Not Reported in Cal.Rptr.2d, 2002 WL 31525574 (Cal.App. 3 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2002 WL 31525574 (Cal.App. 3 Dist.))

Court of Appeal, Third District, California.
J. Alan **CATES**, Plaintiff and Respondent,
v.
CALIFORNIA **STATE CONTROLLER'S** OFFICE, Defendant and Appellant.

No. C036013.
(Super.Ct.No. 98AS06100).
Nov. 14, 2002.

State employee brought action against employer, State Controller's Office, to recover for disability discrimination by refusing to transfer him to a position as a special investigator and retaliation by taking action against him for filing complaint. The Superior Court, Sacramento County, No. 98AS06100, entered judgment on jury verdict for employee. Employer appealed. The Court of Appeal, Raye, J., held that: (1) employee is not required to prove qualification to perform the essential functions of the position as part of a prima facie showing of disability discrimination; (2) evidence supported the finding of disability discrimination; (3) evidence supported finding of retaliation; (4) employer could not raise defense that employee was unable to perform job or that his performance would endanger himself or others; and (5) evidence supported awards of $116,000 in economic damages $300,000 in noneconomic damages.

Affirmed.

West Headnotes

[1] Civil Rights 78 1217

78 Civil Rights
78II Employment Practices
78k1215 Discrimination by Reason of Handicap, Disability, or Illness
78k1217 k. Practices Prohibited or Required in General; Elements. Most Cited Cases
(Formerly 78k173.1)

An employee is not required to prove qualification to perform the essential functions of the position as part of a prima facie showing of disability discrimination. West's Ann.Cal.Gov. Code § 12940, subd. (a)(1); 2 CCR §§ 7293.7, 7293.8, subds. (c, d); BAJI 12.12, 12.14, 12.15, 12.16.

[2] Civil Rights 78 1744

78 Civil Rights
78V State and Local Remedies
78k1742 Evidence
78k1744 k. Employment Practices. Most Cited Cases
(Formerly 78k453)

Evidence supported the jury's finding of disability discrimination by refusing to transfer state employee to a position as a special investigator for State Controller's Office, even though he exceeded all standards and completed the Basic Special Investigators Academy; although the employee had polio damage to one leg and retarded growth of other leg, he passed fitness portion of examination, and the jury could reject as pretext employer's claim that no positions were open.

[3] States 360 53

360 States
360II Government and Officers
360k53 k. Appointment or Employment and Tenure of Agents and Employees in General. Most Cited Cases

Evidence supported finding of retaliation against state employee for filing his claim of disability discrimination in denial of transfer to a position as a special investigator for State Controller's Office; after filing claim, the employee was reprimanded, punished, and ultimately banished to audit division without work, even though he experienced no loss of salary or benefits, and the jury could reject employer's explanations as pretext. West's Ann.Cal.Gov. Code § 12940, subd. (h).

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[4] Civil Rights 78 1225(3)

78 Civil Rights
78II Employment Practices
78k1215 Discrimination by Reason of Handicap, Disability, or Illness
78k1225 Accommodations
78k1225(3) k. Particular Cases. Most Cited Cases
(Formerly 78k173.1)

Civil Rights 78 1728

78 Civil Rights
78V State and Local Remedies
78k1726 Defenses in General
78k1728 k. Employment Practices. Most Cited Cases
(Formerly 78k448.1)

State Controller's Office that did not offer reasonable accommodation to employee could not, in suit alleging disability discrimination, raise defenses that employee was unable to perform job as special investigator or that his performance would endanger himself or others. BAJI 12.14, 12.16, and 12.17.

[5] Civil Rights 78 1765

78 Civil Rights
78V State and Local Remedies
78k1763 Monetary Relief
78k1765 k. Employment Practices. Most Cited Cases
(Formerly 78k454)

Evidence supported awards of $116,000 in economic damages $175,000 in noneconomic damages for disability discrimination by refusing to transfer state employee to a position as a special investigator for State Controller's Office and supported award of $125,000 in noneconomic damages for retaliation for filing a complaint; evidence indicated an annual loss of retirement benefits of $23,200 for five years, employee testified that the humiliation he suffered from the discrimination and retaliation was debilitating, that he became depressed, reclusive, and withdrawn, could not eat, was unable to be intimate with his wife, and had serious stomach problems, his wife corroborated how the discrimination impacted her husband and their marriage.

RAYE, J.

***1** A unanimous jury found that defendant California **State Controller's** Office unlawfully discriminated against plaintiff J. Alan **Cates**, a veteran state employee, by refusing to transfer him to a position as a special investigator even though he exceeded all standards and completed the Basic Special Investigators Academy (Academy), including physical fitness and defensive tactics training; he worked on special assignment as a special investigator for the Federal Bureau of Investigation (FBI) for over three years; and his performance in every job he performed as a state employee was exemplary. Indeed, his supervisor, the director of the Academy, FBI agents, and United States attorneys wrote letters of commendation for his outstanding, even inspirational, performance. The jury also found that defendant thereafter retaliated against plaintiff for filing his discrimination complaint and awarded damages of $416,000.

On appeal, defendant insists the court erred by denying its motions for a nonsuit and a judgment notwithstanding the verdict because there is no substantial evidence to support plaintiff's prima facie case of discrimination or to support a finding of retaliation. The jury soundly rejected defendant's justifications. For the reasons we describe herein, that was the jury's prerogative, and given the credible, even overwhelming, evidence in support of the verdict, we also reject them. Defendant appears to misunderstand the scope of appellate review and the fundamental principles involved in a discrimination claim. Because the facts support the jury's verdict and the law supports the judge's instructions and the denial of the motions for nonsuit and for judgment notwithstanding the verdict, we affirm.

