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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DEWANDRA JOHNSON, Plaintiff and Appellant, v. UNITED CEREBRAL PALSY/SPASTIC CHILDREN'S FOUNDATION OF LOS ANGELES etc., et al., Defendants and Respondents.	B198888 (Los Angeles County Super. Ct. No. BC341303)

APPEAL from a judgment of the Superior Court of Los Angeles County, Aurelio Munoz, Judge. Judgment is reversed and remanded.

Harris & Hoffman, Schonbrun DeSimone Sephlow and V. James DeSimone; Law Office of Twila S. White and Twila S. White for Plaintiff and Appellant.

Knee, Ross & Silverman, Howard M. Knee and Melanie C. Ross for Defendants and Respondents.

This is an appeal from a summary judgment granted to an employer after one of its former employees filed suit alleging the employer fired her because she was pregnant. The plaintiff alleges violations of the California Fair Employment and Housing Act (Gov. Code, 12900 et seq.), specifically sections 12940 (setting out specific types of unlawful conduct by employers, labor organization, employment agencies and others), and 12945 (relating to pregnancy leave and other accommodations).[1]

To support its summary judgment motion, the employer presented evidence to the trial court that it had terminated plaintiff for a valid reason—it had obtained information that plaintiff falsified her work time records. Plaintiff opposed the motion by asserting that (1) she had not falsified her time records, (2) she was fired because she disclosed she was pregnant, and (3) other women had been fired after they disclosed they were pregnant. The latter assertion was based on declarations from the other women.

Defendant made evidentiary objections to these declarations, and the declarations were addressed by both parties at the hearing on the motion for summary judgment. However, the reporter's transcript shows that the trial court made no evidentiary rulings at the hearing, and the trial court's minute order for the summary judgment motion, dated January 16, 2007, does not contain explicit evidentiary rulings. Instead, the minute order shows that plaintiff's evidence of these other firings of pregnant women

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[1] Unless otherwise indicated, all statutory references are to the Government Code.

was implicitly accepted by the trial court, but found to be wanting as sufficient to justify denying defendant's motion for summary judgment.

Defendant served a notice of ruling that does not contain any reference to its evidentiary objections. Later however, defendant submitted an attorney order on the summary judgment motion, which the court signed and filed on March 5, 2007, nearly two months after the hearing that motion. Despite the fact that the minute order indicates otherwise, the attorney order states that the court sustained defendant's objections to the declarations. The court signed the attorney order despite plaintiff's filed objection in which, among other things, she argued that the court had never made an express ruling on defendant's evidentiary objections. The admissibility of these declarations of defendant's former employees, along with the question as to whether triable issues of material fact were disclosed by the evidence submitted by the parties, constitute the appellate issues before us in this matter.

We conclude that the contested declarations are admissible and constitute substantial circumstantial evidence, when considered with other evidence presented by plaintiff, which is sufficient to raise triable issues of material fact as to the reason for plaintiff's termination. Therefore, the summary judgment must be reversed and the matter remanded for further proceedings.

BACKGROUND OF THE CASE

1. *Allegations in the Operative Complaint*

Dewandra Johnson is the plaintiff in this case. The defendant is the United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties

(which also does business as United Cerebral Palsy , Inc., hereinafter, defendant). Two individuals were also named as defendants in plaintiff's operative (second amended) complaint. However, plaintiff ultimately dismissed many of the 12 causes of action in that complaint, and the individual defendants were not named in the remaining causes of action. Therefore, those individuals are not respondents in this appeal. They are, however, important non-parties in the case. They are Raquel Jimenez, plaintiff's former supervisor and a Program Manager at the defendant foundation, and Linda Jones, defendant's director of Client Living Services and Jimenez's supervisor.

The causes of action that remain in the operative complaint (hereinafter, complaint) allege violations of the California Fair Employment and Housing Act and violations of public policy. Specifically, plaintiff asserted causes of action for discrimination based on sex (pregnancy) and discrimination based on disability (pregnancy) in violation of Government Code section 12940 and in violation of public policy; violation of California's law on pregnancy disability leaves (Gov. Code, § 12945); failure to take reasonable steps to prevent discrimination and retaliation (Gov. Code, § 12940); and wrongful termination in violation of public policy.

The complaint alleges all of the following. Defendant is a national charity which assists people with disabilities, including disabilities other than cerebral palsy. Plaintiff began her employment with defendant in November 2004 and was assigned to the position of a caregiver. In May 2005 she was promoted to the position of counselor. She was in her mid-twenties at the time. On or about July 31, 2005, plaintiff contacted Raquel Jimenez (Jimenez) and related that she was ill and needed to seek medical

attention related to her pregnancy. On August 1, 2005, plaintiff's doctor diagnosed her with conditions that rendered her disabled by her pregnancy. Plaintiff alleges that this entitled her to protection under section 12945, including the right to take a pregnancy disability leave and the right to return to her position at the end of the leave. Plaintiff phoned Jimenez that same day and left a message stating that her doctor had prescribed bed rest and instructed her not to return to work until August 8, 2005. Jimenez sent plaintiff a certified letter indicating that plaintiff would need a doctor's note stating she is to be out until August 8, 2005, and a doctor's note releasing plaintiff to come back to work.[2] [3]

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[2] The letter sent by Jimenez is dated August 2, 2005. In her position as defendant's employee, plaintiff was apparently known by the name "Renee," and Jimenez's letter to plaintiff addresses plaintiff as "Dear Renee." The addressee name on the mailing envelope is "Dewandra Renee Johnson." The letter states: "I have received your voicemails, stating you are out for medical reasons. I will need a note from your doctor stating you are out until August 8th, 2005. Since this leave is longer than 3 days, our agency policy states you will also need a note from your doctor releasing you to come back to work. [¶] I have sent a letter since you have not returned my page, and we do not have a current phone number on file for you. At your convenience please contact me at the office [phone number], so we can discuss this matter further."

