heard [Moland] called the 'N' word and said she has seen employees get in [Moland's] face and yell and scream at him." Hendrix did not ask Williams to identify any of those employees. Williams said Moland does not yell back at anyone and remains calm. She said she had seen Dart "do the same, i.e., get in [Moland's] face and yell at him but has not seen [Moland] do that to anyone." She said Ellis allowed her to listen to recorded

conversations she had with Moland in an effort "to try and get [Moland] in trouble."

Bouman did not tell Hendrix he was the other access line caller, but he said he "personally heard negative things being said about [Moland] by [Barhorst] and [Little]." Hendrix said Bouman "did not go into detail," and apparently she never asked him for examples or specifics about what he heard or who made the negative statements. Bouman also said Dart showed Ellis too much favoritism.

Little told Hendrix that Moland did not "talk to employees good" and treated some employees better than others. He said he had not heard anyone say anything derogatory about Moland and denied he used racial slurs or said anything negative about Moland.

Ellis told Hendrix that Moland had been "taking some of her job away from her" and that she felt her job was "in jeopardy." She mentioned two occasions where she believed Moland responded inappropriately to incidents involving the forklift and said Moland told her in approximately January 2012 that "in six months everyone may not be here." Ellis admitted she took pictures of Moland "if he were doing something unsafe," but she apparently did not respond to Hendrix's question asking her about surreptitious recordings of conversations with Moland.

Barhorst told Hendrix that Moland "does not know what he is doing," but Barhorst denied saying anything negative about Moland or using racial slurs. He said he was going to quit because Moland "makes it difficult to want to come to work." Hendrix did not ask Barhorst to elaborate. Several other employees told Hendrix that Dart favored Ellis, that Moland had

favorites, and that "things changed a lot when [Moreno] was fired."

Hendrix gave Wakefield and Cummins a telephonic summary of her conclusions a week after her investigation. Hendrix told Wakefield and Cummins that "there was no way for me to substantiate any type of racial discrimination at the facility," but that she "believed there was certainly a disconnect at the facility, in terms of the management leadership team." Hendrix recommended Moland and Dart "have some sort of training." Cummins's notes of the conversation indicated that Hendrix characterized the Corona plant as a "powder keg" and that employees may "go to outside agencies" including the federal Equal Employment Opportunity Commission (EEOC).[2]

At about the same time Hendrix spoke with Wakefield and Cummins, she completed a written report summarizing her interviews and her observations, findings, and recommendations. Wakefield and Cummins, however, testified they did not read Hendrix's report until after they terminated Moland's employment on March 27, 2012. Hendrix's report concluded she could not "substantiate that racial slurs have been used to refer to [Moland], *other than what was reported in the calls*." Contrary to that conclusion and Hendrix's interview with Williams, the report also stated "there were no employees that could say they personally heard racial slurs or references that implied anything racial about [Moland]." In her report, Hendrix found the management team was "extremely dysfunctional" and she

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[2] Cummins admitted at trial that his undated notes of his and Wakefield's conversation with Hendrix were "partial bits that [he] recalled."

recommended "leadership/sensitivity training." Hendrix also recommended Moland and Dart "meet regularly to discuss one on one issues."

Hendrix testified she did not know that Cummins and Wakefield had decided to terminate Moland's employment or that Moland had told Cummins that Barhorst and Ballard used racial slurs. In a February 28, 2012 email, however, Cummins told Hendrix that Moland had "been in touch . . . about this stuff only yesterday" and that he was "researching the California requirements for severance agreements when a person is laid off." Cummins also stated in his email, "I would like to discuss this with you in light of the Access Line report."

G. *Following the Investigation, McWane Again Decides To Terminate Moland's Employment*

Wakefield and Cummins said they proceeded to terminate Moland's employment based on Hendrix's conclusion there was no racial discrimination directed at Moland. Wakefield said that he believed Moland's and Dart's management styles were "not compatible" and that he feared Dart would leave the company "if we didn't do something." Wakefield knew Moland had accused Dart of drinking at work and Wakefield believed the two supervisors could not have a "healthy relationship" going forward. Neither Wakefield, Cummins, nor Dart gave Moland any notice or warning his performance ever had been deficient in any way, and they did not offer him any training as Hendrix had recommended.

Wakefield and Cummins met with Moland in person on March 27, 2012 and told him that they did not believe his and Dart's management styles were compatible and that there was no

way "to fix that." By this time, Barhorst had made good on his threat to leave Clow, and Wakefield acknowledged he had "production concerns" about losing a "key employee." Cummins and Wakefield also continued to believe Dart might resign if Moland continued to work at Clow. When Moland asked about the allegations of racism he made in his call with Cummins two weeks earlier, Cummins and Wakefield said the company was "moving forward." They did not share Hendrix's conclusions or report with Moland. Cummins gave Moland a separation package and a severance agreement in exchange for a release of claims, which Moland eventually declined to sign.

Moland stopped working at Clow the same day as his meeting with Wakefield and Cummins, but his termination was not effective until April 30, 2012. At that same time Barhorst returned to Clow, and Dart remained at Clow until he retired in May 2013. Clow promoted Jackson to plant manager after Dart retired and never disciplined any employees for the conduct reported in the access line calls.

H. *Moland Sues McWane and Prevails at Trial*

After filing a complaint with the EEOC in 2012, Moland filed this action against McWane and Clow in October 2014.[3] Moland alleged causes of action for unlawful discrimination and harassment based on race, failure to prevent discrimination and harassment based on race, retaliation in violation FEHA, wrongful termination, and intentional infliction of emotional

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[3] Moland also sued Dart, Little, Jackson, Barhorst, Ballard, and Ellis. The court dismissed these defendants with prejudice in May 2015.

distress. The trial court granted summary adjudication on Moland's causes of action for harassment and intentional infliction of emotional distress.

Following trial on Moland's remaining causes of action, the jury found for Moland on his causes of action for discrimination, failure to prevent discrimination, and wrongful termination, but found for McWane on Moland's cause of action for retaliation. The jury awarded Moland $373,514 in past and future economic losses and $2.5 million in past and future noneconomic losses. The jury also found McWane acted with malice, fraud, or oppression and awarded Moland $13.8 million in punitive damages.

McWane filed motions for judgment notwithstanding the verdict and for a new trial, both of which the trial court denied. McWane timely appealed. Moland conditionally cross-appealed from the order granting summary adjudication of his cause of action for harassment.

DISCUSSION

A. *Substantial Evidence Supports the Jury's Finding of Discrimination Based on Race*

1. *Applicable Law and Standard of Review*

"[S]ection 12940(a) prohibits an employer from taking an employment action against a person 'because of' the person's race, sex, disability, sexual orientation, or other protected characteristic." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 215 (*Harris*).) "To state a prima facie case for discrimination in violation of the FEHA, a plaintiff must establish that (1) [he]

was a member of a protected class, (2) [he] was performing competently in the position [he] held, (3) [he] suffered an adverse employment action, and (4) some other circumstance suggests discriminatory motive.'" (*Galvan v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 549, 558; see *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 355-356 (*Guz*).)

A plaintiff may prove discriminatory motive by direct evidence, circumstantial evidence, or both. (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 591.) "Because direct evidence of intentional discrimination is rare and most discrimination claims must usually be proved circumstantially, in FEHA employment cases California has adopted the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792." (*Soria*, at p. 591; see *Harris*, *supra*, 56 Cal.4th at p. 214; *Guz*, *supra*, 24 Cal.4th at pp. 356-357.) Under that test, "a plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff." (*Harris,* at pp. 214-215; see *Guz*, at pp. 354-356.)

"An employer 'discriminates' when it *treats the employee differently* 'because of' a factor listed in the FEHA." (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 126; see *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 658, fn. 3 ["'[T]he theory of "'[d]isparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin."'"].) Racially motivated remarks not made directly in the context of an employment decision or uttered by a non-decisionmaker (so-called "stray remarks"), without more, "do not support a claim under section 12940(a), nor do bigoted thoughts or beliefs by themselves." (*Harris*, *supra*, 56 Cal.4th at p. 231; see *Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1191 (*Husman*).) But discriminatory remarks "may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 541; accord, *Husman*, at p. 1191; see *Reid*, at p. 541 ["the stray remarks cases merely demonstrate the 'common-sense proposition' that a slur, in and of itself, does not prove actionable discrimination"].)