FACTUAL BACKGROUND

Defendant insists there is insufficient evidence to support the jury findings of either discrimination or retaliation. In reviewing the sufficiency of the evidence, we recite the facts in support of the jury's findings, drawing, as we must, all inferences in support of the judgment. (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1120, 94 Cal.Rptr.2d 579.) Nevertheless, we consider the sufficiency of these facts in the context of the entire record. The appellate standard for review of a judgment notwith-

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standing the verdict is the same: We must determine whether substantial evidence supports the jury verdict. (*Diffey v. Riverside County Sheriff's Department* (2000) 84 Cal.App.4th 1031, 1035, 101 Cal.Rptr.2d 353 (*Diffey*).) We may not "weigh evidence, draw inferences contrary to the verdict, or assess the credibility of witnesses." (*Begnal v. Canfield & Associates, Inc.* . (2000) 78 Cal.App.4th 66, 72, 92 Cal.Rptr.2d 611.)

Evidence of Discrimination

Plaintiff was a victim of polio, which destroyed the nerves in his left leg and left his muscles atrophied. His disability was compounded in 1965, when an operation was performed that retarded the growth of his right leg. Although his parents were assured he would be close to six feet tall, as a result of this operation, plaintiff is only five feet four inches.

***2** In 1976 plaintiff was hired by the state as a County Officer I for the California Housing Finance Agency to assist in the development of an accounting system to approve and review claims and to schedule them for payment through the Controller's Office. Within a few months, he transferred to the Department of Benefit Payments, and on April 1, 1978, he transferred to the Controller's Office as an auditor. He remained an employee of the Controller's Office for over 21 years.

During much, if not most, of plaintiff's tenure with the Controller's Office, he conducted investigations and was involved with security. For example, in 1984 he helped to set up the California State Lottery. His supervisor commended him in writing for his stellar performance. "In the past year your analysis [*sic*] have contributed to the redesign of the [plan of financial adjustment] process and set the course for [State Controller's Office] oversight of the state lottery. Despite the tight time frames, you completed sensitive investigations for the executive office and our division chief which were thorough and insightful. Your professionalism is demonstrated by the quality and quantity of your work and your willingness and ability to act independently."

At about the same time, plaintiff was asked to conduct an investigation for the special investigations unit, then under the direction of Stan Whitton. The special investigations unit at the time was in the same division of the Controller's Office as the audit unit. In 1986 plaintiff was reassigned to the special investigations unit and ordered to report to the new chief investigator, John Henry. Henry informed him that in order to formally join the investigations unit he would have to become a sworn officer, and to become sworn, he was required to pass the Academy.

Having successfully investigated many cases, plaintiff expressed his desire to attend the Academy, to become a sworn officer, and thereafter to become a special investigator. He asked Henry at least 20 times between 1986 and 1994 for permission to attend the Academy. Through 1993 Henry lied to plaintiff and told him there were no classes offered in Northern California. Plaintiff persisted. Meanwhile, other investigators went through training in Sacramento.

Finally, in 1994 plaintiff was allowed to attend the inaugural 10 week training program held at Yuba College and run by Gary Schoessler. Schoessler testified that initially he did not believe plaintiff, who was using crutches, could pass the course. In fact, he called Henry to express his reservations, particularly because the attendees were not tested on self-defense skills until the end of the 10-week course, and to make sure that plaintiff's department chief understood the physical requirements of the Academy. Schoessler testified that Henry explained he knew plaintiff would fail, but he had pestered him for so long about becoming an investigator that once he failed the Academy "that would be the end of it." Schoessler also testified that the security investigators Academy had been offered in 1986, 1987, 1988, 1990, and 1991 at the Public Safety Center of Los Rios Community College in Sacramento.

***3** Plaintiff, however, did not fail. In fact, he excelled even though the course had not been modified in any way to accommodate his disability. He received an A in every course offered by the Academy, including firearms and physical fitness. He ran three miles around the track faster than some of the nondisabled attendees. At the end of the Academy, he received an inspirational award, one of only six students who received the award out of approximately 10,000 who had gone through the Academy by the spring of 2000. In a letter of commendation to Henry, Schoessler wrote: "Alan did an excellent job throughout this course, but his accomplishments for physical training, self-defense and firearms training were something out of the ordinary."

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The assistant director of the Academy, Ronnie Del McCarty, taught defensive tactics and fitness. He personally tested plaintiff in 22 different areas, including balance, stance, movement, falling forward and backward, pressure points, escape techniques, throws, body search, handcuffing, weapon retention, weapon take-away, strike, kicks, and arrests. Plaintiff scored nine or 10 on a 10-point scale in all but two areas. He passed the entire examination on defensive tactics and fitness with a score of 91 percent. McCarty testified that plaintiff is "extremely strong," performed according to the same standards as every other student at the Academy, and confirmed that the Academy had not been modified for him. He felt comfortable sending him into the field because he believed that plaintiff could successfully and safely apprehend a suspect.

Plaintiff also testified that he could perform all of the essential functions of a senior special investigator. In fact, according to plaintiff, he had already been performing the tasks of a senior special investigator, including complex fraud investigations for the FBI. As a result of his investigations, the United States Attorney's Office filed 26 separate criminal complaints for prosecution.

Plaintiff passed the Academy in December 1994. He reiterated to Henry his desire to join the investigations unit. But unbeknownst to plaintiff, Henry would not consider him for the job. Henry did not feel comfortable sending him into the field to physically arrest someone. He believed he would have to send two investigators instead of one, and "[h]e wanted people with black and white patrol experience, people that could prove that they could handle themselves physically." Henry admitted at trial that his trial testimony on this point differed from his deposition, taken only a month before trial.

Moreover, Henry had selected others to become his investigators. He asked Darlene Hicks, an administrative assistant, and Paul Lundholm, an auditor, to enroll in the 1994 Academy. After they finished the Academy with plaintiff, Henry reclassified Hicks, who had never submitted an application, and transferred Lundholm into the investigations unit although a position did not exist. In fact, Henry told Lundholm that plaintiff had a disability and would not participate in the physical aspects of the Academy.

