GINA CAVE, Plaintiff and Respondent, v. CALIFORNIA DEPARTMENT OF DEVELOPMENTAL SERVICES, Defendant and Appellant.

F041338

COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

2004 Cal. App. Unpub. LEXIS 8569

September 21, 2004, Filed

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PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Tulare County, No. 01-195382. Joseph A. Kalashian, Judge.

DISPOSITION: The judgment is affirmed. Respondent is awarded costs on appeal.

COUNSEL: Bill Lockyer, Attorney General, Andrea Lynn Hoch, Chief Assistant Attorney General, Jacob Appelsmith, Senior Assistant Attorney General, Alicia M.B. Fowler and Karin L. Polli, Deputy Attorneys General, for Defendant and Appellant.

Law Offices of Walter W. Whelan and Walter W. Whelan for Plaintiff and Respondent.

JUDGES: Dibiaso, Acting P. J.; Cornell, J., Dawson, J. Concurred.

OPINIONBY: Dibiaso

OPINION: STATEMENT OF THE CASE

Respondent Gina Cave was employed as an intermittent, part-time security guard at the Porterville Developmental Center (PDC), a facility operated by appellant California Department of Developmental Services (DDS). n1 Cave was terminated from her employment [*2] on September 15, 1999. On May 2, 2001, Cave filed an action alleging that she had been sexually harassed by a coworker, Johnny Rodriguez, and by one of her immediate line supervisors, Robert Rodriguez, n2 during the term of her employment at PDC, which constituted violations of the California Fair Employment and Housing Act (FEHA), Government Code n3 section 12900 et seq., and specifically section 12940, subdivisions (a) and (j). She also alleged that, in retaliation for her complaints about the sexual harassment, Robert Rodriguez and PDC denied her work assignments and ultimately terminated her from her position at PDC. (§ 12940, subd. (h).) Robert Rodriguez and Johnny Rodriguez were both named as individual defendants in the action, but are no longer parties to the action.

n1 We recognize that appellant DDS was the official employing agency and that PDC is not an independent legal entity. However, this lawsuit involves no other DDS facility. Therefore, for purposes of this opinion, we refer to PDC and DDS interchangeably.

n2 Although they share the same last name, Johnny and Robert are not related. [*3]

n3 All further references are to the Government Code.

After a lengthy jury trial, the jury found in favor of Cave on both causes of action. In a special verdict, the jury determined that Cave's complaints about Johnny Rodriguez and Robert Rodriguez were a motivating factor in the decision to terminate her and that she had proved by a preponderance of the evidence that Johnny Rodriguez sexually harassed her. n4 The jury also

determined that PDC knew or should have known about the harassment and failed to take appropriate, corrective action. The jury awarded Cave $ 70,000 as economic damages, $ 40,000 as emotional distress damages, and $ 75,000 as damages for the sexual harassment. n5

n4 The jury found that Cave had not proved her allegation that Robert Rodriguez had sexually harassed her.

n5 In its reply brief, PDC asks that this court not consider the time line attached as an appendix to Cave's brief. PDC admits the time line was shown to the jury during deliberations but contends it constitutes argument rather than evidence. We will not strike the appendix because the jury viewed it during deliberations and it is therefore a proper matter for review. (*People v. Wims (1995) 10 Cal.4th 293, 315* [on appeal, court examines entire record, including facts, instructions, arguments of counsel, communication with jury during deliberations and verdict].) We do not believe PDC considers this court unable to distinguish between argument and evidence. In any event, the time line could have been shown to the jury only if it were fully supported by the evidence, and PDC at trial made no objection to its use and does not in its briefs assert any error in its use.

[*4]

STATEMENT OF THE FACTS

On appeal, we accept the version of the facts most favorable to the respondent. (*Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 925, 101 Cal. Rptr. 568.)*

Cave was hired as a security guard at PDC on June 15, 1998, through a civil service examination process. She was hired for a limited-term position, which was to end on June 15, 2000. However, the position could be extended for six months and PDC could and did hire off the same civil service eligibility list for permanent full-time positions as they came available. As an intermittent security guard, Cave worked variable hours. She could be scheduled to fill in for vacationing permanent security guards or to help cover vacant positions, or she could work on an "on-call" basis whenever a need arose. As an intermittent guard, Cave worked any one of the available three shifts: days, evenings or nights. If she worked the evening or night shifts, she was paid a shift differential.

The guards were responsible for securing the perimeter of PDC's forensic area. The guards were assigned to work at one of six Observation Posts (OP 1-6), which were small, confined guardhouses located [*5] along the fence surrounding the perimeter, or assigned as the "rover," who was responsible for relieving the other OP guards for breaks and for ensuring the perimeter fence was not breached. Logs were kept at each OP to record the comings and goings of the guards. Three sergeants supervised the guards during Cave's employment at CDC: Robert Rodriguez, Kevin Benzler and Steven Pimentel. Robert Rodriguez was the Administrative Sergeant. The sergeants reported to PDC's Chief of Police, George Horvath. The sergeants directly supervised the security guards and were responsible for scheduling, calling guards to work to fill open shifts, arranging for breaks, submitting time sheets, evaluating performance and conveying directives from Horvath. Each sergeant was assigned certain tasks that could be changed at Horvath's direction. n6 On occasion there were other "Acting Sergeants" who filled the role of sergeant for short periods of time.

n6 For example, in August 1998, Robert Rodriguez was in charge of scheduling security guards. Later, Horvath assigned the responsibility to Benzler, and still later the task was given to Pimentel.

[*6]

A security guard who had a complaint or concern was expected to raise the issue first with his or her immediate supervisor -- the sergeant on duty. The sergeant was expected to "elevate" the concern by passing it to the person next higher in the chain of command. In the summer of 1998, both Benzler and Pimentel understood their responsibility was to present an issue first to Robert Rodriguez, who was to communicate the issue to Horvath. Later, the situation changed and Benzler and Pimentel were told to go directly to Horvath.

Harassment by Johnny Rodriguez

Beginning in early July 1998, Johnny Rodriguez began making unwelcome, sexually explicit comments to Cave. He repeatedly bragged of his sexual prowess with other employees and he shared his sexual fantasies about Cave and other female employees. He told Cave he wanted to have three-way sex with her and another employee so he could watch Cave with another woman. He commented about the size of his penis and invited Cave to join his exotic dancer business. On one occasion he showed Cave hickies and told her he had had a "wild night" the previous evening. Cave told Johnny Rodriguez to stop the comments because she did not want [*7] to hear anything of the sort.

According to Cave, she complained about the comments to Robert Rodriguez on three separate occasions in August 1998, but he did nothing and the harassment continued. On August 14, despite having already been told about the problem, Robert Rodriguez scheduled Cave to work on the same night shift as Johnny Rodriguez. n7 On that night, Cave went home early after complaining to Acting Sergeant Guardado that she could not work with Johnny Rodriguez because of his conduct. Guardado testified he reported Cave's complaint to Robert Rodriguez by leaving a message for him in the box on Robert Rodriguez's desk. n8

n7 Robert Rodriguez testified he did not learn about the sexual harassment until after Johnny Rodriguez's termination.

n8 Robert Rodriguez testified he never received the message.