[3] In support of its motion for summary judgment, defendant presented evidence that it has a pregnancy disability leave policy that permits employees who are unable to work due to a pregnancy to take an unpaid leave of absence of up to four months, and when the employee returns to work the employee will be reinstated in the same or substantially equivalent position. The policy is set out in the employee handbook and in November 2004 plaintiff acknowledged in writing that she received a copy of the handbook.

Plaintiff stated at her deposition that she had not requested an actual pregnancy disability leave. Rather, she simply informed Jimenez that she would be seeing a doctor for pregnancy related problems, and then informed Jimenez that her physician ordered her to bed rest for a week.

Plaintiff further alleges that, on August 8, 2005, she called Jimenez and left a message stating that her doctor had cleared her to come back to work on August 9, 2005. Jimenez responded by phoning plaintiff and telling her to meet Jimenez at the defendant's Santa Monica facility on August 9, 2005 at 1:00 p.m. At their meeting, Jimenez informed plaintiff she was being terminated from employment and should return various materials to defendant, such as a pager and keys, and patient folders that plaintiff had in her possession. Plaintiff was given her final paycheck and a letter of termination.

The complaint alleges on information and belief that plaintiff was terminated because she was pregnant, and because she was disabled by the pregnancy and took a leave relating to her pregnancy. The complaint further alleges that Linda Jones (Jones) participated in the termination after Jones was informed that plaintiff's pregnancy condition required medical leave, and it alleges on information and belief that Jones had a discriminatory animus against pregnant women and a pattern and practice of engaging in adverse treatment of them such that she would create a justification for their termination. Also alleged on information and belief is that Jimenez had a discriminatory animus against pregnant women and heterosexual women. The complaint alleges that Jimenez had disclosed to plaintiff and other employees that she is a lesbian, Jimenez made derogatory remarks regarding pregnant women and heterosexual women, and Jimenez gave preferential treatment to gays and lesbian employees and specifically recruited gays and lesbians to fill positions within the defendant foundation.

2. *Theory of Defendant's Summary Judgment Motion*

The theory of defendant's summary judgment motion is that defendant conducted a good faith investigation into plaintiff's time sheets and billing records for a particular workday; it had reason to conduct the investigation because plaintiff was not at a client's residence when she said she would be there; and from the investigation, defendant came to the conclusion that plaintiff, an hourly employee, falsified a time sheet and billing record in an attempt to collect wages she did not earn, and it was on that basis only that defendant discharged her. Regarding the evidence that plaintiff presented to show that she was fired based on discrimination, defendant argues such evidence is not sufficient to support a finding by a trier of fact that the real reason plaintiff was discharged was because of discriminatory animus against pregnant employees.

3. *Evidence Presented by the Parties*[4]

a. *Plaintiff's Employment Positions and Supervisors*

Defendant is a charitable corporation that provides services to disabled adults. Plaintiff began working for defendant as a Community Trainer (caregiver) in November 2004. That required her to provide direct care to particular clients of defendant. In her position as a caregiver, plaintiff was initially supervised by Jimenez and Loraine Sandgren, who were both program managers. (Jimenez had been hired in November

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[4] Unfortunately, our record review in this case was made more difficult by plaintiff's multiple citations to the record with page references that had nothing to do with the assertion of fact being made by the brief.

2004 for the position of program manager.) Sandgren left defendant's employ in January 2005 when she (Sandgren) became pregnant, and thereafter plaintiff was supervised solely by Jimenez.

In May 2005, plaintiff was promoted to the position of Community Living Specialist (counselor) when Jimenez recommended the promotion and Jones approved it. Plaintiff's duties as a counselor included visiting the residences of defendant's clients, assisting with their case management, staffing coverage for clients, and assisting clients with budgeting, paying bills, and doctor's appointments. She was told she could change her schedule for assisting clients if something came up that required her attention with respect to a client's health, well-being or other living situation. She was given a pager because occasionally Jimenez or defendant's clients would want to contact her.

b. *Disputed Versions of Plaintiff's Job Performance*

Plaintiff stated in her declaration filed in support of her opposition to defendant's motion for summary judgment that supervisor Loraine Sandgren told plaintiff she was pleased with plaintiff's work, told her she wanted plaintiff to have a raise, and told her that one of defendant's clients that plaintiff cared for, as well as that client's mother, had commented they were happy with the care plaintiff was providing to the client. Plaintiff submitted a declaration from the client's mother to that effect, as well as declarations from people who had worked for defendant, and who stated that plaintiff was a good employee. Plaintiff testified at her deposition that in her weekly meetings with Jimenez, Jimenez never told her anything negative or critical about her job

performance, and she stated in her declaration that she had not received any written indications that her job performance was not satisfactory. She stated that throughout her employment with defendant, Jones told her she was doing a good job, as did plaintiff's co-workers, and that once Jones relayed a positive comment about plaintiff's work that was made by the client services coordinator at the Westside Regional Center. Plaintiff asserted that she returned pages as promptly as she could because the pagers that defendant gave her to use did not always function properly, and she asserted that Jimenez knew the pagers were problematic.