***4** Plaintiff continued to excel in his investigative assignments. A United States attorney notified Henry of the excellent work plaintiff had done for the FBI. He wrote: "[Plaintiff's] assistance has been invaluable.... [Plaintiff] has demonstrated an uncanny ability as a criminal investigator in rooting out and exposing fraudulent transactions.... [¶] [Plaintiff] is among the most intelligent, industrious and hardworking criminal investigators that I have had the pleasure of working with." The FBI echoed the United States attorney's assessment of plaintiff's superior investigative abilities. An agent wrote that "... the investigative abilities demonstrated by [plaintiff] is [*sic*] commendable."

Henry, however, appeared uninterested in the investigative skills of his investigators. Hicks, after her reclassification as a special investigator, continued to perform primarily administrative tasks. Although Henry acknowledged that he knew plaintiff was completing complex criminal investigations, he did not consider him for the senior special investigator position.

When plaintiff's assignment with the FBI ended in 1996, he again asked Henry about a vacant senior special investigator position. In a devastating admission, Henry told plaintiff he would not hire someone with his condition. He insisted that the only reason plaintiff had passed the Academy was because it had been modified, and the only reason plaintiff had been admitted was because Henry had used a few favors to get him in. Plaintiff was humiliated. He felt rejected personally and professionally. He took some time off work. When he returned, he filed a discrimination claim.

Brenda Barnes, a disability officer who worked for the Controller's Office, investigated plaintiff's claim. She acknowledged that Henry admitted he had known for years of plaintiff's desire to become an investigator, that Henry wanted his two people to attend the Academy, that he would not feel comfortable sending plaintiff into the field to physically arrest someone, that he would not choose plaintiff to work for him although plaintiff had a lot of experience in the field and knew what it took to be an investigator, and that he put plaintiff on the FBI assignment to get him out of the way. During Barnes's interview of Jim Ferguson, plaintiff's supervisor, she learned that plaintiff was very good at investigations and had al-

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ways received good reviews of his work.

Barnes testified that her role as a disability officer was to provide a fair and impartial assessment of an employee's discrimination claim. Nevertheless, five days before she decided there had been no discrimination, Barnes contacted her supervisor, Austin Eaton, the very man who would consider an appeal of her decision. In a telling e-mail, Barnes reminded Eaton that if they sent plaintiff to their physician, the referral would constitute a job offer contingent upon whether he passed the physical. She inquired of Eaton, "Would you like to meet on this or have me draft a letter stating that there has [*sic*] been no vacancies since 1994?" And that is precisely what she did. Not surprisingly, Eaton confirmed Barnes's determination that there had been no discrimination and rejected plaintiff's appeal.

Evidence of Retaliation

***5** Plaintiff believed he had been a victim of unlawful disability discrimination. He therefore appealed Eaton's decision to the State Personnel Board and filed a claim with the Department of Fair Employment and Housing. His persistence was not well received. In retaliation, defendant humiliated him by a series of employment actions despite more than 20 years of unblemished civil service.

Two "true" vacancies arose after plaintiff filed his discrimination claim, one in 1997 and one in 1998, and he applied for both. The first was to replace Henry when he retired. But Henry himself was permitted to sit on the selection committee and interview plaintiff. Predictably, plaintiff did not get the job. The following year, plaintiff once again applied to become an investigator when a vacancy was created. But then he was told that there were not enough qualified applicants and the position was not filled.

Although plaintiff had worked with state and federal investigators for over 10 years, in May 1998 he was ordered to cease all law enforcement contacts. The same month, a class he had prepared to teach was canceled without explanation.

In June the retaliation escalated from denying plaintiff opportunities to formally reprimanding him for his performance. He was summoned to a meeting to discuss fraud issues but was "grilled for over an hour" about work he had done years earlier under a contract with the Department of Education. On June 30, 1998, he received a written reprimand, euphemistically referred to as a "corrective memorandum," for providing public audit reports to the FBI. The reports suggested widespread fraud in the Medi-Cal program.

John Chen wrote the memorandum. Plaintiff introduced compelling evidence that Chen's allegations were groundless. An FBI agent testified that plaintiff was required by law to turn over to the FBI documents he suspected contained information about fraud. Plaintiff's supervisor, James Ferguson, testified it was proper for plaintiff to provide public audit reports to the United States Attorney's Office. Ferguson further testified that plaintiff had not made any fraud referrals as alleged in the memorandum, Ferguson knew what work plaintiff was performing, he authorized the work plaintiff performed for the Department of Education, and he approved plaintiff's weekly timesheets. In essence, plaintiff's supervisor refuted nearly all of the allegations of wrongdoing.

Hence, the jury was free to infer a retaliatory motive in reprimanding a man who had performed his job, followed proper procedures, and complied with the law. But the evidence of retaliation was much stronger than mere inference. The author of the memorandum, John Chen, at the time of trial the Chief Deputy Inspector General for the State of California, admitted to the jury that he, like John Henry, had not only failed to conduct a reasonable investigation of the charges, but his testimony at trial directly contradicted his deposition testimony. He never spoke to Ferguson before issuing the corrective memorandum although during his deposition he testified he had.

***6** Plaintiff immediately sent a written response to Chen, rebutting the facts outlined in the memorandum and providing a copy of the Controller's policy allowing release of published audit reports and copies of the timesheets approved by Ferguson. Defendant's response was swift. Within two days, plaintiff was banished to an audit division without any work to perform.

DISCUSSION

I

Sufficiency of the Evidence and Burdens of Proof

[1] In its first assignment of error, defendant asserts the evidence is insufficient to support the judgment. Though broadly couched in terms of substantial evidence, defendant's argument is actually bifurcated.

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First, defendant asserts that plaintiff, as part of his prima facie case, was obliged but failed to prove he was qualified for the special investigator job. This failure rendered his action subject to a motion for nonsuit, which the trial court erroneously denied. Second, in view of the legitimate nondiscriminatory reasons proffered by defendant for not hiring him, reasons that plaintiff failed to prove were pretextual, plaintiff failed to prove a discriminatory purpose. The action was thus subject to a directed verdict, which was also erroneously denied.