A plaintiff must also show "a causal link between the employer's consideration of a protected characteristic and the action taken by the employer." (*Harris*, *supra*, 56 Cal.4th at p. 215; accord, *Husman*, *supra*, 12 Cal.App.5th at p. 1186.) A plaintiff demonstrates this link by showing discrimination "to be a substantial factor motivating an employment action." (*Harris*,

at p. 230; see *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 375 ["[a] plaintiff in a racial discrimination action has the burden of proving . . . that the plaintiff's race was a substantial factor in the adverse employment decision"].)

As noted, an employer may rebut a presumption of discrimination with "evidence that its action was taken for a legitimate, nondiscriminatory reason." (*Harris*, *supra*, 56 Cal.4th at pp. 214-215; accord, *Soria v. Univision Radio Los Angeles, Inc., supra,* 5 Cal.App.5th at p. 591.) "'[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. [Citations.] While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, "legitimate" reasons [citation] in this context are reasons that are *facially unrelated to prohibited bias,* and which, if true, would thus preclude a finding of *discrimination.*" (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 861; see *Guz, supra,* 24 Cal.4th at p. 358.) The "ultimate issue is whether [the] employer 'honestly believed in the reasons it offers.'" (*Guz,* at p. 358; see *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 21.)

"Our required standard of review is simply to determine whether the jury had before it substantial evidence from which it reasonably could conclude the challenged employment actions were motivated in substantial part by reasons of race." (*Horsford v. Board of Trustees of California State University*, *supra*, 132 Cal.App.4th at p. 375.) "In reviewing for substantial evidence, we must evaluate the entire record, interpreting the evidence in the light most favorable to the [plaintiff] and drawing

all reasonable inferences in [his] favor. [Citations.] However, substantial evidence is not synonymous with *any* evidence. [Citation.] An inference may not be based on speculation or surmise. [Citation.] An inference also may not stand if it is unreasonable in light of the whole record, or if it is rebutted by ""clear, positive and uncontradicted evidence"" that is not subject to any reasonable doubt." (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 349; see *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 816-817.)

2. *Substantial Evidence Supported the Jury's Finding Clow Terminated Moland's Employment Because of His Race*

McWane argues that substantial evidence did not support the jury's finding Moland's race was a substantial motivating reason in McWane's decision to terminate his employment and that Wakefield and Cummins had a legitimate, nondiscriminatory reason for terminating him, i.e., that Moland and Dart "could not get along" and their management styles differed. But there was substantial evidence from which the jury could reasonably infer that Wakefield and Cummins knew Moland's race was the underlying source of discord in the Corona plant and that, rather than addressing the problem by properly investigating and taking steps to prevent discrimination, Wakefield and Cummins chose to terminate Moland's employment. (See *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 35 ["when asked to determine whether a factual determination is supported by substantial evidence, the reviewing court should draw all reasonable inferences in *favor* of the judgment"]; *Maaso v. Signer* (2012) 203 Cal.App.4th 362, 371 ["[s]ubstantial evidence

includes reasonable inferences drawn from the evidence in favor of the judgment"]; *County of Kern v. Jadwin* (2011) 197 Cal.App.4th 65, 73 ["substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom"].) Thus, even though McWane argues Wakefield, Cummins, and Dart harbored no personal racial animosity toward Moland, there was substantial evidence their decision to terminate Moland was because of his race.

We reject at the outset McWane's argument Moland failed to show any of his supervisors had "racial animus" because, unlike the evidence of "isolated statements made by co-workers or subordinates," Moland did not allege or introduce evidence Wakefield, Cummins, or Dart ever "uttered anything that implies any racial animus in the termination decision." McWane seeks to define "animus" too narrowly. Moland only needed to show that the decisionmakers' actions were motivated by race, not that they ever stated (or "uttered") anything racially insensitive or disliked Moland because he was African American. (See *Wallace v. County of Stanislaus*, *supra*, 245 Cal.App.4th at p. 130, fn. 14 [rejecting the defendant's argument that "animus" means something more than the intent described by the "substantial-motivating-reason test" in *Harris*, *supra*, 56 Cal.4th 203]; see also *Guz*, *supra*, 24 Cal.4th at p. 358 ["the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*"]; *Husman*, *supra*, 12 Cal.App.5th at p. 1186 [considering whether the plaintiff presented evidence showing "the employer's consideration of a protected characteristic" or "impermissible bias" in determining whether the plaintiff met his burden to prove "discriminatory animus"]; *E.E.O.C. v. Joe's Stone Crab, Inc.* (11th Cir. 2000) 220 F.3d 1263, 1283-1284 ["[t]o prove

the discriminatory intent necessary for a disparate treatment . . . claim [under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.], a plaintiff need not prove that a defendant harbored some special . . . 'malice' towards the protected group to which she belongs"].)[4]

Moland met that burden. On February 13, 2012 Dart told Cummins that Barhorst requested early retirement because he did not get along with Moland. Cummins told Dart he did not understand why certain Corona plant employees disliked Moland, and Cummins asked Dart, "Is this a racial issue?" Two weeks later Moland told Cummins that Barhorst used the "N-word" and "doesn't like his skin color." The next day Wakefield and Cummins learned of the access line calls reporting that Barhorst, referring to Moland, said, "'I am not going to work for this n-gg-r anymore,'" that Ballard referred to Moland as a "'coon,'" and that Little and Ellis called Moland a "'n-gg-r.'"[5] Although it is undisputed that McWane conducted an investigation of the access line calls and that the company's in-house investigator concluded she could not "substantiate any type of racial discrimination at the facility," Wakefield and Cummins did not

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[4] "'[B]ecause of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.'" (*Harris*, *supra*, 56 Cal.4th at p. 218; see *ibid.* [construing "because of" in section 12940, subdivision (a), in light of federal courts' interpretation of the same phrase in title VII]; *Guz, supra,* 24 Cal.4th at p. 354.)

[5] At trial Williams testified she never actually heard Ellis refer to Moland using a racial slur.

read the investigator's report before terminating Moland's employment. In addition, Moland's human resources expert testified in detail about the numerous deficiencies in McWane's investigation (including its limited scope), and Cummins testified he still had reason to believe even after the investigation that some employees might "go to" the EEOC (as Moland eventually did).

Moreover, there was no evidence that Wakefield, Cummins, or Dart ever documented any instance where Moland's "management style" caused discord in the plant, despite Cummins's request for Dart to do so, or that Moland's supervisors ever told him his performance as a manager was deficient in any way. There was also no dispute that Barhorst called Moland a "nigger" or that McWane failed to take any action to discipline Barhorst, contrary to the company's anti-harassment and equal employment opportunity policies, both of which prohibited racial discrimination, harassment, and racial slurs. And from the evidence Clow rehired Barhorst after firing Moland because Clow needed Barhorst's valuable skill set and unique services, the jury could reasonably infer Clow terminated Moland, the only African American employee at the Corona plant, to placate Barhorst because he did not like the color of Moland's skin. (See *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1123-1124 [employer's "permissive response to harassing actions undertaken by coworkers and supervisors, combined with the absence of black supervisors and managers in the workplace, also is circumstantial evidence of pretext"]; *Pavon v. Swift Transp. Co.* (9th Cir. 1999) 192 F.3d 902, 909 [jury could have inferred intentional discrimination where management never "seriously investigated" racial slurs and where the company had a "blame-

the-victim mentality, wherein it wrongly perceived [the plaintiff] as the problem, labeled him a troublemaker and terminated him"].) It was a reasonable inference from the evidence that McWane fired Moland because the company thought his race, rather than the white employees who called him "nigger" and "coon," was the problem.