Defendant asserted that during the time plaintiff held the position of counselor, she had performance related issues. Jimenez testified at her deposition that on approximately 12 occasions she found plaintiff's performance to be unsatisfactory. She stated that several of those occasions involved "paging incidents," two involved plaintiff not being able to find coverage for a client that needs 24-hour care, and one involved not being able to obtain medical supplies for a client. Other issues involved plaintiff not appearing at appointments or following a schedule plaintiff devised for herself, and plaintiff having difficulty scheduling staff. These things occurred during the 10 weeks after plaintiff was promoted from caregiver to counselor. However, although Jimenez testified at her deposition that she did address these things with plaintiff verbally, she did not follow up with any written warnings. Also, Jimenez acknowledged that although performance evaluations are written for employees who have significant performance issues, she never wrote one up for plaintiff.

c. *The Question Where Plaintiff Worked on Thursday, July 28, 2005*

Plaintiff testified at her deposition that she was scheduled to work with one of defendant's clients (Steve) at his apartment residence on July 28, 2005, beginning at approximately 9:00 a.m., and scheduled to see another client, Mery, at 2:00 p.m. that same day. However, Mery called plaintiff at around 8:45 in the morning and told plaintiff that she would not be available to see plaintiff in the afternoon. Plaintiff switched Mery to the 9:00 a.m. slot because Mery had a priority situation in that her bills were in danger of being paid late if plaintiff could not see her that day. Plaintiff testified that she told Steve and one of his caregivers, Maya Davis, that she was going to switch his and Mery's schedules.

Jimenez stated in a declaration that she called Steve's residence at approximately 1:00 p.m., looking for plaintiff but plaintiff was not at Steve's home at that time. Jimenez stated that she and plaintiff spoke later that same day and plaintiff told her that she (plaintiff) intended to work with Steve at 4:00 p.m. that day. Plaintiff denies ever speaking with Jimenez that day. However in any event, on or about July 31, 2005, plaintiff faxed billing records (aka monthly service records) to defendant that stated she had worked at Steve's apartment on July 28, 2005 for 4.5 hours; and thereafter, on or about August 8, 2005, plaintiff faxed time records (time sheets) to defendant, and the records indicated plaintiff worked with Steve between 4:00 p.m. and 8:00 p.m. on July 28, 2005.

Nnenna Okezie is employed by defendant as an on-call caregiver. She stated at her deposition that she met Steve for the first time on July 28, 2005, which she said was

a day she was called by a woman counselor who asked if she (Okezie) could care for Steve for the 5:00 p.m. to 11:00 p.m. shift because defendant did not have anyone to cover that shift. Okezie stated that the counselor told her that she (the counselor) would be there at Steve's apartment when Okezie arrived and would explain to Okezie what needed to be done for Steve. She stated the counselor was indeed there when she arrived, did show her what to do for Steve, and told her that another worker would come at 11:00 to care for Steve. Okezie stated in a declaration that she signed after her deposition was taken that when she arrived at Steve's home she relieved the worker who was scheduled to care for him until 5:00 p.m. and no one besides herself worked at his home that evening, and thus she did not see plaintiff at his home that day. She stated that the first time she ever saw plaintiff was when she met plaintiff at her (Okezie's) deposition taken in June 2006.

Plaintiff stated in her declaration that it was she who called Okezie to ask that Okezie cover the shift at Steve's home on July 28, 2005 from 5:00 p.m. to 11:00 p.m. Plaintiff stated she introduced herself as "Renee" in that telephone call to Okezie, and again when Okezie arrived at Steve's apartment on the afternoon of July 28, 2005. Plaintiff stated that Jones and Jimenez and other persons on defendant's staff have referred to her as Renee, defendant has sent her correspondence addressed to her as Renee Johnson, and that to the best of her knowledge, no one else named Renee worked for defendant.

Plaintiff testified that she (plaintiff) arrived at Steve's apartment at approximately 4:00 p.m. on July 28, 2005, and she stayed there about four hours.

Caregiver Maya Davis was there when she arrived. When Okezie arrived about an hour later, plaintiff introduced herself as Renee and explained to Okezie what Okezie would need to do for Steve during her shift. Then plaintiff left Steve's home at 8:00 p.m.

When Okezie was questioned at her deposition about the counselor who called her to come and work at Steve's on July 28, 2005, Okezie stated the counselor was an African American woman whom she had never seen before. Asked if she had ever met an employee by the name of Renee, Okezie stated she had met a Renee, and Renee was Steve's counselor, the person she met on July 28 at his apartment. However, plaintiff was present at Okezie's deposition, and when plaintiff's attorney indicated to Okezie that plaintiff was one of the people at the deposition, Okezie looked at plaintiff and testified she had never met plaintiff before and had never seen plaintiff before. She stated the person she met with on July 28, 2005 at Steve's apartment who told her what needed to be done for Steve has a darker complexion than plaintiff.[5]