On one occasion, when Cave insisted that the sexual offers and comments stop, Johnny Rodriguez became angry and told Cave that "if [Cave] wasn't going to join him and these other women and have [*8] three-way sex so he could watch, he was gonna slam [Cave] on the hood of his car and fuck the shit out of [her] until it hurt." Because she had not received assistance from Robert Rodriguez, Cave went to Benzler, who, along with Pimentel, elevated the complaint first to Robert Rodriguez, who said he had heard the complaint and would take care of it, and then, in mid-August, directly to Horvath. Benzler told Cave that Horvath had not heard any of her complaints before, so Cave went to Horvath and told him everything.

Horvath testified that he first heard about the harassment on August 18 when he talked with Cave. He instructed the sergeants that Johnny Rodriguez was to have no contact with certain persons, although he did not believe he mentioned Cave by name, and to cease any misconduct. On August 31, at Horvath's direction, Cave met with Horvath and EEO Officer Grace Munoz Rios. She described all of Johnny Rodriguez's behavior, including the rape threat. Munoz Rios logged Cave's complaints about Johnny Rodriguez as an informal EEO complaint but did not investigate further. According to Munoz Rios, Horvath told her that Johnny Rodriguez would be moved and Munoz Rios believed [*9] this resolved the matter. Neither she nor Horvath interviewed Johnny Rodriguez.

At Horvath's direction, Johnny Rodriguez was reassigned to OP6 on September 1, 1998. Although there were no additional sexual comments after August 31, the move did not stop contact. Cave testified that she continued to have contact with Johnny Rodriguez "a lot" through October during shift changes.

Johnny Rodriguez was ultimately terminated in October 1998. In early September, Horvath directed Pimentel to conduct an investigation of other complaints made by female employees at PDC. Pimentel memorialized the results of his investigation in a memo dated September 20, 1998. n9 The memo confirmed that Johnny Rodriguez had subjected at least four other women besides Cave to similar harassment. Three of the women testified at trial. Johnny Rodriguez's initial Notice of Termination included a finding that he had harassed Cave as well as the other four women. Later, the reference to Cave was omitted. n10 At Johnny Rodriguez's *Warner* hearing, n11 PDC Director Pitchford decided to "clear" Johnny Rodriguez's name of any wrongdoing and the termination was changed to one "without fault."

n9 Pimentel testified the memo he presented to Horvath was typewritten and contained several references to statements by the victims to the effect that they were hesitant to come forward with their complaints because they feared retaliation from Robert Rodriguez, who was a friend of Johnny Rodriguez. Pimentel also testified his memo recommended that Johnny Rodriguez be placed immediately on administrative leave. PDC produced a different Pimentel memo, computer generated and containing no references to Robert Rodriguez and recommending only that the matter be investigated further. Horvath denied having ever seen a version of the memo containing references to Robert Rodriguez. He admitted however that the initials on the PDC version of Pimentel's memo were his, not Pimentel's. He said he gave the original memo back to Pimentel to correct grammatical and spelling errors and to eliminate personal opinion statements. According to Horvath, when Pimentel returned the memo it had not been initialed, and, given Horvath's time pressures, he initialed it for Pimentel. Pimentel denied Horvath ever gave back the memo for correction. [*10]

n10 PDC Personnel Director Norris Edwards claimed this was done because, under State Personnel Board rules, Johnny Rodriguez could not be disciplined twice for the same conduct. However, at trial, Edwards vacillated about whether the move to OP6 was a disciplinary

action. There was no paper trail documenting the discipline. Neither Horvath nor Robert Rodriguez considered the reassignment to be disciplinary.

n11 The purpose of the *Warner* hearing is to give the employee an opportunity to provide additional information and tell his or her side of the story. The *Warner* hearing is a limited appeal process for temporary employees. Permanent employees are afforded a *Skelly* hearing in which the disciplinary decision can be modified and in which the more formal civil service appeal process applies.

PDC has a sexual harassment policy and it trains its employees accordingly.

Sgt. Robert Rodriguez Retaliation

Robert Rodriguez and Johnny Rodriguez were friends. Soon after Cave reported her complaints to Robert Rodriguez, she noticed a change in his behavior towards her. He began [*11] making offensive gestures, calling her names, driving slowly by her assigned post, parking near her post, watching her and committing other acts of intimidation. n12 Other employees noticed Robert Rodriguez's animus towards Cave. On one occasion, Robert Rodriguez instructed Acting Sergeant Guardado not to call Cave in for work even though it was her turn. Robert Rodriguez told Guardado that Cave was a "fucking bitch" and he did not want her working. Within a day or two after talking with Horvath about Johnny Rodriguez, Cave learned that Robert Rodriguez had told several of the sergeants and some other employees that she and her husband were the subjects of a narcotic investigation by the Porterville Police Department. The statement was false. n13 On another occasion, a coworker told Cave that Officer James Bennett, another friend of Robert Rodriguez, had looked at the OP logbook after Cave had completed her shift. Bennett told the coworker that, if Robert Rodriguez did not "get" Cave, he would.

n12 Cave testified Robert Rodriguez checked on her at PDC even when he was not on duty. In response to this complaint, Horvath sent a memo to all the employees in his division instructing them not to come to the facility during off duty hours. [*12]

n13 At trial, Robert Rodriguez denied making the statement but Horvath testified Robert Rodriguez admitted making the statement and Horvath instructed him to apologize to Cave. Horvath determined that the statement was false. Despite this conclusion, PDC disciplined Robert Rodriguez only for discussing "confidential information" and not for spreading false rumors or intentionally defaming a subordinate. Personnel Director Edwards admitted that, if Robert Rodriguez had made false statements, his letter of instruction should have included this as a ground for discipline.

On September 24, 1998, Cave went back to Munoz Rios and filed a written formal complaint, this time focusing on the harassment and intimidation by Robert Rodriguez, which she perceived as a continuation of the prior harassment by Johnny Rodriguez. She also complained to Horvath about Robert Rodriguez's behavior on many other occasions.

On October 7, 1998, Cave received a letter from Munoz Rios that stated that Robert Rodriguez was "gone" and that he had transferred to another facility. Munoz Rios then called Cave and asked whether [*13] she wanted to pursue her complaint. When Cave said yes, Munoz Rios told her it "wouldn't really be any good." In fact, the statement in the letter was false; Robert Rodriguez was on vacation and had not been transferred.

On January 26, 1999, Munoz Rios sent Cave a notice stating that her EEO complaint could not be substantiated. n14 Munoz Rios had interviewed Robert Rodriguez and had concluded that, because he acted "confused," he knew nothing of Cave's complaints about Johnny Rodriguez. Also, Munoz Rios concluded there were no witnesses to Robert Rodriguez's alleged harassment of, and retaliation against, Cave. n15

n14 Although Munoz Rios testified the January 26, 1999, letter refers to Cave's complaint about Robert Rodriguez, it is undisputed this is the only response Cave received from PDC regarding her EEO complaints. Interestingly, one of the other victims also was told that her complaint that Johnny Rodriguez sexually harassed her could not be substantiated.

n15 Guardado, Benzler and Pimentel all testified they had observed the behavior Cave complained about.