In making its argument, defendant relies on the familiar burden-shifting formula first articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [36 L.Ed.2d 668] (*McDonnell Douglas*). The court held that a plaintiff carries the initial burden of establishing a prima facie case by showing that he belongs to a protected class, he applied and was qualified for the job, he was rejected, and the employer continued to seek applicants who had comparable qualifications. (*Id.* at p. 802.) This burden is light and the evidence necessary to sustain the burden minimal. (*Becka v. APCOA/Standard Parking* (2001) 146 F.Supp.2d 1109, 1113; *Heard v. Lockheed Missile & Space Co.* (1996) 44 Cal.App.4th 1735, 1751, 52 Cal.Rptr.2d 620 (*Heard*).) Moreover, the court emphasized that its iteration of a plaintiff's prima facie case should not be applied rigidly; the facts of a particular discrimination claim necessitate flexibility in determining the elements of a prima facie case. (*Heard, supra,* 44 Cal.App.4th at p. 1750, 52 Cal.Rptr.2d 620; *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 200, 48 Cal.Rptr.2d 448 (*Caldwell*).)

Once the plaintiff makes a threshold showing of discrimination, according to the *McDonnell Douglas* framework, the defendant must produce evidence that the rejection was based on a legitimate, nondiscriminatory reason. (*Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1156, 106 Cal.Rptr.2d 480.) The defendant's burden is a burden of production, not persuasion. If the defendant meets its burden, then the plaintiff bears the ultimate burden of proving discrimination, that is, that the reasons offered by the employer were pretextual. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1003, 67 Cal.Rptr.2d 483.)

***7** These shifting burdens are only relevant to a legal analysis of whether the litigants have created an issue of fact to be resolved by a jury. "Thus, the construct of the shifting burdens of proof enunciated in *McDonnell Douglas* is an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the factfinding process. The device ensures, first, that patently meritless claims, such as those brought by persons not members of a protected class, or those based on positions which are removed from the job market without being filled, do not proceed to trial. [Citation.] Secondly, and more importantly, the shifting burden ensures that an employer who can articulate a nondiscriminatory reason for the adverse employment decision will not avoid liability for discrimination if in fact the proffered reason is merely pretextual." (*Caldwell, supra,* 41 Cal.App.4th at p. 202, 48 Cal.Rptr.2d 448.)

Once a plaintiff has survived pretrial proceedings and motions for a nonsuit or directed verdict, the shifting burdens evaporate. "By the time that the case is submitted to the jury, however, the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision, leaving only the issue of the employer's discriminatory intent for resolution by the trier of fact. Otherwise, the case would have been disposed of as a matter of law for the trial court." (*Caldwell, supra,* 41 Cal.App.4th at p. 204, 48 Cal.Rptr.2d 448.) Defendant asserts plaintiff's claim should not have survived motions for nonsuit and directed verdict. For reasons that follow, we disagree.

The term "burden of proof" is often loosely used in reference to two discrete evidentiary "burdens" at trial. Plaintiff had the initial burden of introducing evidence to establish a prima facie case of employment discrimination. This minimal "burden of going forward with the evidence" or "burden of producing evidence," which serves to shift to the defendant employer the burden of producing rebuttal evidence, is distinct from the true "burden of proof" or "burden of persuasion," which is the obligation to persuade the trier of fact of the merits of a claim. The burden of going forward shifts from the plaintiff employee to the defendant employer as evidence of a discrimination claim is presented during the trial, though the burden of persuasion never shifts; it remains with the party

who had the burden in the first instance. A party who fails to meet its burden of producing evidence risks an adverse legal determination by the court via nonsuit or directed verdict. Whether a party has failed to meet the burden of persuasion is a matter for determination by the jury or court as trier of fact.

Defendant initially argues that plaintiff was required to prove as a part of his prima facie case that he was qualified for the job of senior special investigator. Having failed to prove this critical fact, according to defendant, the burden of producing evidence never shifted; the court was obliged to grant defendant's motion for nonsuit. Defendant cites in support of its argument *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 65 Cal.Rptr.2d 112, a summary judgment appeal involving discrimination based on national origin; *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 66 Cal.Rptr.2d 830, a summary judgment appeal involving disability discrimination; *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 90 Cal.Rptr.2d 15, a summary judgment appeal involving wrongful termination based on medical condition and in violation of public policy; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 100 Cal.Rptr.2d 352, 8 P.3d 1089, a summary judgment appeal in a wrongful termination case based on age discrimination; and *Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, 100 Cal.Rptr.2d 914 (*Quinn*), an appeal following a jury verdict in a wrongful termination case. As noted, none of the cases relied on by defendant involve discrimination based on physical disability. *Quinn* involved disability discrimination, but as we shall explain, *Quinn* 's facts are unique and the rules enunciated of limited application.

***8** Disability discrimination is unlike other forms of discrimination. Like discrimination based on race or gender, discrimination based on physical disability constitutes an unlawful employment practice under the California Fair Employment and Housing Act (FEHA) (Gov.Code, § 12940 et seq.). FEHA, however, "does not prohibit an employer from refusing to hire or discharging an employee with a physical ... disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical ... disability, where the employee, because of his or her physical ... disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety of others even with reasonable accommodations." (Gov.Code, § 12940, subd. (a)(1).) Thus, while discrimination based on race is never justified, a person's disability can be considered when making employment decisions because disability, unlike race, can have a direct impact on the ability to perform certain tasks.

Logically, this distinction should be reflected in allocating the burden of producing evidence. In cases involving discrimination based on race, for example, the central issue will always be whether the prospective employer considered the applicant's race in making the hiring decision. Because race cannot be a factor in assessing qualifications, there is a clear line of demarcation between the issue of discrimination and the issue of qualifications. The issue of qualifications will generally involve a simple and straightforward comparison of job specifications and the applicant's credentials; the issue of discrimination will almost always involve a protracted presentation of conflicting evidence. As a starting point, the plaintiff is obligated to establish qualifications for the position, a generally simple and straightforward showing, before the more difficult issue of discrimination must be addressed.