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[5] There is a dispute about when Okezie was first questioned by Jimenez about her July 28, 2005 work at Steve's. At her deposition, Okezie stated that it was in early August, "a little after the service records were due," that Jimenez first questioned her about her work on July 28, 2005 at Steve's home. Okezie testified that Jimenez asked her (1) if she worked that day for Steve, (2) if someone came in for Steve after her (Okezie's) shift was over, and (3) if she worked alone that day. She told Jimenez that she did work on July 28 at Steve's home and she worked alone that day. She described her conversation with Jimenez as "short." That testimony came after she had been asked earlier at her deposition whether she remembered the date on which she met Steve for the first time. She answered that she met him for the first time on July 28. Asked if there was a reason that date stands out in her memory, she stated: "Yes, because it was called to my attention that another employee said that she worked that day, the old hours that I worked." Asked when it was called to her attention, Okezie stated: "Most likely either late August or early September, because I was out of school and that was when Raquel [Jimenez] contacted me."

One of Steve's caregivers, Maya Davis, submitted a declaration in which she stated that on June 7, 2006, defendant's attorney, Howard Knee, questioned her about events on July 28, 2005. She told Knee that plaintiff did come to Steve's apartment late in the afternoon on July 28, 2005, and plaintiff was still there when Davis left the apartment after her shift was over (at 5:00 p.m.). Davis stated in her declaration that Jimenez was present at this questioning session with Knee, and Jimenez said to Davis "That's not what you told me over the phone," and Davis replied to Jimenez that she (Davis) had "not talked to you about this at all." Davis stated in her declaration that she worked on July 28, 2005 from 9:00 a.m. to 5:00 p.m. caring for Steve. Plaintiff came by at 4:00 p.m. and Okezie arrived there after plaintiff did, and when Davis left at 5:00 p.m., both plaintiff and Okezie were still at Steve's apartment. To meet Davis' declaration, defendant argues that since Okezie stated she worked her shift by herself; as a result defendant argues Davis's declaration, at most, shows only that plaintiff was at Steve's from 4:00 p.m. to 5:00 when Okezie arrived to work the shift by herself.[6]

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[6] Plaintiff disputes that Okezie worked until 11:00 p.m. on the night of July 28, 2005, and she bases this dispute on a portion of the deposition testimony of Danette Knight, who is the person who began caring for Steve at 11:00 p.m. on the night of July 28, 2005. Knight testified she did not recall seeing or talking to a coordinator, caregiver or counselor that day. She stated she walked in the door at Steve's apartment building at 11:00 that day and while going to Steve's apartment she did not see anyone coming from his apartment nor could she recall seeing anyone in that vicinity. However, when asked whether Steve let her into his apartment that day, she stated he did not; and when asked whether she remembered whether anyone let her into Steve's apartment that day, Knight stated she did not remember. Knight stated she had never met an employee by the name of Nnenna and did not remember ever talking to an employee by that name, never met anyone at Steve's apartment by that name, never

Debbie Miller is defendant's coordinator (onsite supervisor) at the apartment building where Steve lives, and one of her duties was to make the rounds of the building to check on defendant's clients that live there. She also assisted with clients that needed assistance and did not have staffing, and she also was responsible for insuring that the grounds of the apartment building were secure and no unwanted people were there. Defendant had clients in 12 units in the building. Miller testified at her deposition that she spoke with Jimenez on one occasion about plaintiff, and the conversation took place between July and August. Jimenez asked her if she saw plaintiff on "the 28th." Miller told Jimenez she did not remember seeing plaintiff (but she did see Okezie). Miller testified that on July 28, 2005, she was making rounds at the apartment building where Steve lived and on one of her rounds she went into Steve's apartment. Asked if she saw anyone there, Miller said she saw Okezie, and this was after 6:00 p.m. In a declaration Miller submitted, she stated that on July 28, 2005, she went to Steve's apartment around 4:00 p.m. and returned later in the evening to his apartment. She did not see plaintiff there.

d. *Defendant Fires Plaintiff*

On Sunday, July 31, 2005, plaintiff left a voice mail message for Jimenez saying she was ill and would not be at work on Monday. Plaintiff asserts that message

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heard the name Okezie or met anyone with that name. Also at her deposition, Knight stated that she had never before seen the person who was previously sitting in the chair that Knight was sitting in. However, there is no indication in the portion of the deposition transcript that is in the appellate record that such person was Okezie. Defendant asserts that Knight's testimony is not material because "mere minutes may have passed between the time Okezie left the apartment and when Knight arrived."

included information that plaintiff needed medical attention relating to her pregnancy. Jimenez denies that plaintiff told her in that message, or anytime before she was fired, that she was pregnant. However, for purposes of the summary judgment motion, defendant accepts, as undisputed, plaintiff's representation that she mentioned the pregnancy in the July 31, 2005 voice mail.[7] On Monday, August 1, 2005, plaintiff left another voice mail message for Jimenez, stating plaintiff's doctor put her on bed rest for a week. Then on August 8, 2005, plaintiff left a voicemail message for Jimenez stating she was cleared to return to work and asking whether she should meet with Jimenez or resume a schedule of meeting with clients. Jimenez responded by leaving plaintiff a voicemail message telling her to meet with Jimenez on August 9, 2005 at 1:00 p.m.