[*14]

Pimentel and Benzler became concerned because of the animosity directed at Cave by Robert Rodriguez and

they discussed the issue with Horvath. In order to separate Cave and Robert Rodriguez, Horvath agreed to assign Cave to special duty work in the office under the direct supervision of Benzler and Pimentel. Robert Rodriguez was also working in the office during the daytime on a special assignment. Cave was allowed to arrange her hours so as to avoid him, which meant working evening and night hours. On May 1, 1999, Cave was reassigned to regular duty. Soon thereafter, Robert Rodriguez returned to regular duty as well and this meant Cave was once again working under his direct supervision. When Benzler and Pimentel expressed concerns about the arrangement, Horvath stated he was under pressure from upper management and from Robert Rodriguez.

Cave testified the harassing behavior continued and she ultimately requested a stress leave in late May. On May 25, 1999, Cave told Munoz Rios that she was still enduring retaliation from Robert Rodriguez and that she was going to file a complaint with the Department of Fair Employment and Housing (DFEH) because she did not feel that PDC was protecting [*15] her from Robert Rodriguez and his continuing harassment. On June 3, 1999, Munoz Rios received formal notice that Cave had filed a DFEH complaint.

PDC Retaliation

On June 3, Munoz Rios informed Cave by letter that she was under investigation as a result of a complaint against her. Cave was not told who the complainant was, although later she learned it was Alicia Reguero, a close friend of Robert Rodriguez. n16 Cave was placed on noncall status, which meant she could not be called into work and she received no pay while on leave. A consultant, Lieutenant Barber, who had been working with PDC on other matters, investigated the allegations. Several other individuals were investigated at the same time, including Reguero, Robert Rodriguez, Bennett and Benzler. These four individuals were also placed on leave, but, because they were permanent employees at the time, they received pay during the investigation. n17 Barber prepared an investigative report. The report was discussed, along with other documents, at a disposition meeting, at which it was decided that Cave should be terminated.

n16 According to Munoz Rios, Reguero filed her complaint of preferential treatment concerning work assignments in November 1998. [*16]

n17 Like Cave, Reguero, Robert Rodriguez and Benzler were served with Notices of Termination. Reguero and Robert Rodriguez were offered a settlement and both returned to work with reduced penalties. Reguero's discipline was a five-day suspension. Robert Rodriguez was demoted to Police Officer I, although, because of a pay increase in that job category, he did not take a reduction in pay.

Cave was served with a Notice of Termination, effective September 15, 1999. She had received no prior discipline and no prior warnings with respect to any of the grounds stated for termination or for any other conduct. At trial, there was substantial dispute as to who actually made the decision to terminate Cave. The original Notice was signed by Administrative Service Director John Sawyer, and the amendment by Labor Relations Analyst Susan Koski for Personnel Officer Norris Edwards. Munoz Rios and Horvath said they were not decision makers, but admitted they were part of the "disposition group." Sawyer signed the termination notice, but did not do any investigative work or verify the accuracy of the report. [*17] He testified his role was to simply review and sign the paperwork.

The Notice of Termination stated that Cave was being discharged for "failure to demonstrate merit, efficiency, fitness and moral responsibility." The specific grounds stated were:

1. That Cave boasted that her personal friendship with Benzler resulted in preferential treatment concerning work hours and job assignments.n18

n18 Koski testified that, beginning in October 1998, she received complaints from six to eight guards about Cave being given preferential treatment with respect to the number of hours she was allowed to work. Koski also testified that there were complaints about preferential treatment of Reguero by Robert Rodriguez.

2. That she received more than the 1500 hours allowed for limited term intermittent security guards with a 12-month period.

3. That she knowingly "defrauded and suborned fraud against the State of California" by accepting a shift differential for work performed during the period in which she was assigned to [*18] work on the special project (February 15 to April 30, 1999).

4. That between February and May 1999 she allowed her children to be on facility grounds, in and around secured areas while on duty, "in effect making this facility [her] child care provider and placing your children at risk to their health and safety."

5. That she lied to Investigator Barber when she denied knowledge that her children were on facility grounds for extensive periods of time.

6. That she filed a "false Police Report, alleging harassment and verbal assault by [PDC] contract employee, Janitor, Michael Davis." Furthermore, that she "secured a temporary restraining order against Mr. Davis, . . . and persuaded, as a personal favor, your close personal friend and supervisor, facility Police Officer II, Sgt. Kevin Benzler, in violation of facility policy to serve the restraining order." And, that Cave persuaded Benzler to "advocate on [her] behalf"

7. That Cave filed a second false police report, alleging harassing and threatening phone calls from a fellow [PDC] employee . . . September Stirling, whom [Cave] alleged was having an affair with [her] estranged husband, Kevin Cave, Painter, who also works [*19] at [PDC.]" This allegation also states that it was Cave who made the threatening phone calls and that she was dishonest.

The Notice of Termination was amended to include another ground for discipline -- that Cave made several "rude, harassing and threatening phone calls to fellow State employee, . . . Sheri Meier." Horvath testified that Cave's behavior constituted "serious misconduct" justifying discharge.

DISCUSSION

I.

To our astonishment, the Attorney General seems to be unaware of what we thought was the well-known principle that an appellant who challenges the sufficiency of the evidence to support an adverse judgment cannot rely upon only the evidence favorable to the appellant but must set forth in the appellant's briefs *all* relevant evidence in the record relating to the issue. (*Toigo v. Town of Ross (1998) 70 Cal.App.4th 309, 317* [when an appellant challenges the sufficiency of the evidence, all material evidence on the point must be set forth and not merely appellant's own evidence; failure to do so amounts to waiver of the alleged error and the court may presume that the record contains evidence to sustain every finding of fact]; [*20] *Jordan v. City of Santa Barbara (1996) 46 Cal.App.4th 1245, 1255;* see also *Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881, 92 Cal. Rptr. 162; Grand v. Griesinger (1958) 160 Cal.App.2d. 397, 403;* see *California Rules of Court, rule 14(a)(2)(C)* [the briefs must contain a summary of the significant facts in the record].)

Here, the Attorney General's briefs are running violations of these rules. Though many of the legal issues raised by appellant on appeal turn on factual disputes hotly contested at trial, most of which were decided against appellant by the jury, the Attorney General's briefs recite and rely solely upon the one-sided evidence supporting the case unsuccessfully sought to be made by the appellant at trial and ignore almost entirely the evidence introduced by respondent supporting the case successfully made by respondent at trial.

While we would be justified in disregarding appellant's briefs and affirming the judgment on this basis, we will not do so and instead we will address the case on the merits, based upon the complete factual record summarized in respondent's brief.

We summarize [*21] the principles that govern our review of appellant's contention that the evidence does not support the verdicts.