McWane argues Wakefield and Cummins decided to terminate Moland on February 16, 2012 because of Moland's "conflicts with and insubordination to Dart and problematic management style, including failure to communicate well with his subordinates," put that decision "on hold" after receiving the access line calls, then reinstated or re-made the same decision on March 27, 2012 for the same (pretextual, as the jury found) reasons, as if nothing else transpired. But even assuming Wakefield and Cummins decided on February 16, 2012 to terminate Moland's employment, they made another decision on March 27, 2012 to terminate Moland's employment after Hendrix's investigation, except that by the time they made the second decision they had knowledge of the access line calls and Moland's allegation that Barhorst called him a "nigger," which Hendrix testified (despite the conclusions of her report) was "blatant discrimination." That Wakefield and Cummins may have decided to terminate Moland before learning of the racially motivated remarks by Barhorst and others does not negate the racial motivation underlying their second decision. (See *Husman v. Toyota Motor Credit Corp.*, *supra*, 12 Cal.App.5th at p. 1182 ["a discriminatory motive may have influenced otherwise legitimate reasons for the employment decision"]; cf. *Harris*, *supra*, 56 Cal.4th at pp. 224-225 ["when 'a preponderance of all the evidence demonstrates that the adverse employment action was

caused at least in part by a discriminatory motive,'" an employer cannot avoid liability by demonstrating it would have reached the same decision absent the discriminatory motive]; *id.* at pp. 232-233 [allowing an employer's "same decision" showing to defeat liability under section 12940, subdivision (a), would be contrary to the purposes of FEHA].)[6]

McWane also argues it cannot be liable for discrimination based on racial slurs or animosity from Moland's subordinates and coworkers. McWane misunderstands Moland's theory of liability. Moland did not argue in connection with his cause of action for discrimination McWane was liable for racial slurs made by Moland's subordinates and coworkers. Instead, Moland argued those remarks evidenced what the trial court called "race issues" at the Corona plant that McWane chose to handle by

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[6] McWane argues this is not a "mixed-motive" case because the jury found Moland's "race or color was a substantial motivating reason in McWane's decision to discharge [Moland], and there was no other substantial motivating reason." The jury found that, "[s]tanding alone, . . . Moland's alleged inability to get along with his superiors, coworkers and subordinates" was not a substantial motivating reason for his termination. This finding suggests the jury did not believe McWane's argument Wakefield and Cummins decided to terminate Moland for legitimate reasons on February 16, 2012. Although McWane does not directly contest this implied finding, it is supported by substantial evidence, including the uncontested facts that, prior to February 16, 2012, no one at Clow ever told or warned Moland he needed to improve his management or communication skills, offered training to improve his management or communication skills, gave him a negative performance review, documented or disciplined him for any deficient performance, or documented the decision to terminate him on February 16, 2012.

terminating Moland's employment rather than creating a more inclusive and less hostile work environment. As discussed, that was an employment decision based on race.

Finally, McWane argues "'a strong inference'" of no discriminatory motive arose from the fact that the same decisionmakers hired, promoted, and fired Moland within 22 months. (See *Husman*, *supra*, 12 Cal.App.5th at pp. 1188-1189; *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 809 ["'where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive'"].) "According to this theory, ""[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.""" (*Husman*, at p. 1188; see *Horn*, at p. 809.) "While once commonly relied on by courts affirming summary judgment against a plaintiff alleging discriminatory action, the same-actor inference has lost some of its persuasive appeal in recent years. . . . [I]n *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 [(*Nazir*)] Division Two of the First District—the same court that had previously decided *Horn v. Cushman & Wakefield Western, Inc.*—cautioned that, while same-actor evidence could generate an inference (and not a presumption) of nondiscrimination, 'the effect should not be an a priori determination, divorced from its factual context[,] . . . be placed in a special category, or have some undue importance attached to it, for that could threaten to undermine the right to a jury trial by improperly easing the burden on employers in

summary judgment.'" (*Husman*, at pp. 1188-1189; *Nazir*, at p. 273, fn. omitted.)

Like the facts in *Nazir*, the facts of this case are not well suited to the same-actor inference, particularly on appeal after a jury verdict in favor of the plaintiff. (See *Nazir*, *supra*, 178 Cal.App.4th at pp. 274-277.) Moland did not argue that Wakefield and Cummins hired him despite their dislike for African Americans and then later discriminated against him or that Wakefield and Cummins developed a prejudice against African Americans during Moland's tenure at the Corona plant. Instead, he argued Wakefield and Cummins made an economic decision based on the color of his skin, i.e., they decided to sacrifice Moland and McWane's legal duty not to discriminate in favor of keeping Barhorst (and Dart) happy and the plant more productive. Moland's theory did not rely on the "psychological science" underlying the same-actor inference. (See *Husman*, *supra*, 12 Cal.App.5th at p. 1189 [describing the psychology underlying an "'initial positive employment decision and a subsequent negative employment decision against a member of a protected group'"].) In any event, to the extent an inference of nondiscriminatory motive may have arisen, Moland rebutted that inference by presenting evidence of the racial reasons and motivations underlying Wakefield and Cummins's employment decision. Moland satisfied his burden by persuading the jury Wakefield and Cummins did not "honestly believe" in the reasons they gave for their decision to terminate Moland's employment. (See *Guz*, *supra*, 24 Cal.4th at p. 358; *Veronese v. Lucasfilm Ltd.*, *supra*, 212 Cal.App.4th at p. 21.) McWane's same-actor

argument does not prove there was no substantial evidence to support the verdict.[7]

B. *Substantial Evidence Supported the Jury's Award of Punitive Damages*

McWane contends substantial evidence did not support the jury's finding that an officer, director, or managing agent of McWane engaged in sufficiently malicious, oppressive, or fraudulent conduct to justify an award of punitive damages. Viewing the evidence in the light most favorable to Moland, we agree with the trial court's ruling on McWane's posttrial motion that substantial evidence supported the jury's finding McWane engaged in or ratified conduct that was malicious, oppressive, or fraudulent.

1. *Applicable Law and Standard of Review*

"Punitive damages may be awarded only on proof by 'clear and convincing evidence' that the defendant 'has been guilty of oppression, fraud, or malice.'" (*Mazik v. Geico General Ins. Co.* (2019) 35 Cal.App.5th 455, 462 (*Mazik*); see Civ. Code, § 3294, subd. (a).) "[Civil Code] [s]ection 3294 defines 'malice' as intentional injury or 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights

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[7] McWane argues that, because substantial evidence did not support the verdict for Moland on his cause of action for discrimination, his cause of action for failure to prevent discrimination under section 12940, subdivision (k), also fails. Because substantial evidence supported the verdict on Moland's cause of action for discrimination, it is McWane's challenge to the verdict on the cause of action for failure to prevent discrimination that fails.

or safety of others.' [Citation.] 'Oppression' is 'despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.'" (*Mazik*, at p. 470; see Civ. Code, § 3294, subd. (c).) "'Conscious disregard' means "'that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences.'" [Citation.] Put another way, the defendant must 'have *actual knowledge* of the risk of harm it is creating and, in the face of that knowledge, fail to take steps it knows will reduce or eliminate the risk of harm.'" (*Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1159.) """"Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages. . . . Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate."""" (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 715-716.)

In an employment case, wrongful termination, without more, will not support an award of punitive damages. (*Scott v. Phoenix Schools, Inc.*, *supra*, 175 Cal.App.4th at p. 717.) But evidence an employer offered a pretextual basis to justify an otherwise wrongful termination may support a finding of malice or oppression. (See *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 912 [evidence the defendant passed over the plaintiff for a promotion because of her gender, and then tried to use subsequently created criteria for the job to cover up the illegal basis for the decision, supported a finding of malice or oppression]; *Stephens v. Coldwell Banker Commercial Group,*

Inc. (1988) 199 Cal.App.3d 1394, 1403-1404 [unwarranted criticism created to support a wrongful termination constituted oppressive behavior where the criticism damaged the plaintiff's reputation and subjected the plaintiff to embarrassment], disapproved on another ground in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.)

Civil Code section 3294, subdivision (b), provides that an employer may not be liable for punitive damages based on the conduct of an employee "unless the employer (1) 'had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others'; or (2) 'authorized or ratified the wrongful conduct for which the damages are awarded'; or (3) 'was personally guilty of oppression, fraud, or malice.'" "And, with respect to a corporate employer, 'the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.'" (*Mazik*, *supra*, 35 Cal.App.5th at pp. 463-464.)

"[M]anaging agents are employees who 'exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy.' [Citation.] . . . [U]nder [Civil Code] section 3294, subdivision (b), a 'plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business.'" (*Mazik*, *supra*, 35 Cal.App.5th at p. 464; see *White v. Ultramar, Inc.*, *supra*, 21 Cal.4th at pp. 566-567.) To "justif[y] punishing an entire company for an otherwise isolated act of oppression, fraud, or malice," a managing agent must have discretionary authority over "formal policies that affect a

substantial portion of the company and that are the type likely to come to the attention of corporate leadership." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 714-715 (*Roby*).) A supervisor does not qualify as a managing agent merely because he or she has the ability to hire and fire workers. (*White*, at p. 566; *Mazik*, at p. 464.) "The scope of a corporate employee's discretion and authority" is a question of fact for the jury to decide "on a case-by-case basis." (*White*, at p. 567; see *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 63.)