When plaintiff and Jimenez met on August 9, 2005, Jimenez fired plaintiff. Asked at her deposition what it was that Jimenez said to her when she was fired, plaintiff responded that Jimenez said that "based on what has happened," Jimenez did not feel that plaintiff was capable of handling the job. Plaintiff testified that Jimenez did not explain what she meant by the phrase "based on what has happened." Plaintiff stated the other things that Jimenez said to her at that time were to turn in some documents, to sign a document to receive unemployment benefits, and that she (Jimenez) did not need to see plaintiff's medical release from plaintiff's doctor. Thus,

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[7] As noted *infra*, in a motion for summary judgment, we view the evidence in the light most favorable to the party opposing the motion.

not mentioned specifically by Jimenez at their meeting were plaintiff's billing and time records, plaintiff's pregnancy, nor the week of sick leave that plaintiff had taken.[8]

Asked at her deposition what it was that caused defendant to make the decision to terminate plaintiff, Jimenez stated it was her (Jimenez) having confirmed with Steve, and with Okezie and Debbie Miller, that plaintiff had not been at Steve's home working on the evening of July 28, 2005. In her declaration, Jimenez stated she and Jones talked about the situation, she (Jimenez) suggested that plaintiff be terminated, and Jones agreed and instructed Jimenez to fire plaintiff.

DISCUSSION

1. *Standard of Review*

We review the order granting defendant's motion for summary judgment on a de novo basis. (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 474.) In doing so, we apply the same rules the trial court was required to apply in deciding the motion.

When the defendant is the moving party, it has the burden of demonstrating as a matter of law, with respect to each of the plaintiff's causes of action, that one or more elements of the cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849.) If a defendant's presentation in its moving

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[8] Plaintiff did not ask Jimenez why she was being fired. That fact could be used to prove more than one thing. Defendant might assert it shows that plaintiff knew she had falsified time records. Plaintiff could assert that she did not falsify time records and she only refrained from asking why she was fired because she believed that it was because she was pregnant and had taken time off from work because of the pregnancy.

papers will support a finding in its favor on one or more elements of the cause of action or on a defense, the burden shifts to the plaintiff to present evidence showing that contrary to the defendant's presentation, a triable issue of material fact actually exists as to those elements or the defense. (§ 437c, subd. (p)(2).) That is, the plaintiff must present evidence that has the effect of disputing the evidence proffered by the defendant on some material fact. (*Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 849.) Thus, section 437c, subdivision (c), states that summary judgment is properly granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Because a summary judgment denies the adversary party a trial, it should be granted with caution. (*Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 865.) Declarations of the moving party are strictly construed, those of the opposing party are liberally construed, and doubts as to whether a summary judgment should be granted must be resolved in favor of the opposing party. The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact. (*Id*. at pp. 865-866.) If, in deciding this appeal, we find there is no issue of material fact, we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not, and whether it was raised by defendant in the trial court, or first addressed on appeal. (*Western Mutual Ins. Co. v. Yamamoto* (1994)

29 Cal.App.4th 1474, 1481.) If, on the other hand, we find that one or more triable issues of material fact exist, we must reverse the summary judgment.

2. *General Principles Applicable to Wrongful Discrimination Cases*

Because it is often difficult to produce direct evidence of an employer's discriminatory intent when the employer takes a negative action against an employee or prospective employee, certain rules regarding the allocation of the burdens and order of presentation of proof have developed in order to achieve a fair determination of the question whether intentional discrimination motivated the employer's actions. (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 254, fn. 8.)

At trial, the plaintiff must present a prima facie case of discrimination: he was a member of a protected class; he was qualified for the position he sought or he was performing competently in the position he held; he suffered an adverse employment action (for example, he was denied employment, terminated, or demoted); and there is evidence that suggests the employer's motive for the adverse employment action was discriminatory. The burden on the plaintiff at that stage is not onerous, but it does require the plaintiff to present evidence of actions taken by the employer from which the trier of fact can infer, if the actions are not explained by the employer, that it is more likely than not that the employer took the actions based on a prohibited discriminatory criterion. If the plaintiff establishes a prima facie case of discrimination, a rebuttable presumption of discrimination arises and the burden shifts to the employer to rebut the presumption with evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer carries that burden, the presumption of discrimination

disappears, and the plaintiff's task is to offer evidence that the justification presented by the employer is a pretext for discrimination, or additional evidence of discriminatory motive. The burden of persuasion on the issue of discrimination remains with the plaintiff. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354-356.)

In *Hersant v. Department of Social Services* (1977) 57 Cal.App.4th 997, 1003-1005, the court stated that in employer-initiated summary judgment motions, an employer's presentation of evidence showing a nondiscriminatory reason for an adverse employment action, coupled with the employee's presentation of a prima facie case of discrimination, will not result in the need for a trial on the issue of discrimination. Rather, the employee must present evidence to rebut the employer's claim of nondiscriminatory motivation, or the employer will prevail on its motion. "[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Id*. at pp. 1004-1005.) The employee must do more than raise an issue whether the employer's action was unfair, unsound, wrong or mistaken, because the overriding issue is whether discriminatory animus motivated the employer. (*Id*. at p. 1005.) " '[T]he [employee] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the

employer did not act for . . . [the asserted] non-discriminatory reasons." [Citations.]' [Citations.]" (*Ibid*.) "In other words, plaintiff must produce substantial responsive evidence to show that [the employer's] ostensible motive was pretextual; that is, 'that a discriminatory reason more likely motivated the employer or that the employer's explanation is unworthy of credence.' " (*King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 433.)[9]