When a judgment or finding of fact is attacked on the ground there is no substantial evidence to sustain it, the power of the appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding or judgment. (*Foreman & Clark Corp. v. Fallon, supra, 3 Cal.3d at p. 881.)* Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion essential to the case. (*Desmond v. County of Contra Costa (1993) 21 Cal.App.4th 330, 335; Roddenberry v. Roddenbery (1996) 44 Cal.App.4th 634, 651.)* The trier of fact is not obliged to accept direct evidence of a fact (*Overton v. Vita-Food Corp. (1949) 94 Cal. App. 2d 367, 370;* disapproved on other grounds in *Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861, 864, fn. 2, 44 Cal. Rptr. 767)* or to draw an inference of fact from circumstantial evidence even though the circumstantial evidence may rationally support [*22] such an inference (*Blank v. Coffin (1942) 20 Cal.2d 457, 461-462; Antonovich v. Superior Court (1991) 234 Cal. App. 3d 1041, 1051, 285 Cal. Rptr. 863).* This means that, regardless of how overwhelming and persuasive a party believes its proof was with respect to a particular issue or defense, the trier of fact acts within its power to remain unconvinced by that evidence and to make findings consistent with such a view. This is true even in the absence of contrary evidence. (*Overton v. Vita-Foods Corp., supra, 94 Cal. App. 2d at p. 370.)*

Further, the credibility of witnesses is a matter for the trier of fact to resolve. "Accordingly, the testimony of a witness offered in support of a judgment may not be rejected on appeal unless it is physically impossible or

inherently improbable and such inherent improbability plainly appears. [Citation.] Similarly, the testimony of a witness in derogation of the judgment may not be credited on appeal simply because it contradicts the plaintiff's evidence, regardless how 'overwhelming' it is claimed to be. [Citation.]" (*Beck Development Co. v. Southern Pacific Transportation Co. (1996) 44 Cal.App.4th 1160, 1204.)* [*23]

II.

PDC contends the trial court erred in denying PDC's motion in limine to exclude the Pimentel memo and other evidence concerning Johnny Rodriguez's sexual harassment of multiple female PDC employees. PDC moved to exclude the Pimentel memo and the other evidence on the grounds that the evidence was irrelevant and unduly prejudicial and was impermissible propensity evidence. (*Evid. Code, § § 350, 352, 1101*.) The trial court denied the motion, but ruled that the memo would be admissible only for the limited purpose of establishing what information Horvath had about the nature of the complaints and whether PDC acted reasonably in response to the complaints.

Relevant evidence is "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Evid. Code, § 210*.)

PDC's knowledge concerning the nature of Johnny Rodriguez's misconduct was relevant evidence properly admitted by the trial court. (See *Bihun v. AT&T Information Systems, Inc.(1993) 13 Cal.App.4th 976, 990-991,* [*24] disapproved on other grounds, *Lakin v. Watkins Assoc. Inc. (1993) 6 Cal.4th 644.)* Evidence that tends to show that other employees complained about the same or similar conduct was also relevant to the question whether PDC acted reasonably to prevent further harassment. (*Baskerville v. Culligan Intern. Co. (7th Cir. 1995) 50 F.3d 428, 432 n19* [reasonableness of an employer's response depends, in part, on the gravity of the harassment alleged].) The evidence was damaging to appellant, but it was not unduly prejudicial or likely to confuse the jury and thus was not excludable under *Evidence Code section 352*. (*People v. Yu (1983) 143 Cal. App. 3d 358, 377, 191 Cal. Rptr. 859* [the prejudice referred to in *Evid. Code, § 352* applies to evidence which uniquely tends to evoke an emotional bias against defendant and which has very little effect on the issues; prejudicial is not synonymous with damaging].)

n19 See *County of Alameda v. Fair Employment and Housing Com. (1984) 153 Cal. App. 3d 499, 504, 200 Cal. Rptr. 381* [reference to federal decisions in title IV cases appropriate in case brought under FEHA; both statutes supported by same public policy].)

[*25]

The evidence was also not made inadmissible by *Evidence Code section 1101* because, even if it did show that Johnny Rodriguez had a propensity to harass female coworkers, it had another, highly relevant purpose -- to prove that PDC possessed information that Cave was not the only victim and chose nonetheless to leave Johnny Rodriguez on the job in a position where he would have contact with Cave and others.

The Pimentel memo, in its various forms, was also offered to show that PDC was being dishonest in its investigation and in its treatment of Cave. This evidence was relevant to the contested issue of retaliatory motive.

We find no abuse of discretion in admitting the evidence. (*Beyda v. City of Los Angeles (1998) 65 Cal.App.4th 511, 516* [appellate court reviews any ruling by trial court as to the admissibility of evidence for abuse of discretion].)

III.

PDC contends there was insufficient evidence to support the jury's finding the Cave was sexually harassed by Johnny Rodriguez.

A.

PDC maintains that Johnny Rodriguez's conduct cannot "be considered severe or pervasive enough to create an objectively hostile work [*26] environment." To the contrary, the record contains ample evidence to support a conclusion that Cave was subjected to pervasive and severe sexual harassment. (*Clark County School Dist. v. Breeden (2001) 532 U.S. 268, 270, 149 L. Ed. 2d 509* [actionable sexual harassment is conduct so severe or pervasive that it alters conditions of employment and creates abusive work environment]; *Fuller v. City of Oakland (9th Cir. 1995) 47 F.3d 1522, 1527* [plaintiff in sexual harassment litigation required to show (1) she was subjected to verbal or physical contact of a sexual nature, (2) the conduct was unwelcome, and (3) the abusive conduct was sufficiently severe or pervasive so as to alter the conditions of her employment thus creating an abusive working environment].) Whether the conduct complained of is sufficiently pervasive to create a hostile or offensive work environment is to be determined from the totality of the circumstances. (*Herberg v. California Institute of the Arts (2002) 101 Cal.App.4th 142, 149-150.)* Factors to be considered include (1) the nature of the unwelcome sexual acts or words; (2) the frequency of the offensive

acts [*27] or encounters; (3) the total number of days over which the offensive conduct occurred; and (4) the context of the conduct. (*Ibid; Harris v. Forklift Sys. (1993) 510 U.S. 17, 22, 126 L. Ed. 2d 295.)*

Cave testified that Johnny Rodriguez repeatedly made rude and offensive sexual comments to her, referring to his sexual behavior and his sexual abilities. He repeatedly invited Cave to engage in sexual activity with him and made unwelcomed sexual offers. He threatened to rape her. The conduct continued over a period of two months. n20 The workspace where the conduct occurred was small, confined and isolated. Sometimes the contact between Cave and Johnny Rodriguez was at night when Cave was working alone.