A plaintiff may prove oppression, fraud, or malice either by direct evidence probative of the existence of hatred or ill will or by implication from indirect evidence from which the jury may draw inferences. (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 923; *Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66-67.) We review a finding the defendant engaged in oppression, fraud, or malice for substantial evidence. (*Garcia v. Myllyla* (2019) 40 Cal.App.5th 990, 999; *Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1125.) "In applying that standard, we '"view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor."'" (*Mazik*, *supra,* 35 Cal.App.5th at p. 462.)[8]

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[8] McWane argues the standard of review is '"whether the record contains substantial evidence to support a determination by clear and convincing evidence."' The Supreme Court has granted review in a conservatorship case to decide whether, in reviewing "a trial court order that must be based on clear and convincing evidence, is the reviewing court simply required to find substantial evidence to support the trial court's order or

2. *Wakefield and Cummins Engaged in and Ratified Malicious or Oppressive Conduct*

McWane argues, as it did on the issue of its liability, that because "no racial animus" influenced the decision to terminate Moland, McWane did not engage in malicious or oppressive conduct. McWane first repeats the argument rejected by the jury that Wakefield and Cummins decided to terminate Moland on February 16, 2012, before they had any knowledge employees in Corona had used racial slurs to refer to Moland. McWane then repeats its arguments that no one in a management position "harbored racial animus" toward Moland and that, because Hendrix concluded there was no racial discrimination at the Corona plant, Wakefield and Cummins could not have terminated Moland because of his race. As discussed, however, substantial evidence supported the jury's findings that McWane terminated Moland because of his race.

Substantial evidence also supported the jury's finding that McWane acted with malice, fraud, or oppression or that one or more officers, directors, or managing agents of McWane engaged in, authorized, adopted, or approved conduct constituting malice,

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must it find substantial evidence from which the trial court could have made the necessary findings based on clear and convincing evidence?" (*Conservatorship of O.B.* (2019) 32 Cal.App.5th 626, review granted May 1, 2019, S254938.) Incorporating the clear and convincing standard of proof into the substantial evidence standard of review "is not of great significance on appeal" in this case. (See *Mazik*, *supra*, 35 Cal.App.5th at p. 462.) Under either standard of review, the evidence was sufficient to support the jury's finding that McWane engaged in oppressive or malicious conduct.

fraud, or oppression. McWane concedes Wakefield and Cummins, who made the decision to discharge Moland, were managing agents. Wakefield and Cummins admitted Moland's allegation Barhorst referred to him using "the n-word" was "serious" and "concern[ing]." They nevertheless fired Moland without reading Hendrix's report of her (inadequate) investigation and rehired Barhorst, a decision that showed """"extreme indifference"""" to Moland's rights. (*Scott v. Phoenix Schools, Inc.*, *supra*, 175 Cal.App.4th at pp. 715-716; see *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 945 [jury could infer malice where the plaintiff's supervisor used a racial slur and more senior supervisors approved the termination of the plaintiff's employment, despite never communicating any negative feedback to him], disapproved on another ground in *White v. Ultramar, Inc.*, *supra*, 21 Cal.4th at p. 574, fn. 4]; *Bains LLC v. Arco Products Co.* (9th Cir. 2005) 405 F.3d 764, 775 [defendant's "failure to remedy or even address the discriminatory effects of its employee's conduct" supported award for punitive damages "to prevent such discrimination from occurring in the future"]; *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 817-818 [upholding a punitive damages award where the plaintiff was subjected to the use of a racial slur]; *Mility v. County of Kern* (E.D.Cal. 2017) 2017 WL 3284392, at p. 3 ["The use of racial slurs or epithets is sufficient for finding maliciousness or recklessness to satisfy the standard for punitive damages."].)

Wakefield and Cummins also testified they knew the use of racial slurs violated McWane's employment policies and subjected employees to immediate disciplinary action. Thus, Wakefield and Cummins knew the use of racial epithets affected Moland's right to be free from racial discrimination in the

workplace, and their conscious disregard of that right constituted malicious or oppressive conduct. (See *Pulte Home Corp. v. American Safety Indemnity Co.*, *supra*, 14 Cal.App.5th at p. 1124 [ratification occurs where a managing agent consciously disregards, authorizes, or ratifies an act of oppression, fraud, or malice]; *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174, 1198-1199 [a plaintiff may demonstrate intentional discrimination sufficient to support punitive damages award under title VII by "'demonstrating that the relevant individuals knew of or were familiar with the antidiscrimination laws and the employer's policies for implementing those laws'"].)

There also was evidence Wakefield and Cummins downplayed the significance of the allegations of race discrimination in the Corona plant by suggesting the possibility Dart or Barhorst might resign was more important. Wakefield testified Barhorst was "the only one in the facility that could efficiently or effectively run the equipment that was there [in Corona]. So that was a concern." And Cummins wrote to Wakefield and Hendrix that the access line calls alleging multiple racist incidents were "a small part of what we're dealing with," which Cummins explained referred to his concern Dart was going to resign. Based on this evidence, and McWane's decision to rehire Barhorst despite his racist remarks, the jury could conclude that "the corporate consciousness of [McWane] fostered tolerance of discrimination." (*Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 Cal.App.3d 793, 802.)

C. *The Punitive Damages Award Was Excessive*

McWane argues the punitive damages award of $13,800,000 was excessive under the United States Constitution and should be reduced to no more than the amount of compensatory damages. The trial court rejected McWane's argument, concluding "the punitive damages award is in the 'single-digits' ratio (6 to 1) and thus arguably within [the] constitutional strictures for exemplary damages—as well as comparable to other verdicts in recent employment cases." We review de novo whether an award of punitive damages is excessive under the federal Constitution. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172 (*Simon*); *Mazik*, *supra*, 35 Cal.App.5th at p. 463.)

"'The due process clause of the Fourteenth Amendment to the United States Constitution places constraints on state court awards of punitive damages.'" (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 84; see *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416-418 [123 S.Ct. 1513] (*State Farm*); *Roby*, *supra*, 47 Cal.4th at p. 712.) "'The imposition of "grossly excessive or arbitrary" awards is constitutionally prohibited, for due process entitles a tortfeasor to "'fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'"'" (*Bankhead*, at p. 84; see *Simon*, *supra*, 35 Cal.4th at p. 1171.) The United States Supreme Court in *State Farm* articulated "'three guideposts' for courts reviewing punitive damages: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil

penalties authorized or imposed in comparable cases.'" (*Roby,* at p. 712, quoting *State Farm,* at p. 418; see *Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 371-372 (*Nickerson*); *Simon*, at pp. 1179-1180; *Mazik*, *supra*, 35 Cal.App.5th at p. 471.)

1. *Reprehensibility*

"Of the three guideposts that the high court outlined in *State Farm* [citation], the most important is the degree of reprehensibility of the defendant's conduct. On this question, the high court instructed courts to consider whether '[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.'" (*Roby*, *supra*, 47 Cal.4th at p. 713, quoting *State Farm*, *supra*, 538 U.S. at p. 419.)

With regard to the first subfactor, the harm to Moland was "'physical' in the sense that it affected [his] emotional and mental health, rather than being a purely economic harm." (*Roby*, *supra*, 47 Cal.4th at p. 713.) Moreover, although McWane did not "purposefully threaten[ ] the lives of the innocent" (*Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 219 (*Gober*)), the intentional deprivation of freedom from discrimination on the basis of race or ethnicity is highly reprehensible because "intentional discrimination is . . . a serious affront to personal liberty" (*Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F.3d 1020, 1043). In addition, because it also was reasonable

to infer McWane's discrimination and failure to prevent discrimination would affect Moland's emotional well-being, McWane's "'conduct evinced an indifference to or a reckless disregard of the health or safety of others.'" (*Roby*, at p. 713; see *State Farm, supra*, 538 U.S. at p. 419.) Thus, the first and second subfactors indicate considerable reprehensibility.

The third subfactor is also present. At the time McWane terminated Moland's employment, Moland was 51 years old and supporting a family of three that included a young daughter. Moland was therefore financially vulnerable. (See *Gober*, *supra*, 137 Cal.App.4th at p. 220 [grocery store employees who relied on their jobs for their livelihood were financially vulnerable]; *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists* (9th Cir. 2005) 422 F.3d 949, 958 (*Planned Parenthood*) [physicians whose practices were targeted by anti-abortion protestors were financially vulnerable because "their livelihoods depended upon their practices"].)