Disability is different. Unlike race, disability can be considered in evaluating qualifications for a position. However, an employer may be compelled to modify job specifications in order to accommodate a person's disability. This obligation of "reasonable accommodation" ensures that the qualifications issue in disability discrimination cases will be far more complicated than in most cases involving race, gender, or age discrimination. The employer's perception of the job vis-à-vis the applicant's particular disability is critical. It would be unreasonable, under such circumstances, to impose on the applicant the burden of going forward with evidence on the issue of qualifications; that burden is best placed on the employer.

This is the position taken by the California Code of Regulations, which clarifies the employee's and employer's respective burdens of proof by distinguishing the elements of the employer's potential defenses. California Code of Regulations, title 2, section 7293.7, entitled "Establishing Disability Discrimination," provides: "Disability discrimination is established by showing that an employment practice denies, in whole or in part, an employment benefit to

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an individual because he or she is an individual with a disability." "Defenses," delineated in title 2, section 7293.8 of the California Code of Regulations, include, in pertinent part: "(b) Inability to Perform. It is a permissible defense for an employer ... to demonstrate that, after reasonable accommodation has been made, the applicant or employee cannot perform the essential functions of the position in question because of his or her disability." An employer can also take into account the extent to which the applicant's or employee's inability to perform the essential functions of the position, after reasonable accommodation, endangers himself or herself as well as others. (Cal.Code Regs., tit. 2, § 7293.8, subds. (c) & (d).)

***9** The standardized jury instructions parrot the statutory and regulatory schemes. According to BAJI No. 12.12, delivered to the jury in this case, the essential elements of an employee's claim for unlawful disability discrimination are: "One, plaintiff is an individual with a physical disability; [¶] Two, defendant was an employer; [¶] Three, plaintiff was an employee of the Defendant; [¶] Four, defendant denied in whole or in part an employment benefit to the plaintiff. [¶] Five, plaintiff's disability was a motivating factor of this denial; and [¶] Six, defendant's denial caused plaintiff to suffer injury, damage, loss, or harm." BAJI No. 12.14 (defense of inability to perform), BAJI No. 12.15 (defense of undue hardship), and BAJI No. 12.16 (defense of health or safety) set forth a defendant's burden of proving the elements of these various defenses.

In short, neither FEHA nor its implementing regulations require an employee to prove he or she is qualified to perform the essential functions of the position as part of a prima facie showing of disability discrimination, and none of the cases cited by defendant could, or did, add the element of qualification to the employee's burden of persuasion at trial.

Two federal cases are in accord. In *Ackerman v. Western Elec. Co., Inc.* (9th Cir.1988) 860 F.2d 1514 (*Ackerman*), the employer argued that the employee, an installer of telecommunications equipment, had not established that she could, with reasonable accommodation if necessary, perform the essential functions of the position as an essential part of her prima facie case. (*Id.* at p. 1518.) The court pointed out that earlier regulations had appeared to place this burden on the employee, but the California Fair Employment and Housing Commission amended its regulations "and deleted the requirement that a plaintiff show as part of her prima facie case that she was a 'qualified handicapped person.' " (*Ibid.*)

Thus, according to the court in *Ackerman,* the employee need only show that she was disabled and had been denied an employment benefit because of it. "We accept the view of the Commission that it was an incorrect reading of their regulation to require [the plaintiff] to show ability to perform the job as part of her prima facie case, or as an issue upon which she bore the burden of proof. [Fn. omitted.] Because the burden of proof of that issue should properly have been placed upon the Company, it was clearly not error for the district court to decline to grant summary judgment for the Company when it found an insufficient showing as to what functions of the installer's job were 'essential.' " (*Ackerman, supra,* 860 F.2d at p. 1519.)

Jimeno v. Mobil Oil Corp. (9th Cir.1995) 66 F.3d 1514 (*Jimeno*) restates an employee's burden of proof. [Government Code] Section 12940[, subd.] (a) prohibits discrimination in employment on the basis of physical disability, as well as other characteristics. Under the regulations interpreting the FEHA, '[p]hysical handicap discrimination is established by showing that an employment practice denies, in whole or in part, an employment benefit to an individual because he or she is a handicapped individual.' Cal.Code Regs. tit. 2, § 7293.7. There are two elements of a prima facie case: (1) the complainant must satisfy one of the statutory definitions of 'handicapped' individual and (2) the employer must have 'discriminated on that basis.' " (*Jimeno, supra,* 66 F.3d at p. 1520.) Moreover, the court acknowledged the employer had the burden of proving its defense that the employee in essence was not qualified because he was at risk of injuring himself. (*Id.* at pp. 1533-1534.) In *Jimeno,* the employer offered sufficient evidence to merit a jury trial on its defenses. (*Id.* at p. 1535.)

***10** The defendant places great reliance on *Quinn, supra,* 84 Cal.App.4th 472, 100 Cal.Rptr.2d 914. But the facts of *Quinn* are easily distinguished. The City of Los Angeles hired Eugene Quinn as a police officer by mistake. He failed the medical exam because of a significant hearing impairment, but because of a clerical error, he was notified to report for

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further tests. After passing these tests, he became a probationary patrol officer. He was, however, unable to hear the radio, the mobile display terminal, or his partner's instructions. As a consequence, he was terminated. (*Id* . at pp. 476-477, 100 Cal.Rptr.2d 914.) The facts of *Quinn* are inapposite. Unlike plaintiff, who had passed the Academy, including rigorous physical requirements, and appeared to satisfy all the objective medical standards, Quinn was a probationary officer who was hired by mistake and whose disability was shown to negatively impact his ability to perform the essential functions of a police officer. Whatever presumption of competence that ordinarily might attach to an applicant for a position could not attach to Quinn, who had been mistakenly given the opportunity to fail and did so.[FN1] As the court itself acknowledged, "Consequently, this is not, as plaintiff argues, a situation of an employee properly hired who subsequently suffers an adverse employment decision because of his disability. (Compare *Ackerman* [, *supra,*] 860 F.2d 1514....) Instead, this situation involves an individual who was never qualified to be hired from the outset." (*Quinn, supra,* 84 Cal.App.4th at p. 483, 100 Cal.Rptr.2d 914.)