> n20 The amount and extent of the continued contact between Cave and Johnny Rodriguez was disputed at trial. In a flagrantly one-sided presentation of the facts, PDC claims that Cave "produced no evidence . . . of any days when sexual harassment could have occurred after August 5, 1998 . . . because she and Johnny Rodriguez did not work together on any shift after August 5, 1995." However, at trial, Cave testified that, even when she and Johnny Rodriguez did not work the same shift, they had contact at shift changes and that the harassment occurred on multiple occasions, not just the four shifts they worked together. Whether Cave was truthful at trial and adequately explained the difference between her deposition testimony and her trial testimony was a credibility determination for the jury. Even though Cave could not identify the exact dates she was harassed, the jury could reasonably infer, from her testimony and other supporting evidence, that the harassment continued until August 31, several weeks after PDC was informed of the problem.

[*28]

Such behavior is more than a single isolated incident, more than just boorish or offensive. (*Downes v. F.A.A. (D.C. Cir. 1985) 775 F.2d 288, 293* [although occasional, isolated, sporadic, or trivial, acts are insufficient, but a concerted pattern of harassment of a repeated, routine or a generalized nature would be], abrogated on other grounds, *Harris v. Forklift Systems, Inc. supra, 510 U.S. 17.)* The consistent nature of the behavior, the vulnerability of the work environment and the threat of violence, all are factors that the trier of fact could consider in determining whether Cave's conditions of employment had changed and whether she had indeed found herself in a hostile working environment. (See *Sheffield v. Los Angeles County (2003) 109 Cal.App.4th 153, 163-164* [threat of violence could be found to change conditions of employment; harasser made a fist and slammed fist into other palm while looking at appellant and frowning]; *Hall v. Gus Const. Co., Inc. (8th Cir. 1988) 842 F.2d 1010, 1012* [constant verbal abuse, requests for sexual relations]; *Yates v. Avco Corp. (6th Cir. 1987) 819 F.2d 630, 632* [*29] [constant rude comments to and requests for sexual favors]; *Katz v. Dole (4th Cir. 1983) 709 F.2d 251, 254* [coworkers' systematic infliction of extremely vulgar and offensive sexual slurs and insults].)

B.

PDC argues that there was insufficient evidence to establish that PDC failed to take prompt, effective, corrective action after learning of Cave's complaints about Johnny Rodriguez's conduct.

Under section 12940, subdivision (j) and (k), PDC had a duty, once it became aware of the conduct, to take reasonable steps to correct it. (*Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 606, 262 Cal. Rptr. 842; Fuller v. City of Oakland (9th Cir. 1995) 47 F.3d 1522, 1528* [in title IV case -- once employer knows of coworker harassment, a remedial obligation arises]; *Yamaguchi v. United States Dep't of the Air Force (9th Cir. 1997) 109 F.3d 1475, 1482* [in title IV case - employer is liable for coworker harassment unless it takes remedial measures].) Here, the jury could reasonably find that, although Cave reported the harassment to her immediate supervisors on more than one occasion, no [*30] action was taken for several weeks and the action ultimately taken, when it occurred, was not reasonable. (See *Guess v. Bethlehem Steel Corp. (7th Cir. 1990) 913 F.2d 463, 465* [effectiveness of employer's action is a question of fact]; *Smith v. St. Louis Univ. (8th Cir. 1997) 109 F.3d 1261, 1265* [whether employer took proper remedial action is issue of fact]; *McGinest v. GTE Service Corp. (9th Cir. 2004) 360 F.3d 1103, 1120* [the reasonableness of the remedy depends on its ability to (1) stop harassment by the person who engaged in the harassment; and (2) persuade potential harassers to refrain from unlawful conduct; to be adequate, employer must intervene promptly].)

Cave testified that she complained to Robert Rodriguez, who was her immediate supervisor, at least three times before going to Benzler in mid-August 1998. Robert Rodriguez told her that he would talk to Johnny Rodriguez but in fact did nothing. Cave went to Benzler and Pimentel because Robert Rodriguez failed to act. Benzler said he took Cave's complaints to Robert Rodriguez and then to Horvath directly. Horvath admitted that he learned of Cave's complaint on August

18, 1998, and [*31] that two days later he talked to Executive Director Pitchford about the allegation.

Horvath, on his part, took no action for at least two weeks. This delay alone supported a jury finding that PDC failed to take prompt, reasonable action after it learned of the harassment. (See *Fisher v. San Pedro Peninsula Hosp., supra, 214 Cal. App. 3d at pp. 605-606* [appellant's immediate supervisor and supervisor's superior both aware of harassment; employer liable for failure to take reasonable steps to prevent further harassment]; *Intlekofer v. Turnage (9th Cir. 1992) 973 F.2d 773, 778* [to be adequate, an employer must intervene promptly].)

After the meeting with Munoz Rios and Cave, Horvath instructed the sergeants to admonish Johnny Rodriguez to stay away from certain people, n21 maintain professional presence and cease any "inappropriate" behavior. He instructed *Robert Rodriguez* to move Johnny Rodriguez to OP6, even though Cave had told Horvath she had reported the harassing behavior to Robert Rodriguez and that he had done nothing to correct the situation. By early September, Horvath knew that Johnny Rodriguez had harassed other females at PDC. [*32] n22 Even then, Horvath did not discipline Johnny Rodriguez. n23 (*McGinest v. GTE Service Corp., supra, 360 F.3d 1103, 1120* [remedial measures must include some form of disciplinary action which must be proportionate to the seriousness of the offense]; *Ellison v. Brady (9th Cir. 1991) 924 F.2d 872, 882-883* [failure to take even the mildest form of disciplinary action, renders initial remedy insufficient].)

n21 Horvath did not mention Cave's name at the meeting. Given the vagueness of Horvath's charge, one wonders how he expected Johnny Rodriguez to know what behavior to cease.

n22 Pimentel testified he talked to Castillo on September 1, 1998, and to Horvath after each of the interviews. From the Pimentel memo, the jury could logically infer that Horvath was well aware of the danger posed by leaving Johnny Rodriguez on the job but failed to take any further corrective steps.

n23 Contrary to PDC's contention, the reassignment was not discipline. Neither Horvath nor Robert Rodriguez considered it discipline. There was no formal record of discipline, and most significantly, Robert Rodriguez testified he "asked" Johnny Rodriguez if he was "willing" to move. Robert Rodriguez testified he was not told what the problem was or who made the complaints. Again, in the absence of such basic information, and given the move was requested rather than mandated, how could the reassignment be corrective?