"Under the fourth subfactor, conduct that is recidivistic can be punished more harshly than an isolated incident." (*Gober*, *supra*, 137 Cal.App.4th at p. 220.) Under this subfactor, a court may consider whether an employer engaged in multiple incidents of malicious or oppressive conduct against the plaintiff or others that independently would support an award of punitive damages. (See *Roby*, *supra*, 47 Cal.4th at pp. 713-714 [misconduct of employees not attributable to corporate defendant does not support a finding of recidivistic conduct]; *Gober*, at p. 221 [recidivistic conduct includes illegal or wrongful conduct toward others that was similar to the tortious conduct that injured the plaintiff].) For example, "a series of unreasonable decisions" that caused the plaintiff's harm is not sufficient evidence of

recidivism. (*Gober*, at p. 220, citing *State Farm*, *supra*, 538 U.S. at p. 423.) Moland argues "high-level managing agents" of McWane committed "multiple reprehensible actions," but Moland presented no evidence McWane failed to prevent discrimination or discriminated multiple times against him or other employees. Moland proved only one instance of discrimination and failure to prevent discrimination (i.e., the termination of his employment). (See *Roby*, at p. 714 [adoption of discriminatory attendance policy "was a single corporate decision"].) This subfactor therefore weighs against a high degree of reprehensibility.

The last subfactor, whether the harm was the result of intentional malice, trickery, or deceit, or mere accident, indicates at least a moderate degree of reprehensibility. Moland introduced evidence McWane terminated his employment to retain Barhorst, who resigned because he did not want to work for an African American. Indeed, Barhorst returned to McWane just weeks after Moland's termination, and there is no evidence McWane ever imposed any discipline on Barhorst or required him to have any training, which suggests McWane did not genuinely attempt to address what Cummins called "the racist issues." The lack of any evidence documenting Moland's allegedly deficient performance also could have led the jury to conclude Wakefield, Cummins, and Dart intentionally exaggerated Moland's and Dart's allegedly different "management styles" to legitimize the company's employment decision. As recently as two weeks before the access line calls, Cummins told Wakefield he was "not ready to totally blame" Moland for the "management problem" at the Corona plant. Other than speaking to Dart, whom Cummins acknowledged took the word of hourly employees over Moland's, Wakefield and Cummins did not investigate whether Moland

lacked the necessary skills to perform his duties or offer him training to address any deficiencies before summarily terminating his employment.

McWane argues its anti-discrimination and anti-harassment policies, the access line reporting system, and its prompt investigation of the access line calls mitigate the reprehensibility of its actions, and to a degree they do. But McWane failed to apply those policies to employees who made racist remarks, to adequately investigate the access line calls and Moland's allegations of racially-motivated conduct, and to implement the recommendations of Hendrix's (inadequate) investigation.

Thus, while McWane argues the reprehensibility of its conduct was "non-existent to extremely low," the evidence showed a degree of reprehensibility warranting a substantial punitive damages award. (See *Roby*, *supra*, 47 Cal.4th at p. 716 ["an act rooted in 'intentional malice'" is more reprehensible than a mere "failure to prevent the foreseeable discriminatory consequences flowing from [an] otherwise appropriate [corporate] policy"]; *Planned Parenthood*, *supra*, 422 F.3d at pp. 958-959 ["'infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty'"], quoting *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 576; *Swinton v. Potomac Corp., supra,* 270 F.3d at p. 818 [racial slurs and racially-charged jokes directed at the plaintiff, coupled with the "abject failure" of the defendant to combat such conduct, constituted "highly reprehensible conduct justifying a significant punitive damages award"]; *Pavon v. Swift Transp. Co., supra*, 192 F.3d at p. 909 [management's failure to take meaningful steps to

stop racial insults and slurs was "reprehensible enough to support the punitive damages awarded"]; see also *Bains LLC v. Arco Products Co., supra*, 405 F.3d at p. 775 ["there can be no excuse for intentional, repeated ethnic harassment, so the reprehensibility here is worse than conduct that might have some legitimate purpose"].)

2. *Ratio of Compensatory Damages to Punitive Damages*

To evaluate the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, courts consider the ratio of the punitive damages award to the compensatory damages award. Although there is no "bright-line ratio which a punitive damages award cannot exceed" (*State Farm*, *supra*, 538 U.S. at p. 425), courts have established some general guidelines for determining whether a particular award is reasonable in light of the harm caused by the defendant (see *BMW of North America, Inc. v. Gore*, *supra*, 517 U.S. at p. 581 ["the proper inquiry is '"whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred"'"]). "'[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process,'" and "'ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than 9 or 10 to 1 are suspect and, absent special justification . . ., cannot survive appellate scrutiny under the due process clause.'" (*Nickerson*, *supra*, 63 Cal.4th at p. 372; see *State Farm*, *supra*, 538 U.S. at p. 425.) More specifically, the United States Supreme

Court has observed that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." (*Ibid.*; see *Nickerson*, at p. 367 ["Absent special justification, ratios of punitive damages to compensatory damages that greatly exceed 9 or 10 to 1 are presumed to be excessive and therefore unconstitutional."].)

"Multipliers *less* than nine or 10 are not, however, presumptively *valid*." (*Simon*, *supra*, 35 Cal.4th at p. 1182.) "[D]ue process permits a higher ratio between punitive damages and a small compensatory award for purely economic damages containing no punitive element than [it does] between punitive damages and a substantial compensatory award for emotional distress; the latter may be based in part on indignation at the defendant's act and may be so large as to serve, itself, as a deterrent." (*Id*. at p. 1189; accord, *Roby*, *supra*, 47 Cal.4th at p. 718.) Indeed, the United States Supreme Court stated in *State Farm* that "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee" when "compensatory damages are substantial." (*State Farm*, *supra*, 538 U.S. at p. 425; accord, *Roby*, at p. 718; *Mazik*, *supra*, 35 Cal.App.5th at p. 474.) "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm*, at p. 425.)

The jury awarded Moland $13,800,000 in punitive damages and $2,873,514 in compensatory damages, $2,500,000 of which was past and future noneconomic damages. The ratio of punitive to compensatory damages was 4.8 to 1, which is not inherently

suspect.[9] The jury's award of noneconomic damages in this case, however, is substantially greater than the award of noneconomic damages in any of the cases cited by Moland. (See *Gober*, *supra*, 137 Cal.App.4th at p. 208 [noneconomic damages for multiple

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[9] Moland argues that, under *Nickerson*, *supra*, 63 Cal.4th 363, the trial court's post-verdict award of $1,551,605 in attorneys' fees should be added to his compensatory damages, which would reduce the ratio to 3 to 1. The California Supreme Court in *Nickerson* held that courts may include compensatory damages awarded for attorneys' fees incurred in recovering insurance benefits in calculating the ratio of punitive to compensatory damages. (*Id*. at p. 377.) The Supreme Court in *Nickerson* relied on *Brandt v. Superior Court* (1985) 37 Cal.3d 813, which held attorneys' fees are an economic loss that a plaintiff may recover as compensatory damages when an insurer breaches the implied covenant of good faith and fair dealing by failing to compensate the insured for a loss covered by the policy. (*Id*. at p. 817; see *Nickerson*, at p. 372.) But the Supreme Court in *Brandt* distinguished between attorneys' fees incurred to compel payment of benefits under an insurance policy from "attorney's fees *qua* attorney's fees, such as those attributable to the bringing of the bad faith action itself," the latter of which are not recoverable as damages. (*Brandt*, at p. 817.) And the determination of the former "must be made by the trier of fact unless the parties stipulate otherwise." (*Id*. at p. 819; see *Nickerson*, at p. 373.) Here, the parties did not stipulate to have the court determine the amount of attorneys' fees Moland would be entitled to if he succeeded at trial; indeed, the court instructed the jury not to consider attorneys' fees in its award. Instead, the court determined the amount of attorneys' fees under section 12965, subdivision (b), which does not contemplate the trier of fact determining the amount of reasonable attorneys' fees. (See § 12965, subd. (b).) Moland's award of attorneys' fees was not damages under *Nickerson* and *Brandt*.

plaintiffs ranged from $62,500 to $200,000]; *Flores v. City of Westminster* (9th Cir. 2017) 873 F.3d 739, 763 [noneconomic damages for multiple individual plaintiffs ranged from $40,000 to $100,000 for those plaintiffs who received punitive damages ranging from four to eight times compensatory damages]; *Zhang v. American Gem Seafoods, Inc.*, *supra*, 339 F.3d at p. 1040 [noneconomic damages ranging from $123,000 to $223,000]; *Swinton v. Potomac Corp.*, *supra*, 270 F.3d at p. 799 [noneconomic damages of $30,000].) Other cases with substantial punitive damages awards also involved much lower awards of compensatory damages. (See, e.g., *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 5 [reducing the ratio of punitive damages to compensatory damages to 9 to 1 where the compensatory damages were approximately $165,000]; *Planned Parenthood*, *supra*, 422 F.3d at p. 963 [affirming a 9 to 1 ratio of punitive damages to compensatory damages where the compensatory damages for the plaintiffs ranged from $375 to $40,000]; *Bains LLC v. Arco Products Co.*, *supra*, 405 F.3d at p. 775 [reprehensibility of ethnic harassment supported a ratio between 6 to 1 and 9 to 1 where the jury awarded the plaintiff $50,000 in compensatory damages].) These cases do not support significant punitive damages in addition to a substantial compensatory damages award.