3. *Defendant Met Its Evidentiary Burden, and Plaintiff Presented a Prima Facie Case of Discrimination*

To support its motion for summary judgment, defendant was required to present evidence of a nondiscriminatory reason for taking the adverse employment action of firing plaintiff, who is a member of a protected class (pregnant employees). Defendant presented evidence that although plaintiff claimed in her time/billing records to have worked at Steve's home for four or four and one-half hours in the afternoon/evening portion of July 28, 2005, the caregiver who worked the 5:00 p.m. to 11:00 p.m. shift at Steve's home on that day told Jimenez that plaintiff was not at Steve's during that shift. Thus, the nondiscriminatory reason given by defendant for firing plaintiff was that plaintiff had falsified time records. On its face, it is sufficient to support a summary judgment in favor of defendant.

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[9] In *Guz v. Bechtel National, Inc*., *supra*, 24 Cal. 4th 317, 360, where an employer moved for summary judgment, the court stated that it was not determining whether the plaintiff had an initial burden of presenting a prima facie case of discrimination, only that once the employer presented a nondiscriminatory reason for taking an adverse employment action against the plaintiff, the plaintiff would have to "show there was nonetheless a triable issue that decisions leading to Guz's termination were actually made on the prohibited basis of his age."

Plaintiff, in turn, presented evidence of a prima facie case that she was fired for an impermissible reason: she is a member of a protected class, she was performing her job competently, she suffered an adverse employment action, and evidence suggests a discriminatory motive for the adverse employment action because Jones indicated at her deposition that a pregnant employee poses safety concerns to herself and her clients. However, because defendant presented a legitimate reason for firing plaintiff, plaintiff also had to present "substantial evidence" that defendant's stated nondiscriminatory reason for firing her is untrue or pretextual, or that defendant fired her with a discriminatory animus. (*Hersant v. Department of Social Services*, *supra*, 57 Cal.App.4th at pp. 1004-1005.)

4. *Evidence Upon Which Plaintiff Relies to Meet Her Substantial Evidence Burden*

Plaintiff questions whether Jimenez did a thorough (good faith) investigation before firing plaintiff, since Jimenez questioned Okezie but did not question plaintiff herself, nor did Jimenez question Maya Davis who was working at Steve's until Okezie arrived there. However, *without more*, that comes under the rule that to defeat a summary judgment motion, a plaintiff must do more than raise an issue whether the employer's action was unsound, unfair, wrong or mistaken. Further, we note that although Jimenez did not question plaintiff or Maya Davis about plaintiff's whereabouts on the afternoon/evening of July 28, 2005, Jimenez did question Debbie Miller about whether she saw plaintiff at Steve's apartment building on July 28 and Miller said she did not recall seeing her. Additionally, Jimenez stated in her declaration that she

checked the log book that is maintained at Steve's apartment and found no entry from plaintiff for July 28, 2005. While entries in a log book were not required, defendant could argue it was not unreasonable for Jimenez to note the absence of an entry by plaintiff as one piece of evidence that plaintiff did not work at Steve's home on the day in question.

Plaintiff also questions whether Okezie's representations to defendant about plaintiff not being at Steve's home were correct given that plaintiff goes by the name Renee and Okezie *testified* that a woman named "Renee" was at Steve's apartment when Okezie arrived there and Renee explained to her how to care for Steve. Plaintiff also asserts there are contradictions in the evidence that Okezie and Miller gave *in their declarations and depositions*. However, all of these evidentiary matters came into being after the fact; they are not things that occurred prior to the decision to fire plaintiff. Thus, *by themselves*, they do not negate the evidence presented by defendant that it had a good faith reason for firing plaintiff (i.e., a reasonable belief that plaintiff had falsified time records), *at the time it fired her*. (*King v. United Parcel Service, Inc*., *supra*, 152 Cal.App.4th 426, 433, 436, "It is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.")

Nor does plaintiff necessarily meet her summary judgment burden of presenting substantial evidence of lack of good faith, pretext, or discriminatory animus when she argues that she was fired very shortly after (1) she revealed to Jimenez that she was pregnant, and (2) she was away from work due to her pregnancy. In *King v. United*

Parcel Service, Inc., *supra*, 152 Cal.App.4th 426, the court held that the timing of an adverse employment action is not, by itself, sufficient to raise an inference that an employer took such action for an unlawful purpose. The employee in *King* was fired less than two months after returning from a four-month medical leave of absence. The employer presented evidence that the ground for firing the employee was that he violated the company's "integrity policy." The *King* court stated: "[A] disabled employee has no greater prerogative to compromise his integrity than any other employee. The mere fact that UPS found plaintiff had breached its integrity policy shortly after returning to work is insufficient to raise an inference that his blood disorder prompted his discharge." (*Id.* at p. 436.)[10]

Nor are we persuaded by plaintiff's argument that not telling her that she was being fired because of her time records constitutes substantial evidence of pretext, a lack of good faith, or discriminatory animus on the part of defendant such that one can reasonably infer that it was plaintiff's pregnancy that caused plaintiff to be fired. Indeed, our Supreme Court has held that one cannot reasonably draw an inference of

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[10] Federal courts in the Ninth Circuit are inclined to give the timing of adverse employment actions more weight. In *Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061, 1069, the court observed that the time between an employee's protected activity and an adverse employment action imposed on the employee can provide strong evidence of retaliation by an employer. There, the employee was fired nine days after she complained of discrimination. The court in *Passantino v. Johnson & Johnson* (9th Cir. 2000) 212 F.3d 493, 507 stated that "evidence based on timing can be sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by the defendant."

"Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th 317, 354.)

intentional discrimination solely from evidence that an employer lied about its reasons for taking an adverse employment action. "The pertinent statutes do not prohibit lying, they prohibit discrimination." (*Guz v. Bechtel National, Inc*., *supra*, 24 Cal.4th at p. 361.) While a circumstantial case of discrimination may be "considerably assist[ed]" by proof that the employer's stated reasons are not worthy of belief, "because it suggests the employer had cause to hide its true reasons," "[s]till, there must be evidence supporting a rational inference that intentional discrimination, on grounds prohibited by the statute, was the true cause of the employer's actions." (*Ibid*, italics and citations omitted.) Thus, it follows that if "merely" lying about the reasons for an adverse employment action will not *by itself* support an inference of intentional discrimination, neither will a failure to give an employee any explanation at all for firing her. And neither will Jimenez's cryptically telling plaintiff, when she fired plaintiff, that "based on what has happened [Jimenez] did not feel like [plaintiff] was capable of handling the job." That ambiguous message does not speak specifically to false time records, the alleged performance related issues, or pregnancy. At best, it is not inconsistent with plaintiff's pregnancy condition, and it hints that perhaps Jimenez did not want to state the real reason for why plaintiff was being fired.[11]

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[11] Plaintiff also relies on *King v. United Parcel Service, Inc*., *supra*, 152 Cal.App.4th 426, and *Cotran v. Rollins Hudig Hall Internat., Inc*. (1998) 17 Cal.4th 93 for their instruction on another type of cause of action—breach of implied employment contract to terminate only for good cause. Plaintiff asserts that to have an honest belief in its reason for firing plaintiff, defendant should have conducted an investigation in which neutral personnel investigated the facts and plaintiff was given an

While we have set out several matters which *by themselves* will not constitute substantial evidence that defendant's stated reason for firing plaintiff was pretextual or that defendant acted with a discriminatory animus when it fired her, the critical question arises as to whether these matters when *taken together* do constitute sufficient evidence to demonstrate a triable issue of fact with respect to plaintiff's contention that her pregnancy was the true cause of defendant's decision to fire her. In our view, they do. Plaintiff was fired the very day after she returned from a short sick leave related to her pregnancy. Jimenez did not give plaintiff a specific reason for why she was being fired, and Jones admitted she had concerns about having pregnant employees care for defendant's clients. Jimenez never asked plaintiff about the hours she claimed on her time sheets, and there is no indication that plaintiff's time records were previously a cause for concern. Plaintiff goes by the name Renee, and Okezie testified that a woman named Renee was at Steve's home when she arrived there and Renee showed her how to care for Steve.

Additionally, plaintiff presented evidence she was never told that her job performance was unsatisfactory in any manner. In *Siegel v. Alpha Wire Corp*. (3rd. Cir. 1990) 894 F.2d 50, 55, the court observed that "inconsistencies in performance evaluations prior and subsequent to an employee's termination may support an inference of pretext." (Accord *Shager v. Upjohn Co*. (7th Cir. 1990) 913 F.2d 398, 401.) Here, plaintiff presented evidence that she was promoted to the position of

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opportunity to explain what happened. However, plaintiff is not suing defendant for breach of an implied contract.

counselor, was not given negative performance evaluations prior to her firing, and her co-workers and clients found her to be competent, whereas Jimenez testified that after she was promoted to the position of counselor, the quality of her work declined.

5. *Declarations From Other Employees Also Constitute Substantial Evidence That Requires Reversal of the Summary Judgment*

Plaintiff presented other evidence that will also support a rational inference that intentional discrimination on the basis of plaintiff's pregnancy was the true cause of defendant's decision to fire plaintiff. It comes in the form of what defendant characterizes as "me too" evidence—evidence from other former employees of defendant who state in their declarations that (1) they too were fired shortly after they became pregnant, (2) they know of people being fired by defendant because they were pregnant, (3) they resigned because Jimenez made their work stressful after they notified her they were trying to become pregnant, or (4) they know of occasions when employees who were dishonest or cited for dishonesty, were not fired by defendant. These employees worked at the same facility where plaintiff worked, they were supervised by the same people that supervised plaintiff (Jimenez and Sandgren), and their supervisors were, in turn, supervised by Jones. Taken together, this is substantial evidence sufficient to raise a triable issue of material fact as to why defendant fired plaintiff.[12]

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[12] Because the "me too" declarations by former employees raise the triable issue of material fact needed by plaintiff to defeat defendant's motion for summary judgment, they are unlike comments made by Jimenez, which, *by themselves* do not support the rational inference of discrimination based on pregnancy needed to defeat the motion for

As discussed below, courts have routinely sanctioned use of this "me to" type of evidence. Nevertheless, relying on *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511 and other cases, defendant filed written objections to those portions of the declarations that deal with representations regarding pregnancy.