[*33]

Munoz Rios herself took no steps to investigate Cave's complaints of harassment by Johnny Rodriguez. Thus, she remained by her own inaction ignorant of the risks involved because she did not discover that there were multiple victims or that the harassment included risks of violence. n24 She chose instead to rely upon Horvath's assurances that the matter had been handled. n25 Compare to this laissez faire approach to the responses found reasonable in other reported decisions. (See e.g., *Berry v. Delta Airlines, Inc. (7th Cir. 2001) 260 F.3d 803* [employer immediately and extensively investigated victim's complaints, confronted the alleged harasser, separated the employees by changing their shifts, and required all employees to watch a sexual harassment training video); *McKenzie v. Illinois DOT (7th Cir. 1996) 92 F.3d 473, 481* [meeting was held within ten days to discuss the complaint, after which the harasser was kept from having contact with the plaintiff, a memo was issued to all employees regarding the employer's sexual harassment policy, and the plaintiff saw the harasser only once after the meeting and heard no more harassing comments from him]; [*34] *Saxton v. Am. Telephone and Telegraph Co. (7th Cir. 1993) 10 F.3d 526, 535-536* [employer began an investigation the day after receiving the complaint and completed the investigation within the week, and transferred the alleged harasser].)

n24 Munoz Rios knew that Cave had been threatened with rape. A permissible inference may be drawn from the Pimentel memo that, had an adequate investigation been done, PDC would have learned of the other victims. The memo reveals that, when Pimentel interviewed one victim, that victim named another, and the second victim named another, etc. Had the investigation been even remotely thorough, it is reasonable to conclude that Kristi Gandarilla would have told PDC that Johnny Rodriguez had threatened that he would "kick [her] ass and make [her] like it when he was done" -- a threat similar to that made towards Cave.

n25 PDC tries to justify its actions by asserting that Cave agreed to the proposed resolution -- that Johnny Rodriguez be moved. Yet, Cave testified she told Horvath and Munoz Rios that she wanted the harassment to stop and

that she thought Johnny Rodriguez would be moved away from PDC.

[*35]

There was also the testimony -- unchallenged by appellant on this appeal -- by Cave's expert, Amy Oppenheimer, who opined that PDC's response was anything but effective. She took the position that Johnny Rodriguez should have been immediately placed on administrative leave and that it was foolhardy to leave him in the work place. This testimony alone supports the jury's conclusion that PDC's reaction was unreasonable and ineffective.

The jury was fully justified in concluding that moving Johnny Rodriguez to OP6 was an unreasonable and ineffective response given the circumstances, even though there were no further sexual comments after that date. (See *Sheffield v. Los Angeles County (2003) 109 Cal.App.4th 153, 163-164* [employer under a continuing duty to protect plaintiff from harm; must act immediately when there is a threat of harm]; see also *Baskerville v. Culligan Intern. Co., supra, 50 F.3d 428, 432* [had harassing employee assaulted victim, adequate response might have required employer to fire employee on the spot]; *Intlekofer v. Turnage (9th Cir. 1992) 973 F.2d 773, 779-780* [an oral warning may be sufficient where the [*36] harassing conduct is not serious].) The jury could rationally conclude that there remained substantial contact between Cave and Johnny Rodriguez in an environment that left Cave vulnerable to future harassment and possible harm. n26 (See *Konstantopoulos v. Westvaco Corp. (3d Cir. 1997) 112 F.3d 710, 717* [allowing harasser to work in close proximity to victim is a factor to consider when determining if employer's response is adequate]; *Ellison v. Brady, supra, 924 F.2d 872, 883* [in some cases mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment].)

n26 This is true even though Cave admitted Johnny Rodriguez never made any further comments of a sexual nature to her after September 1, 1998. Cave testified contact with Johnny Rodriguez made her nervous and scared, given that Johnny Rodriguez had threatened to rape her. Such nervousness could have been found to be reasonable given the work environment.

[*37]

IV.

Appellant claims there was insufficient evidence to establish that the reasons for Cave's termination were pretextual and motivated by her complaints against Johnny Rodriguez and Robert Rodriguez.

In considering whether the evidence was sufficient to establish the elements of retaliation under FEHA, we read the record in the light most advantageous to Cave, resolve all conflicts in her favor, and give her the benefit of all reasonable inferences which support the verdict. (*Iwekaogwu v. City of Los Angeles (1999) 75 Cal.App.4th 803, 814.)* There are two methods by which to show that an employer's proffered explanation for firing a plaintiff is actually a pretext for retaliation. The first is to directly persuade the fact finder that the decision to terminate was more likely motivated by a retaliatory reason. The second is to indirectly establish that the employer's proffered explanation is unbelievable, which then allows the inference that the decision to terminate was motivated by a retaliatory reason. (*Texas Dep't of Cmty. Affairs v. Burdine (1981) 450 U.S. 248, 256, 67 L. Ed. 2d 207.)*

A.

Pretextual Reasons for Discharge [*38]

Cave's evidence established that the reasons given for her discharge were either false, greatly exaggerated or based on conduct which, when engaged in by other employees, did not result in discipline. This is evidence of pretext intended to hide a retaliatory motive. (*St. Mary's Honor Ctr. v. Hicks (1993) 509 U.S. 502, 511, 125 L. Ed. 2d 407* [factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination]; *Guz v. Bechtel Nat., Inc. (2000) 24 Cal.4th 317, 361* [proof that employer lied about reasons for discharge may "considerably assist" a circumstantial case of discrimination].)

Preferential treatment regarding work hours

Cave was one of several guards who worked on average more than 125 hours a month. None of the other guards were disciplined for this workload. There was ample evidence that, if believed, defeated PDC's argument that Cave received preferential treatment in work assignments. The sergeants, not the guards themselves, were responsible for assigning work [*39] hours. There was no clear policy as to the amount of hours a security guard could work. Horvath agreed to fill vacant positions by assigning the top performers, of whom Cave was one, to work these hours. The jury rejected PDC's claim that Cave was the only employee who boasted, and that she was thus deliberately

depriving others of work. PDC did not call any of Cave's coworkers to verify that she boasted of hours and Cave denied doing so.

Purported Fraudulent Receipt of Differential Pay

PDC claimed Cave intentionally and fraudulently accepted shift differential pay to which she knew she was not entitled. However, the evidence established that Cave was specially assigned to work in the office from February 15, 1999, to April 30, 1999, and that she worked, with Horvath's approval, varied hours, including evening and night shifts, in order to avoid Robert Rodriguez. She received pay differential for the hours worked during the night and evening during this period.

Cave did not fill out her time sheets, nor did she designate whether the hours worked were subject to a pay differential. Pimentel, her immediate supervisor, did so. The most telling evidence tending to show that this [*40] stated reason for discipline was pretextual was the testimony of Horvath, who, when asked whether Cave was eligible to receive a shift differential for these hours, testified "that would be a personnel expert matter. I can't say either way." No other member of PDC management explained why Cave was not allowed a differential when she worked hours normally assigned a shift differential.

Children at the Facility

Several witnesses said they saw Cave's two children at the PDC facility on various occasions. Cave presented evidence of that: 1) her children were only on PDC facilities when being dropped off or picked up by either her ex-husband or Benzler, whose wife provided child care, and only for 5 to 10 minutes at a time; 2) her ex-husband lived on the facilities and that, when her children were with him, they would legitimately be at the facilities, 3) other employees lived on the facility with their children, and others who did not live at the facilities brought their children on the facility but were not disciplined; n27 4) her son participated in a sanctioned "ride along" program n28 on two or three occasions and rode with Benzler in a PDC vehicle as part of the program; 5) [*41] once Benzler used the PDC vehicle to pick up her daughter and transport her to his wife, and Benzler was disciplined for this but Cave was not; and 6) Cave was never warned that her children's presence at the facility was an issue. The jury was free to accept Cave's evidence and to conclude that PDC would not have disciplined Cave on these grounds had it not been seeking some pretextual justification to terminate her.

n27 Robert Rodriguez testified he did not see anything improper regarding Cave's children on the premises.

n28 There was an allegation that Cave permitted her son to be within the secured forensic area. However, the evidence established that Benzler took her son into the secured area during an authorized "ride along." Cave did not know Benzler had done so until after the fact, and told Benzler not to take her son in the secured area again.