Citing *State Farm* and *Roby*, McWane argues the jury's substantial award of noneconomic damages supports a punitive damages award no higher than the award for compensatory damages; i.e., a ratio of 1 to 1. The defendants' conduct in *State Farm* and *Roby*, however, was less reprehensible than McWane's. In *State Farm* the defendant committed insurance fraud that caused only economic injury, although the jury also awarded the

plaintiffs $1 million for the emotional distress caused by their ordeal. (*State Farm*, *supra*, 538 U.S. at p. 426.) In *Roby* the defendant adopted a facially neutral employee attendance policy that had a discriminatory effect on the plaintiff because of her medical condition. (*Roby*, *supra*, 47 Cal.4th at p. 716.) The Supreme Court characterized the defendant's conduct as "managerial malfeasance" that did not rise to the level of "oppression, fraud, or malice." (*Id.* at pp. 716-717.)

In cases where noneconomic compensatory damages and the reprehensibility of the defendant's conduct are both high, the constitutional limit may exceed a ratio of 1 to 1. For example, in *Turley v. ISG Lackawanna, Inc.* (2d Cir. 2014) 774 F.3d 140 a jury awarded the victim of racial harassment $1,320,000 in compensatory damages and $19,000,000 in punitive damages, which the trial court reduced to $5 million. (*Id.* at pp. 146-147.) The court in *Turley* acknowledged that the plaintiff suffered an unusually hostile work environment and that, while "[m]anagement was not wholly unresponsive" to the plaintiff's complaints, management failed to punish culpable employees and to investigate reports to the company's telephone complaint line. (*Id.* at pp. 149-150.) In light of the jury's substantial compensatory damages award, the court considered whether to reduce the punitive damages to equal compensatory damages under *State Farm*. (*Turley*, at p. 167, citing *State Farm*, *supra*, 538 U.S. at p. 425.) Given the "extreme nature of the defendants' conduct," however, the court held "an approximate 2:1 ratio is . . . permissible under the Constitution." (*Turley*, at p. 167; see *BMW of North America, Inc. v. Gore*, *supra*, 517 U.S. at p. 575 [reprehensibility is "the most important indicium of the reasonableness of a punitive damages award"].)

As in *Turley*, the punitive damages award here exceeds the constitutional limit. And although the conduct at issue in this case arguably is less severe than the conduct described in the *Turley* opinion,[10] the reprehensibility of McWane's conduct supports a two-to-one ratio of punitive to compensatory damages.

3. *Relationship Between the Punitive Damages Award and Civil Penalties for Comparable Conduct*

"Finally, we consider 'the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases'" to assess the constitutionality of a punitive damages award. (*Roby, supra*, 47 Cal.4th at p. 718; see *State Farm, supra*, 538 U.S. at p. 418.) "Generally, civil penalties for acts comparable to the defendant's misconduct may demonstrate the existence of fair notice that wrongful conduct could entail punitive damages." (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1314-1315.)

McWane argues the $150,000 cap on administrative fines that existed for claims before the California Fair Employment

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[10] The plaintiff in *Turley* "endured an extraordinary and steadily intensifying drumbeat of racial insults, intimidation, and degradation over a period of more than three years. The demeaning behavior . . . included insults, slurs, evocations of the Ku Klux Klan, statements comparing black men to apes, death threats, and the placement of a noose dangling from the plaintiff's automobile." (*Turley*, *supra*, 774 F.3d at p. 146; see *id*. at pp. 147-150 [describing in detail the conduct underlying the plaintiff's causes of action for unlawful discrimination and intentional infliction of emotional distress].)

and Housing Commission (FEHC) prior to certain amendments to FEHA that became effective January 1, 2013 suggests a lower punitive damages award is appropriate. (See *Roby*, *supra*, 47 Cal.4th at pp. 718-719 [administrative fine under former § 12970, subd. (a)(3), could not exceed $150,000]; former § 12970, repealed by Stats. 2012, Ch. 46, § 50.) Even if the prior cap on administrative fees applied to a hypothetical FEHC proceeding in 2012 (Moland had three years in which to file a complaint with the FEHC under section 12960, subdivision (e), and did not file the complaint in this action until 2014),[11] the Supreme Court in *Roby* approved a punitive damages award of almost $2 million despite the cap on administrative fines that was still in effect during the pendency of that action. (See *Roby*, at p. 719.) Thus, while this guidepost may weigh in favor of a constitutional limit lower than the jury's award, it does not mandate a significantly lower award.

Having applied the test for constitutionality articulated in *State Farm*, we conclude a ratio of punitive damages to compensatory damages of 2 to 1 is the federal constitutional limit under the circumstances in this case. This conclusion takes into account the moderately high degree of reprehensibility of

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[11] In any proceeding commencing on or after January 1, 2013, the prior cap on administrative fines would no longer have restricted the amount of the fine awarded to Moland. (See *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 953 ["legislation is deemed to operate prospectively only, unless a clear contrary intent appears"]; *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475 ["'Generally, statutes operate prospectively only.'"].)

McWane's conduct and the jury's substantial award of compensatory damages, which included a substantial award for noneconomic damages. A punitive damages award of $5,747,028 will have the appropriate deterrent effect in light of McWane's wrongdoing without imposing a constitutionally excessive or arbitrary award. (See *State Farm*, *supra*, 538 U.S. at pp. 417-418; *Simon*, *supra*, 35 Cal.4th at p. 1171.) Instead of ordering a retrial on the question of punitive damages, we reduce those damages to the $5,747,028 maximum. (See *Roby*, at p. 720; *Simon,* at pp. 1187-1188.)[12]

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[12] McWane also argues the jury's award of punitive damages was excessive under California law because it was "the product of passion and prejudice." McWane argues counsel for Moland "continuously asked inflammatory leading questions unsupported by any admissible evidence, repeatedly sought to elicit inadmissible evidence, improperly introduced irrelevant evidence of [Moland's] summarily adjudicated harassment claims, and utilized the illegally-obtained and inadmissible recordings to inflame the passions of the jury." Counsel for McWane, however, either failed to object to the allegedly improper questions or did object and the trial court sustained the objection. In the latter instances, McWane does not argue the trial court erred in failing to admonish the jury or in refusing to take any requested remedial measures. McWane therefore forfeited this argument on appeal. (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794-795; *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 598-599.)

D. *The Alleged Misconduct of Moland and His Attorneys Did Not Entitle McWane to a Terminating Sanction or a New Trial*

On June 22, 2017, during the trial, counsel for Moland attempted to introduce into evidence certain audio recordings Moland made of his coworkers talking about him outside his presence. Moland testified he sometimes left an audio recorder on his desk inside an office he shared with Jackson and Ballard, and Jackson testified he was aware of the recorder and did not object to being recorded. McWane objected to the admission of the recordings at trial because Moland did not produce them to McWane in discovery or inform McWane they existed. The trial court sustained the objection, sustained objections to questions asking for the content of the recordings, and instructed the jury the recordings could not be admitted into evidence because Moland had not disclosed them in discovery. McWane moved for sanctions, including a terminating sanction, for discovery abuse. It appears, however, the trial court never ruled on that motion. McWane renewed its request for terminating sanctions in its motion for a new trial, which the trial court denied. McWane argues the trial court erred in failing to grant its requests for a terminating sanction or a new trial based on discovery abuse and subsequent misconduct by Moland and his attorneys.