> FN1. We point out that plaintiff offered more than sufficient evidence to establish any preliminary showing he was qualified to perform the essential functions of a special investigator. Defendant dismisses plaintiff's testimony, fortified as it is by the testimony of the director and the teacher at the Academy, that he was physically fit and capable of effectuating an arrest. But the courts emphasize that a plaintiff's burden to establish a prima facie case is minimal. (*Heard, supra,* 44 Cal.App.4th at p. 1751, 52 Cal.Rptr.2d 620 .) Defendant, in fact, offers nothing more than a stereotypical bias that a man with postpolio could not satisfy the physical demands of the job. Plaintiff may have acknowledged weakness in his legs, but his performance at the Academy suggests he could perform the essential functions of the position. Had Henry, like the director of the Academy, looked beyond the brace and crutches, he might have seen the plaintiff's actual, rather than perceived, ability.

The court ascribed to the trial court the task of weeding out meritless claims and sanctioned a variety of procedural mechanisms, including summary judgment, motions for nonsuit, and motions for judgment notwithstanding the verdict. (*Quinn, supra,* 84 Cal.App.4th at p. 481, 100 Cal.Rptr.2d 914.) *Quinn,* therefore, does direct the trial court to determine, as a matter of law, whether an employee makes a sufficient threshold showing to trigger the employer's burden to proffer a legitimate explanation for its action. Because a plaintiff must only offer minimal evidence, it makes sense that in the context of a mistaken employment, the court would consider the basic qualification for employment. But the court also quoted a comment to BAJI No. 12.01, directly applicable to the case before us: " 'Care must be taken in distinguishing between the "prima facie" elements of a claim for employment discrimination and the "essential elements" of the same case which the jury must decide.' " (*Quinn, supra,* 84 Cal.App.4th at p. 481, 100 Cal.Rptr.2d 914.)

Sufficiency of the Evidence to Prove Disability Discrimination

[2] Defendant does not dispute that plaintiff suffers from a physical disability within the meaning of FEHA. Defendant does, however, insist that plaintiff never became an investigator because there were no vacant positions once he passed the Academy. In other words, he was denied the opportunity for a legitimate, nondiscriminatory reason. The jury disagreed. There is ample evidence to support the jury's finding of discrimination.

***11** Plaintiff testified to the extraordinary effort he made to become an investigator. He succeeded in convincing even his skeptics that he was physically capable of passing the rigorous fitness portion of the Academy. He not only passed each and every segment of the examination, including the fitness portion, but he was presented with an inspirational award. His instructors attested to his ability to execute an arrest and to his physical endurance and coordination, emphasizing that the course had not been adapted to accommodate his disability and yet he surpassed the performance of many nondisabled participants. Moreover, plaintiff's supervisor at the Controller's Office, an FBI agent, and a United States attorney commended plaintiff on his superior investigative skills. In sum, plaintiff had an outstanding record of public service.

Defendant argues that graduation from the

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Academy does not guarantee placement as an investigator, nor even prove he was qualified, and more importantly, whether he was qualified or not, there simply were no available positions. The jury, however, was free to reject defendant's proffered justification as pretextual. It had become, at that point in the proceedings, a classic credibility contest.

Defendant insists that because plaintiff was not qualified until he passed the Academy in December 1994, any open positions before that date are irrelevant. But defendant ignores the evidence that Henry actively prevented plaintiff from becoming qualified by lying to him that there were no courses being offered when, in fact, they were offered every year until 1992. Defendant would also have us forget that Henry handpicked two candidates to attend the Academy with the expectation they would become investigators although, as Brenda Barnes later wrote, there were no "true vacancies." Hence, the jury could discount defendant's attempt to hide behind bureaucratic labels and formalities if it determined that defendant ignored, juggled, or otherwise manipulated those rules to assist nondisabled employees.

The jury, however, heard much more than nuance and innuendo. In 1996 the discrimination became blatant. Unmasked, it was ugly. An investigator left the unit and plaintiff applied for the position. Henry told plaintiff he simply would not consider someone with "his condition" and that the only reason he had passed the Academy was because the program had been modified. During the discrimination investigation, Henry told Barnes he had put plaintiff on assignment with the FBI to get him out of the way. For the first time, plaintiff realized he would never become an investigator for defendant. The discrimination accomplished what the disability could not: plaintiff was humiliated. He was told that not enough qualified people applied, and as a result, the application process was suspended. Certainly, the jury could plausibly decide defendant ended the process rather than hire plaintiff.

Sufficiency of the Evidence of Retaliation

***12** FEHA not only prohibits discrimination, it also prohibits overt or subtle retaliation against the employee who files a discrimination complaint. It is unlawful "[f]or any employer ... to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint ... under this [Act]." (Gov.Code, § 12940, former subd. (f), now subd. (h).) To sustain his burden of proving retaliation, an employee must show that he engaged in protected activity, that he suffered an adverse employment action by the employer, and that there is a causal link between the two. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69, 105 Cal.Rptr.2d 652.) The causal link may be proved by circumstantial evidence that the employer knew the employee was engaged in the protected activity and inflicted the retaliatory employment action within a short time thereafter. (*Ibid.*)

Defendant contends there was no substantial evidence either that plaintiff suffered any adverse employment actions or that there was the requisite causal link. Again, we must read the record " ' " 'in the light most advantageous to the plaintiff, resolve all conflicts in his favor, and give him the benefit of all reasonable inferences in support of the original verdict....' " ...' " (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 814, 89 Cal.Rptr.2d 505 (*Iwekaogwu*).)