False Police Report against Michael Davis

There was evidence presented to establish that Cave's police report concerning janitorial contract employee [*42] Michael Davis, which became the basis for a temporary restraining order against him, was legitimate. Cave testified that Davis was a violent man with a grudge against her landlord and that he identified her with the landlord and his family. She also testified Davis had made threats which caused her to fear for her safety and that the police report was truthful. The restraining order against Davis was renewed several times by a judicial officer, who presumably concluded Cave's report was valid. There was also evidence that PDC's claim that Benzler inappropriately used PDC authority to help Cave obtain the order was specious because Horvath not only knew of the threats but sanctioned Benzler's involvement in helping Cave obtain the order and authorized PDC personnel to serve the order.

Purported False Report about September Stirling

PDC claimed that Cave filed a false police report alleging harassing and threatening phone calls from Cave's coworker Stirling. Stirling was dating Cave's ex-husband Kevin at the time. PDC claimed Cave was the one who made the threatening phone calls, not Stirling. Cave and her ex-husband, Kevin, both testified at trial that Stirling made the [*43] threats. The jury was free to believe their testimony and reject Stirling's.

Harassing Calls to Sheri Meier

PDC asserted that, sometime around May 24, 1999, Cave made multiple phone calls to coworker Sheri Meier, telling her to stay away from Kevin Cave. Cave testified she did not know Sheri Meier. Meier did not testify at trial, so the allegations were not substantiated by PDC. The lack of evidence, the late addition of this "ground" for discharge to the Notice of Termination, and Cave's testimony that she did not know who Meier was, supports a reasonable inference that this was yet another specious reason for termination intended to hide a retaliatory motive.

B.

Evidence of Retaliatory Motive

In addition to presenting evidence that the reasons stated for her discharge were false, Cave offered strong circumstantial evidence that her termination was retaliatory. There was evidence that PDC was not forthright in handling Cave's discharge. During the litigation process, the decision makers, or those who participated in the process, vacillated about the exact reasons for Cave's discharge, about the information they had substantiating the reasons given, about [*44] who was in charge of the investigations and about what was the justification for their actions during the process. There was evidence that Horvath changed the Pimentel memo to eliminate all references to Robert Rodriguez and the threat of retaliation. During litigation, there was arguably an attempt by PDC to influence witnesses. n29 Simply put, there was ample evidence that the decision makers appeared to be hiding something.

n29 Munoz Rios suggested to Gandarilla that she might not be well enough to testify and should "let it go." Guardado was advised by PDC's counsel not to look at files or go through his things prior to testifying. Before litigation, Munoz Rios tried to get Cave to drop her complaint against Robert Rodriguez by telling her he had been transferred to another facility when he was only on vacation and by telling her it would do no good to pursue her complaint.

There was also evidence from which a jury could conclude that PDC had no intention of fairly investigating Cave's allegations or fairly [*45] investigating or evaluating the reasons given for her discharge. For example, Johnny Rodriguez was never interviewed, despite testimony from Munoz Rios and Oppenheimer that the alleged harasser should always be interviewed and despite PDC policy that he be interviewed. Horvath told Pimentel not to interview Johnny Rodriguez. When upper management decided a follow up investigation was needed into the allegations against Johnny Rodriguez, Robert Rodriguez was assigned to do the investigation even though he was implicated in the questioned conduct. Robert Rodriguez admitted to Horvath that he had falsely told other PDC employees that Cave was under investigation for drug activity. Despite Horvath's knowledge that there was an EEO complaint pending against Robert Rodriguez for retaliation, Robert Rodriguez's malicious untruth was not considered despite the close timing of the false statement to Cave's complaints about Johnny Rodriguez. Edwards obtained September Stirling's side of the story related to the threatening phone calls, but never talked to Cave. Pimentel's memo was changed to Horvath's liking, and Horvath was seen giving instruction to Barber when Barber was preparing his investigative [*46] report.

There was in addition evidence that Cave was singled out and treated differently from other employees who engaged in misconduct. Horvath told Robert Rodriguez to simply apologize to Cave for making defamatory statements. n30 While PDC purportedly investigated and served other employees (Reguero, Robert Rodriguez, Bennett, and Benzler) with Notices of Termination at the same time as Cave was served for similar conduct, the actual discipline imposed upon those employees gave rise to an inference of a cover intended to mask the retaliatory motive behind Cave's discipline. Both Robert Rodriguez and Reguero were offered settlements which resulted in almost no penalty, even though both had prior disciplinary records and their misconduct was, objectively, at least as serious as Cave's. No such settlement was offered to Cave. n31 Despite a progressive discipline policy n32 intended to motivate employees to correct objectionable behavior, it was not invoked for Cave. n33

n30 PDC contends that Robert Rodriguez was disciplined for this behavior but the notice of discipline stated only that Robert Rodriguez had violated PDC policy by discussing a confidential matter. This does not reflect the true nature of his offense and implies wrongly that the information discussed was true when PDC had confirmed it was false. [*47]

n31 Although the record is not clear about what happened to Bennett, a close ally of Robert Rodriguez, it appears he was not discharged. Benzler, on the other hand, was terminated in part for alleged preferential treatment of Cave. He, like Cave, was not reinstated.

n32 Koski testified that temporary employees were not entitled to progressive discipline, but PDC's written policy does not distinguish between the two and Reguero was not fired when she fell asleep on the job, even though this was a dischargeable offense. A lesser discipline was imposed. The jury was free to reject Koski's testimony and view PDC's failure to use progressive discipline with Cave as evidence of retaliation.

n33 Compare PDC's failure to put Cave on notice that her behavior needed correction with PDC's willingness to warn, counsel and impose

less severe discipline when dealing with Johnny Rodriguez and Robert Rodriguez. Alice Reguero also benefited from PDC's progressive discipline policy even though she repeatedly failed to perform the responsibilities of her job by falling asleep while on duty and leaving her assigned job post to visit with Robert Rodriguez. Horvath also warned Benzler that it appeared he was giving Cave preferential treatment on at least two occasions.