1. *Relevant Proceedings*

In December 2014 McWane served a request for production of documents including "[t]ape recordings, sound reproductions, . . . computer data, . . . data processing cards or tapes, and computer disks or diskettes" that "concern, refer, relate to, evidence, support, refute, discuss, mention or have

anything whatsoever to do with" the allegations in the complaint. In February 2015 Moland asserted a number of objections and produced several hundred pages of responsive documents, but he did not produce any audio recordings.

McWane deposed Moland on March 16, 2015. Counsel for McWane asked Moland if he ever "use[d] an audio recorder to record conversations with anyone at Clow Valve." Moland responded, "No. But I did have an audio recorder to keep notes that I used early on at the company." Counsel for McWane followed up, "You had an audio recorder on your desk?" Moland said, "Yes." Counsel for Moland asked, "Did you ever use it to record anyone's conversations with you?" Moland replied, "No." Technically, Moland's answer was accurate, because the audio recordings he later sought to admit at trial were of conversations between other employees and not of "conversations with [him]."

On June 21, 2017, approximately one week after trial began, counsel for Moland asked Ballard questions about whether he ever joked with another employee about shooting Moland while going "coon hunting" and about whether he had participated in several other very specific conversations with coworkers. Counsel for Moland's questions were based on the undisclosed audio recordings. Ballard responded negatively to each question without objection from counsel for McWane. The next day McWane filed written objections to this line of questioning, arguing the questions were improper "did you know" questions that were not based on any evidence and were contrived to inflame the jury. McWane asked the court to admonish the jury not to consider the questions as evidence. The court agreed and instructed the jury at that time that "[w]hat the

attorneys say during the trial is not evidence." The court provided the same instruction at the end of the trial.

During his cross-examination of Jackson, counsel for Moland asked whether Jackson had seen a tape recorder on Moland's desk in the office Jackson and Moland shared. Jackson stated that he had and that, "if [Moland] wants to tape record, he can tape record." Later in the questioning, counsel for Moland asked Jackson whether Barhorst "gets away with a lot of stuff . . . including using racial slurs." Jackson said, "No," after which counsel for Moland approached the bench and asked the court to admit "audios that we have that contradict Mr. Jackson's testimony." Counsel for Moland explained "these are audios that were picked up" when Moland had his recorder on his desk as Jackson described.

Counsel for McWane objected, arguing that the recordings were "illegal tapes under Penal Code [section] 632," not produced in discovery, not on the exhibit list, and never disclosed to McWane. Counsel for Moland said the "recorder was out in the open, everyone knew that Mr. Moland was recording," the recordings were "never requested specifically in discovery," and the recordings would impeach Jackson's testimony. After a discussion regarding the scope of McWane's requests for production of documents, the trial court tentatively sustained the objection.

During McWane's cross-examination of Moland the next day of trial, June 26, 2017, counsel for McWane asked Moland about the undisclosed recordings. Moland said that he thought he had complied with McWane's requests for production of documents and that he did not give the recordings to his counsel until "a couple months ago or so." He stated, "It may have been a

miscommunication with my attorneys, but I don't honestly remember audios being part of any of the document [requests]." During counsel for Moland's redirect examination, counsel asked Moland what he heard on one of the recordings, and counsel for McWane objected. During a sidebar discussion, the trial court asked counsel for McWane what remedy he wanted, and counsel for McWane said, "[Moland] shouldn't be able to use these tape recordings and . . . he shouldn't be allowed to testify what's on the tape recordings that he listened to." The trial court agreed.

Counsel for Moland proceeded to ask Moland several questions alluding to the content of the recordings, prompting additional objections from counsel for McWane, which the court sustained. The trial court then explained to the jury, "There are reasons why the tapes aren't coming in. The defense, about two years ago maybe or something like that, made a blanket request for all documents similar to this, audio recordings and all kinds of recordings, and they were not provided. [¶] It is absolutely vital that any documents that you have that are asked for by the opposition . . . must be provided. And they weren't provided, and therefore, I'm not going to allow them into evidence."

McWane filed a motion to compel discovery and for sanctions against Moland. McWane argued the audio recordings would support its after-acquired evidence defense because "Moland's making of illicit recordings constitute[d] misconduct that would have led to his termination." McWane also argued Moland and his counsel engaged in serious misconduct and violations of the discovery process that warranted terminating sanctions. The record does not include any reference to a ruling on McWane's motion, and it is unclear whether the trial court

was aware of the motion at the time it excluded the audio tapes and informed the jury of Moland's discovery violation.[13]

That afternoon McWane called Tiffany Tremmel, the human resources manager who replaced Cummins after his retirement, to testify. Tremmel testified that McWane would terminate a supervisor for breaking any law, including recording a coworker without his or her permission, and that McWane would have terminated Moland had the company known Moland surreptitiously recorded his coworkers' conversations. On cross-examination, Tremmel admitted neither she nor Cummins investigated allegations in the access line calls that Ellis "'record[ed] conversations between [Moland] and other employees in order to get them in trouble.'" She also admitted that Ellis has never been investigated for that alleged conduct and that McWane did not have a written policy prohibiting an employee from recording others with or without their permission.

Following trial McWane reiterated the arguments from its motion for discovery sanctions in its motion for a new trial. McWane argued Moland's failure to disclose the audio recordings "was an irregularity that prevented McWane from having a fair trial, that subjected McWane to unfair surprise, that constituted willful suppression of evidence, and that resulted in errors in law that McWane objected to at trial." (See Code Civ. Proc., § 657.)

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[13] Moland's respondent's brief states he "had no opportunity to respond in writing to McWane's motion for sanctions filed on June 26, 2017 [citation], granted the same day," and cites those portions of the reporter's transcript where the court excluded the recordings from evidence. The trial court's minute order for June 26, 2017 does not refer to McWane's motion to compel discovery and for sanctions.

"Absent terminating sanctions," McWane argued, "misconduct of the type committed by Moland is at least per se grounds for a new trial under [Code of Civil Procedure section 657]." The trial court denied the motion.

In its opening brief on appeal McWane argues the trial court abused its discretion in not granting McWane's request for terminating sanctions. Although there is no minute order reflecting a ruling on that request, the trial court undeniably did not grant it, and Moland appears to concede the court ruled on McWane's motion during trial. McWane also argues it was entitled to a new trial under Code of Civil Procedure section 657 because the misconduct by Moland and his attorneys "were irregularities in the proceedings that severely prejudiced McWane."

2. *The Trial Court Did Not Abuse Its Discretion in Denying McWane's Request for Terminating Sanctions*

Failing to respond to an authorized method of discovery is a misuse of the discovery process subject to sanctions, including a terminating sanction under the Code of Civil Procedure and the court's inherent authority. (Code Civ. Proc., §§ 2023.010, subd. (d), 2023.030, subd. (d); see *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, 190-191 (*Howell*) [identifying statutory and common law authority for imposing discovery sanctions]; *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1516 (*Van Sickle*); *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 765 (*Slesinger*).) "Other sanctionable discovery abuses include providing false

discovery responses . . . .” (*Howell*, at p. 191; see *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 333.)

“‘The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should “‘attempt[ ] to tailor the sanction to the harm caused by the withheld discovery.’” [Citation.] The trial court cannot impose sanctions for misuse of the discovery process as a punishment.’” (*Van Sickle*, *supra*, 196 Cal.App.4th at p. 1516; see *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992.) “‘“Discovery sanctions ‘should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery.’” [Citation.] If a lesser sanction fails to curb abuse, a greater sanction is warranted: continuing misuses of the discovery process warrant incrementally harsher sanctions until the sanction is reached that will cure the abuse.” (*Van Sickle*, at p. 1516; see *Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604 (*Lopez*) [trial court should select a sanction that is tailored to the harm caused by the withheld discovery].)