An "adverse employment action is adverse treatment that is reasonably likely to deter employees from engaging in protected activity." (*Ray v. Henderson* (9th Cir.2000) 217 F.3d 1234, 1237.) Plaintiff had been a state employee for 20 years when he filed his discrimination claim in 1996. He offered evidence to expose a dramatic shift in the way he was treated after he filed his claim. While no single event might have amounted to retaliatory conduct, the jury had more than sufficient evidence to conclude that cumulatively a series of decisions constituted a retaliatory pattern of conduct amounting to adverse treatment.

[3] We have detailed that evidence above. Suffice it to say, there was substantial evidence from which the jury could infer that plaintiff was reprimanded, punished, and ultimately banished as a result of filing his claim. Defendant attempts to minimize the significance of the corrective memorandum as a mere warning, to justify the cancellation of the class plaintiff had planned to teach as an administrative prerogative, and to explain the transfer to the single audits division as a necessary reallocation of resources. Moreover, defendant emphasizes that plaintiff did not interview for the position in 1998 and therefore had not completed the application process. Defendant

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claims it limited plaintiff's working relationship with the FBI and the United States Attorney's Office only to improve the relationship with the Attorney General's Office. In short, defendant insists that none of the negative responses plaintiff endured constituted an adverse employment action. He asks us to determine, presumably as a matter of law, that each response was benign, particularly because he suffered no loss of salary or benefits.

***13** Defendant construes an adverse employment action too narrowly. Many adverse actions do not involve a loss of salary or benefits. (*Strother v. S. Cal. Permanente Medical Group* (9th Cir.1996) 79 F.3d 859, 869 [exclusion "from educational seminars, meetings, and positions" constituted adverse employment action]; *Collins v. State of Ill.* (7th Cir.1987) 830 F.2d 692, 703-704 [transfer to undesirable office held to satisfy adverse employment requirement].) Human beings are much too clever in designing nefarious, yet subtle, forms of retaliation to define an adverse action simply in terms of dollars and cents. The ultimate mediator, as here, is a jury. Defendant introduced evidence to support its assertion that these legitimate, nonretaliatory reasons justified its actions, but the jury rejected these explanations as mere pretext to mask its underlying animus toward plaintiff. Defendant would have us disregard these findings. We cannot usurp the important role of the jury when, as here, the findings are supported by substantial evidence.

Similarly, the jury could have found that Chen honestly believed the substance of his memorandum and sought to warn plaintiff he had violated internal policies. But it did not. Chen's dishonesty and lack of diligence, coupled with the convincing evidence that the allegations in the memorandum were bogus, support the jury's finding that Chen knew about the discrimination claim and punished plaintiff for it. More compelling yet was the proximity between Chen's receipt of plaintiff's thorough rebuttal and plaintiff's transfer to a new position with no work to do.

We conclude there is substantial evidence to support the jury's finding of retaliation. An employer need not fire an employee to punish and humiliate him. Plaintiff had spent 20 years dedicated to state service in conducting audit investigations, including working for law enforcement agencies. Throughout that time he was commended for the superior work he performed, the initiative he demonstrated, and the dedication he had to delivering an excellent work product. That all changed, however, once he filed the discrimination claim. The jury sniffed retaliation through the barrage of pretextual justifications and backpedaling. Construing the evidence in favor of plaintiff, as we must, we conclude there is substantial evidence of retaliation.

II

[4] Defendant complains that the court improperly refused to instruct the jury on its defenses. It requested the court to instruct the jury in the language of BAJI Nos. 12.14, 12.16, and 12.17 that an employer can refuse to hire or promote an employee who is unable to perform the essential elements of the job or who is at risk of injuring himself or others. The court refused to give the instructions because defendant had never offered plaintiff a reasonable accommodation, a prerequisite to these defenses.

"It is a permissible defense for an employer or other covered entity to demonstrate that, *after reasonable accommodation has been made,* the applicant or employee cannot perform the essential functions of the position in question because of his or her disability." (Cal.Code Regs., tit. 2, § 7293.8, subd. (b), italics added.) Similarly, employers are provided a defense to reject an applicant or employee if, because of his or her disability, the applicant or employee would endanger his or her own health and safety or the health and safety of others. (*Id.* at subds. (c) & (d).) The Government Code, however, includes the same proviso. The health and safety defense is permissible if the employer demonstrates that *even with reasonable accommodation* the applicant or employee cannot perform the essential functions of the job without endangering himself or others. (Gov.Code, § 12940, subd. (a)(1) & (2).)

***14** Defendant failed to offer plaintiff reasonable accommodation.[FN2] That failure alone constitutes an unlawful business practice under FEHA. (Gov.Code, § 12940, former subd. (k), now subd. (m); *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 946-947, 62 Cal.Rptr.2d 142.) Moreover, there was evidence the failure was intentional. Barnes, the disability officer, warned her supervisor, Eaton, that if they sent plaintiff to be examined by a physician, their duty to offer reasonable accommodation would be triggered. Hence, defendant did not avail itself of the

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opportunity to secure a medical opinion as to plaintiff's physical capabilities. At trial, defendant attempted to demonstrate that plaintiff's postpolio symptoms prevented him from performing the essential functions of an investigator, but without the benefit of a physical examination, the only medical opinion it produced was the testimony of plaintiff's treating physician.

> FN2. Somewhat ironically, defendant attempts to use a much earlier and benign accommodation against plaintiff on appeal. Years earlier, plaintiff's time was divided between Northern and Southern California. Because his staff often had difficulty reaching him, he asked his supervisor if the state would provide him a cellular telephone. His supervisor couched the request as a "reasonable accommodation." Plaintiff assented to the supervisor's characterization of the request as a reasonable accommodation. His assent did not constitute any kind of admission that he could not perform the essential functions of a special investigator.