[*48]

The timing of events suggests that PDC was activated by a retaliatory motive. Cave was notified by PDC that she was being investigated just days after she told Munoz Rios that she was unhappy with PDC's response to her complaints and that she was filing a DFEH complaint. (See *Iwekaogwu v. City of Los Angeles, supra, 75 Cal.App.4th at p. 815* [an employee engages in protected activity under the FEHA when she threatens to file a charge of employment discrimination].) The Notice of Investigation went out the same day that PDC received official notice of the DFEH complaint. n34 Prior to the Notice of Investigation, Cave was considered an outstanding employee with no prior discipline. A retaliatory motive may be inferred from the timing of the adverse action, by the identity of the persons making the decision to take adverse action, n35 and by the terminated employee's job performance before termination. (*Flait v. North Am. Watch Corp. (1992) 3 Cal.App.4th 467, 479; Miller v. Fairchild Industries, Inc. (9th Cir. 1989) 885 F.2d 498, 505-506.)* Here, the timing, the knowledge of the decision makers and the suddenness and severity of the [*49] discipline imposed all permitted an inference that PDC was motivated by a retaliatory purpose. (*Jordan v. Clark (9th Cir. 1988) 847 F.2d 1368, 1376* [causal link may be established by inference -- employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision]; *Jones v. Lyng (D.D.C. 1986) 669 F. Supp. 1108, 1121* [retaliatory motive is proved by showing that plaintiff engaged in protected activities, that employer was aware of the protected activities, and that the adverse action followed within a relatively short time].)

n34 The first reason stated for Cave's discharge is the so-called preferential assignment of work hours that resulted in Cave working more hours than other guards, thus depriving other guards of work. Significantly, Reguero filed her complaint about this so-called preferential treatment in November 1998. Edwards investigated the complaint in November and December 1998. Despite clear evidence that Cave was indeed working more hours, and Benzler was assigning those hours, Cave was not disciplined or warned about this behavior until after Cave's DFEH complaint was filed. Her termination followed. This evidence amply supports a reasonable, if not strong, inference of pretext. [*50]

n35 Although in its brief PDC claims that Edwards and Munoz Rios did not participate in the decision to terminate Cave, the record established that they did participate in gathering the information and presenting it to the dispositional committee.

The record is replete with other examples of evidence from which the jury could reasonably have inferred that PDC intended to retaliate against Cave for complaining about the sexual harassment, for complaining about Robert Rodriguez, and for taking her complaint to DFEH. The most telling evidence may be from Koski, who testified that Sawyer wanted Cave terminated -- "that's the decision that he wanted implemented" -- and that Koski was directed to gather information to "support" the decision. In contrast, Sawyer claimed he only reviewed the paper work. Although PDC contends that Cave's evidence at trial was tantamount to a request that the jury "second-guess the employer's sincere, legitimately motivated responses to complaints from plaintiff's coworkers concerning her treatment of them and the investigations that resulted from those numerous complaints, [*51] " the record fully supports the jury's conclusion that PDC's response was anything but sincere or legitimately motivated. A reasonable trier of fact could conclude that PDC engaged in intentional retaliation in violation of the FEHA.

V.

PDC argues that there was insufficient evidence to justify the amount awarded to Cave for the sexual harassment by Johnny Rodriguez ($ 75,000). Although there was no evidence of economic loss based on the harassment, there was considerable evidence of Cave's resulting emotional distress. Cave testified that "I was getting really nervous about what he [Johnny Rodriguez] was gonna do next to me, or what he was going to say. I didn't know. I was very scared. I was upset." Cave's son also testified that his mother was very happy about getting the job at PDC for the first month but then her attitude changed. She was more irritable, mad about

everything, frustrated, always stressed, and in a bad mood when she came home. He also testified that she cried all the time. Guardado testified that, when Johnny Rodriguez appeared to relieve her, Cave went home very emotionally upset. She said Johnny Rodriguez was harassing her and she "couldn't take it [*52] anymore."

Given the seriousness and pervasiveness of the harassment, we find the amount awarded to be supported by the evidence. (See *Washington v. Farlice (1991) 1 Cal.App.4th 766, 772* [emotional distress includes recovery for mental suffering, embarrassment, humiliation, anxiety]; *Green v. Rancho Santa Margarita Mortgage Co. (1994) 28 Cal.App.4th 686, 699* [evidence of extreme frustration, disappointment, loss of security when denied loan for discriminatory reasons sufficient to support compensatory damage award]; *Stephens v. Coldwell Banker Commercial Group, Inc. (1988) 199 Cal. App. 3d 1394, 1402-1403, 245 Cal. Rptr. 606* [plaintiff was embarrassed, irritable and depressed at home, shocked and stunned; this type of injury is compensable] disapproved on other grounds in *White v. Ultramar, Inc. (1999) 21 Cal.4th 563, 574, fn. 4.)* The award is not excessive, so we cannot conclude the award was the result of passion or prejudice. (See *Bihun v. AT&T Information Systems, Inc., supra, 13 Cal.App.4th 976, 996-997; Watson v. Department of Rehabilitation (1989) 212 Cal. App. 3d 1271, 1293-1293, 261 Cal. Rptr. 204* [*53] [value placed on general damages not so disproportionate to harm suffered as to raise a presumption of passion or prejudice].)

There is also substantial evidence to warrant the award for lost wages ($ 70,000). The evidence supports a reasonable conclusion that, had Cave not been terminated, she would have been hired by PDC as a permanent security guard. n36 At least four interim security guards were hired to fill permanent positions after Cave was put on administrative leave; all holding positions lower than Cave on the hiring list. Cave scored the highest grade among the exam takers, and she was considered a top employee. The jury significantly reduced the amount Cave's expert calculated as lost front pay, presumably concluding Cave would be able to find suitable mitigation employment at either a higher rate of pay (the expert calculated mitigation at minimum wage) or within a shorter period of time. (*Bertero v. National General Corp. (1974) 13 Cal.3d 43, 61, 118 Cal. Rptr. 184* [a reviewing court must uphold an award of damages whenever possible and all presumptions are in favor of the judgment]; *Cloud v. Casey (1999) 76 Cal.App.4th 895, 910* [*54] [plaintiff in discrimination action entitled under FEHA to be made whole].)

n36 There was also evidence that Cave's contract as a temporary security guard could be renewed for six months.

VI.

Albert Einstein commented that he had found only two things that were infinite -- the universe and human stupidity -- but that he "was not sure of the former." The actions of the PDC employees and officials in this case would not cause Mr. Einstein to be unsure of the latter. It is simply inconceivable that anyone not entirely comatose for the past several decades of intense publicity and indoctrination -- by a proliferation of laws, by continual media attention, and by instructional seminars -- about the evils and huge risks of committing sexual harassment and, for management types, of failing to act reasonably and responsibly when presented with complaints of sexual harassment, could have bungled things as badly as PDC management did in this case. The trial record is a laboratory example of what not to do [*55] and how not to do it when it comes to sexual harassment complaints -- from Johnny Rodriguez, through PDC's Keystone Kops middle management of "good old boys [and girls]," to Sawyer who, though nominally in charge of the operation, apparently considered himself to be nothing more than a rubber stamp for anyone who happened by. A wise man observed that people learn from experience that people never learn anything from experience. He must have had PDC in mind. Given the facts implicitly found by the jury in this case, the verdict stands on very solid evidentiary ground. PDC ought to consider itself fortunate that the amount awarded was not more.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

Dibiaso, Acting P. J.

WE CONCUR:

Cornell, J.

Dawson, J.