“‘A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction.”’” (*Van Sickle*, *supra*, 196 Cal.App.4th at p. 1516; see *Howell*, *supra*, 18 Cal.App.5th at p. 191 [“sanctions are generally imposed in an incremental approach, with terminating sanctions being the last resort”]; *Lopez*, *supra*, 246 Cal.App.4th at p. 604 [“the terminating sanction is a drastic penalty and should be used

sparingly"].) In considering whether to impose a terminating sanction, the trial court must also consider "the nature of the misconduct (which must be deliberate and egregious, but may or may not violate a prior court order), the strong preference for adjudicating claims on the merits, the integrity of the court as an institution of justice, the effect of the misconduct on a fair resolution of the case, and the availability of other sanctions to cure the harm." (*Slesinger, supra*, 155 Cal.App.4th at p. 764.) "A trial court must be cautious when imposing a terminating sanction because the sanction eliminates a party's fundamental right to a trial, thus implicating due process rights." (*Lopez*, at p. 604; see *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 613 ["The rule that a sanction order cannot go further than is necessary to accomplish the purpose of discovery . . . is rooted in constitutional due process."].) The trial court, however, "may impose terminating sanctions as a first measure in extreme cases, or where the record shows lesser sanctions would be ineffective." (*Howell*, at pp. 191-192.)

"A court has broad discretion in selecting the appropriate penalty, and we must uphold the court's determination absent an abuse of discretion." (*Lopez*, *supra*, 246 Cal.App.4th at p. 604; see *Howell*, *supra*, 18 Cal.App.5th at p. 191; *Van Sickle*, *supra*, 196 Cal.App.4th at p. 1516.) "We defer to the court's credibility decisions and draw all reasonable inferences in support of the court's ruling." (*Lopez*, at p. 604; see *Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390.) "'Sanction orders are "subject to reversal only for arbitrary, capricious or whimsical action."'" (*Van Sickle*, at p. 1516; accord, *Howell*, at p. 191.)

Here, even assuming Moland engaged in purposeful discovery misconduct by lying in his deposition and withholding

the audio recordings in response to a relevant request for production of documents, the trial court did not abuse its discretion in imposing the sanctions it did rather than imposing a terminating sanction. The trial court acted well within its discretion in imposing the lesser sanctions of excluding the audio recordings, sustaining counsel for McWane's objections to questions that attempted to elicit the contents of the recordings, instructing the jury not to consider counsel's questions as evidence, and explaining to the jury Moland failed to comply with McWane's discovery requests. McWane's motion for sanctions did not identify any prior discovery abuses or a pattern of misconduct that might have warranted more severe sanctions, such as issue or evidentiary sanctions, much less a terminating sanction in the first instance. (See *Howell*, *supra*, 18 Cal.App.5th at pp. 191-192.)

McWane cited in the trial court and cites on appeal *Slesinger*, *supra*, 155 Cal.App.4th 736. In *Slesinger* the plaintiff hired a private investigator who trespassed on the defendant's private property and its document destruction firm, took thousands of documents marked confidential and privileged, and provided those documents to the plaintiff and its counsel. (*Id.* at pp. 740-742, 744, 747-748.) The plaintiff repeatedly disavowed knowledge of how it obtained the documents, altered the documents to remove "confidential" markings or stamps, failed to keep records of which documents the plaintiff kept and which it discarded, claimed not to have used the documents in the litigation, and refused to produce the documents in discovery despite appropriate requests for production. (*Id.* at pp. 744-747, 754, 755-756, 768.) The plaintiff's principal also denied in her deposition she hired the private investigator. (*Id.* at

pp. 744-745.) Based on this litany of deliberate and egregious wrongdoing, and the trial court's finding the plaintiff would not comply with any other remedial order, the court in *Slesinger* concluded "no remedy short of terminating sanctions can effectively remove the threat [to the administration of justice] and adequately protect both the institution of justice and [the defendant] from further . . . abuse." (*Id.* at p. 756.)

McWane did not claim or seek to prove Moland or his attorneys stooped to the level of the plaintiff in *Slesinger*. Nothing in the record suggests Moland would not have complied with less drastic sanctions. The trial court refused to admit the audio recordings, and the court made the jury aware of Moland's failure to comply with legitimate discovery requests. McWane argues Moland and his counsel attempted "to ambush" McWane at trial with the audio recordings, but that's all it was; an attempt that ultimately failed. Moland's conduct did not rise to the level of egregiousness required to impose a terminating sanction as the first sanction, and the trial court did not abuse its discretion by denying McWane's request for a terminating sanction.

3. *McWane Did Not Suffer Any Prejudice from Alleged Misconduct by Moland or His Counsel*

"A jury's verdict may be vacated and a new trial ordered based on '[i]rregularity in the proceedings of the court, jury or adverse party.'" (Code Civ. Proc., § 657, subd. (1).) Misconduct of a party or a party's counsel may constitute an irregularity justifying a new trial. (See *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 303 [misconduct of counsel]; *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152,

1162, fn. 5 [misconduct of party].) A party moving for a new trial on the ground of party or attorney misconduct must establish both that misconduct occurred and that the misconduct was prejudicial. (*Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 694; *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 57.) Misconduct justifies a new trial only where it is reasonably probable the party moving for a new trial would have obtained a more favorable result absent the misconduct. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801-802; *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1411.)

We review the entire record and make an independent determination whether a party's or an attorney's misconduct was prejudicial. (*Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872; *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 296, fn. 16.) In so doing we evaluate "'(1) the nature and seriousness of the misconduct; (2) the general atmosphere, including the judge's control of the trial; (3) the likelihood of actual prejudice on the jury; and (4) the efficacy of objections or admonitions under all the circumstances.'" (*Bigler-Engler*, at p. 296.)

Even assuming McWane demonstrated misconduct, it has not shown the jury would have reached a different result had that misconduct not occurred. McWane contends the misconduct by Moland and his attorneys was "extremely prejudicial" because the jury learned Moland's audio recordings existed while their contents remained undisclosed. McWane's characterization that the jury was left with a "'grossly distorted picture'" of the statements on the recordings, however, is inaccurate. Once the jury became aware the recordings existed, counsel for Moland twice asked Moland questions that could have elicited information about their content, but in both instances the court

sustained counsel for McWane's objections. The jury may have inferred from McWane's objections the content of the recordings did not reflect well on McWane, but the trial court instructed the jury to consider only evidence admitted at trial and to "totally disregard" testimony stricken by the court. Except in cases of extreme misconduct, which McWane has not shown, we presume the jury followed the court's instructions. (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at pp. 803-804; see *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1123 [counsel's brief mention of inadmissible evidence was "very unlikely" to affect the verdict, where the trial court admonished the jury to disregard the question].)

Moreover, the jury's split verdict demonstrated the jury "rationally consider[ed] the evidence admitted at trial" despite any misconduct. (*Bigler-Engler v. Breg, Inc.*, *supra*, 7 Cal.App.5th at p. 297.) Moland presented strong evidence McWane knew its employees referred to Moland using extremely offensive racial slurs, conducted an inadequate investigation of that conduct, and fired Moland in order to retain a manager who failed to take appropriate action and to rehire one of the worst offenders. Neither Moland's disclosure of the recordings in discovery nor his attorneys' silence with regard to their existence at trial would have resulted in a more favorable verdict for McWane.

McWane also argues the misconduct by Moland and his attorneys prevented McWane from preparing its defense based on the after-acquired evidence doctrine. Also not accurate. "The doctrine of after-acquired evidence refers to an employer's discovery, *after* an allegedly wrongful termination of employment . . . , of information that would have justified a

lawful termination." (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 428.) The employer has the burden to demonstrate the employee would have been terminated as a matter of settled company policy. (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 846.) McWane presented its after-acquired evidence defense to the jury, and the jury rejected it. There may be some truth to McWane's assertion it would have done more to prepare its defense prior to trial had it known of Moland's recordings earlier, but no amount of preparation could have changed the uncontested facts that several McWane supervisors (including Wakefield, Cummins, Dart, and Hendrix) were aware of allegations Ellis also recorded her colleagues without their consent and that McWane never confronted her or conducted an investigation. Thus, McWane could not have proven that Moland's """wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it""" or """that such a firing would have taken place as a matter of 'settled' company policy.""" (*Murillo*, at pp. 845-846; see *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 362-363 [115 S.Ct. 879].)[14]

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[14] Because we affirm the judgment on liability, we do not consider Moland's cross-appeal challenging the trial court's order granting summary adjudication on his harassment cause of action. In his opening brief as cross-appellant, Moland states: "If McWane's appeal is granted and retrial is ordered, then [the trial court's order granting summary adjudication of Moland's cause of action for harassment] should be reversed and Moland's harassment claim should be resolved by a jury."

DISPOSITION

The judgment is modified to award punitive damages in the total amount of $5,747,028. As modified, the judgment is affirmed. Moland is to recover his costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.