In essence, defendant attempted to secure a defense to which it was not entitled. And herein may lie the essential problem in this case. Defendant had the option, indeed the duty, to refuse to allow plaintiff to become an investigator if his physical disability prevented him from performing the essential functions of the position or if the disability rendered him a danger to himself or others. (See *Diffey, supra,* 84 Cal.App.4th at p. 1039-1040, 101 Cal.Rptr.2d 353.) But before an employer can make the determination that a disability prevents an employee from performing the essential functions of the job, it must offer the disabled employee reasonable accommodations. This defendant did not do, and this refusal ultimately led to a convoluted trial strategy. We explain.

Having failed to offer plaintiff a reasonable accommodation, defendant could not avail itself of the trilogy of defenses that might have otherwise been available to it. Hence, the employer attempted to foist its burden of proving a defense upon the employee under the guise that the employee had the burden of providing his own qualification as part of his prima facie case, the somewhat complicated problem we resolved above. Having failed in its attempt to reverse the employer's and employee's burdens of proof, defendant claims its belated effort to resurrect a defense was improperly aborted. Not so.

An employer remains saddled in the courtroom by the employment actions it took against the employee in the workplace. Defendant did not offer plaintiff reasonable accommodation, and therefore it could not raise as a defense either that plaintiff was unable to perform or that his performance would endanger himself or others. Had defendant opened the possibility for reasonable accommodation, it would have preserved its defense and been entitled to the instructions it requested at trial. But by refusing to accommodate, its defenses as described in BAJI Nos. 12.14, 12.16, and 12.17 were foreclosed. Thus, the court properly refused to instruct the jury on defenses defendant did not have.

III

***15** [5] The jury found that plaintiff suffered $116,000 in economic damages, $175,000 in noneconomic damages for disability discrimination, and $125,000 in noneconomic damages for retaliation. Again, defendant contends the award of damages is not supported by substantial evidence. Essentially, defendant reargues the same evidence rejected by the jury and clings to its theory of the case. Fundamental limitations on the scope of appellate review constrain us from usurping the role of the jury. Because there is sufficient evidence to support the jury's findings, and no evidence to suggest the jury was motivated by passion or prejudice, whim or caprice, we affirm the award of damages.

" 'The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. As a result, all presumptions are in favor of the decision of the trial court [citation]. The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.' " (*Iwekaogwu, supra,* 75 Cal.App.4th at p. 820, 89 Cal.Rptr.2d 505.)

Plaintiff lost significant retirement benefits as a

result of the discrimination. An actuarial expert testified that the difference between plaintiff's retirement benefits and the benefits he would have received as a special investigator amount to $23,200 per year. Defendant seems to concede that the expert's testimony constitutes substantial evidence of an annual difference in benefits, but it contends the jury must have made a mathematical miscalculation. Defendant's supposition is sheer speculation belied by the evidence presented at trial.

Defendant assumes that plaintiff could not have become an investigator until 1996 when he returned to the Controller's Office from the FBI. Indeed, that was the defense theory, a theory justified in part by plaintiff's initial FEHA complaint. But by the time of trial, plaintiff's theory had expanded. He testified that he told Henry he wanted to become an investigator as early as 1987, but Henry prevented his acquisition of the training necessary by lying to him that no courses were available when, in fact, other similarly situated employees attended the requisite training. Based on this testimony, the jury could have assessed damages from as early as 1987. Instead, however, it appears the jury determined that plaintiff should have been given the job in 1995 and therefore was entitled to the lost retirement benefits for five years. Since plaintiff passed the Academy in December 1994, the jury's findings are indeed supported by substantial evidence. Five years at $23,200 would equal the exact amount the jury awarded for economic damages-$116,000. The award of economic damages was proper.

***16** Defendant maintains the noneconomic damages are excessive. Plaintiff testified that the humiliation he suffered from the discrimination and retaliation was debilitating. He became depressed, reclusive, and withdrawn. He could not eat, was unable to be intimate with his wife, and had serious stomach problems. Embarrassed, he avoided his peers. He felt "inadequate." His wife corroborated how the discrimination impacted her husband and their marriage. They sought counseling. Thus, there was substantial evidence to support an award of noneconomic damages. Defendant insists, however, that the amount of the noneconomic damages triggers a presumption that the jury acted passionately, not reasonably. We disagree.

In *Iwekaogwu, supra,* 75 Cal.App.4th 803, 89 Cal.Rptr.2d 505, the Court of Appeal upheld an award of $500,000 in damages to compensate a Nigerian civil engineer for his employer's retaliatory conduct. Although the jury had not distinguished economic and noneconomic damages, the court calculated that the economic damages could not have exceeded $37,500. (*Id.* at p. 821, 89 Cal.Rptr.2d 505.) Nevertheless, the court upheld an award of over $450,000 in emotional distress damages.

The court explained: "Iwekaogwu had been referred for psychological treatment but did not receive such care. Nevertheless, the jury could have concluded that Iwekaogwu should receive such treatment. The jury also could have concluded that he was suffering from emotional distress that significantly altered his ability to enjoy life and to engage in ordinary activities, that interfered with his family life, and that included fear of physical harm from coworkers. The remittitur amount chosen by the trial court was not excessive as a matter of law in light of the evidence presented at trial and the deference due the trial court's exercise of its discretion." (*Iwekaogwu, supra,* 75 Cal.App.4th at p. 821, 89 Cal.Rptr.2d 505.)

Nor was the $300,000 awarded plaintiff so large as to shock the conscience or evidence passion or prejudice. The court recognized in *Iwekaogwu* that the jury, having seen the witnesses, including the injured employee, was best equipped to assess the extent of the emotional damages. The jury may have acquired an understanding of how job discrimination and retaliation can drastically affect the quality of life of an employee with a physical disability who, struggling against difficult odds, simply wants to avail himself of the same opportunities offered his nondisabled peers. It is always difficult to quantify the value of emotional distress and perhaps even more so when the victim is particularly vulnerable. But as the court concluded in *Iwekaogwu,* deferring as we must to the jury verdict, we conclude the award of noneconomic damages is not excessive.

We affirm the judgment.

We concur: DAVIS, Acting P.J., and CALLAHAN, J.

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