In *Beyda v. City of Los Angeles*, *supra*, 65 Cal.App.4th 511, 518, the plaintiff claimed workplace sexual harassment, and sought to introduce evidence that some of the defendant's other employees had also been sexually harassed. The *Beyda* court upheld the exclusion of the evidence, saying: "When offered on the theory that respondents are likely to have committed the conduct at issue [in *Beyda*] simply because they did the same thing before, the evidence goes to propensity, and is inadmissible

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summary judgment. Jimenez was reported to have once remarked at a restaurant, when told that another employee was trying to get pregnant, that the employee should have a drink instead. The comment was made in approximately July 2005. The comment is not per se evidence of a discriminatory animus against pregnancy, if only because the context of the comment is not known. For example, perhaps there was a good reason why that particular employee would be better off not being pregnant. Jimenez was also reported to have remarked: "Why would you want to become pregnant?"

Defendant asserts that these two remarks by Jimenez about pregnancy are reasonably seen as "stray remarks" that carry little or no weight on the issue whether the firing of plaintiff was the result of discriminatory animus on the part of defendant. (*Horn v. Cushman & Wakefield Western, Inc*. (1999) 72 Cal.App.4th 798, 809-810.) We disagree. They are comments that are in the mix of evidence to be presented by plaintiff to the trier of fact and the trier of fact will determine their importance. The same is true of evidence relating to what some employees perceived as a gay and lesbian subculture of employees at defendant's facility; comments made by Jimenez (who is open about being a lesbian), about heterosexuality and being a lesbian; Jimenez telling her lesbian and gay friends to interview for positions there; and gays and lesbians receiving favorable treatment from defendant.

under Evidence Code section 1101, subdivision (a)."[13] (*Ibid*.) The *Beyda* court stated that rather than lacking probative value, the evidence was actually too relevant and had too much probative value. However, *Beyda* did not address whether the evidence could be admitted under the provisions of subdivision (b) of Evidence Code section 1101. As discussed below, many courts have held that evidence of the type sought to be introduced by the plaintiff in *Beyda*, and by the plaintiff in the instant case, is admissible under subdivision (b) of section 1101 (and under its federal rules of evidence counterpart), to show intent or motive, for the purpose of casting doubt on an employer's stated reason for an adverse employment action, and thereby creating a triable issue of material fact as to whether the stated reason was merely a pretext and the actual reason was wrongful under employment law.

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[13] Evidence Code section 1101 (§ 1101) provides: "(a) Except as provided in this section [and in Sections not relevant to this case], evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such act."

The Federal Rules of Evidence contain similar provisions. Rule 404 states in relevant part: "(a) Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, . . .

"(b) Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, . . . "

a. *The Declarations*

Melissa Wyatt stated she worked for defendant as a counselor from March 2004 to March 2005 and during that time, she was present at a meeting in January 2005 when Jimenez and Jones discussed another employee, Diana Olivas, who was pregnant. Jimenez and Jones told Wyatt they wanted to fire Olivas because she was pregnant but they couldn't do that because it was illegal. So Jimenez and Jones discussed reasons they could use to fire her. Their reason for wanting to fire Olivas was because they were worried about being liable in case she was injured. Noting that Olivas had nicked defendant's client Steve while shaving him, Jimenez and Jones discussed terminating Olivas based on Olivas being too rough with Steve, and ultimately, Jimenez did tell Olivas that she was being fired because she was too rough with Steve. Wyatt was present when Jimenez fired Olivas.

In a second declaration, Melissa Wyatt stated Diana Olivas was fired within a few weeks of when she inquired about maternity leave, and Jones was "extremely worried about Diana's safety and Diana hurting herself on the job." Wyatt also stated that when Jones and the person who formerly held Jimenez's position as program manager, Loraine Sandgren, learned that another employee, Denise Wooten, was pregnant, they "created accusations about Denise in order to terminate her," and Sandgren fired Wooten.

Diana Olivas stated in her declaration that she was six months pregnant when she inquired about maternity leave in March 2005 and was fired by Jimenez. She was told

she was being fired because she was rough with Steve in that she nicked him once when she shaved him.

Denise Wooten stated in a declaration that she began working for defendant in February 2004 and learned she was pregnant in November 2004. She told one of defendant's counselors she was pregnant and the counselor told Jones and Sandgren, and a week or two later (in December 2004), Wooten was fired. Jones called her on the phone one day and left a message saying that she was being fired.

Wendy Nash stated in her declaration that she learned in late October 2004 that she was pregnant, and she told a client of defendant, that she was caring for at the time, about the pregnancy. That client, in turn, told Loraine Sandgren that Nash was pregnant. Within two days of telling the client that she was pregnant, Nash was fired by Sandgren. Sandgren told her she was being fired because Sandgren had learned Nash was pregnant.[14]

Sandra Baeza stated she worked for defendant from August 2003 to July 2005. Jimenez became less friendly to her after she told Jimenez she was trying to become pregnant. She resigned from her position with defendant because Jimenez made it

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[14] We note that all four of the employees who were fired when they became pregnant (plaintiff, Diana Olivas, Denise Wooten and Wendy Nash) worked at defendant's Santa Monica facility, and that facility had the same three supervisors during the period of the firings (2004 and 2005). The supervisors were Jones, Sandgren, and Jimenez. Those matters, coupled with the very short period of time between when these several employees state their supervisors learned they were pregnant and when they were fired, could reasonably be used by a trier of fact as evidence that knowledge of the pregnancies caused the supervisors to fire the employees.

a very stressful place to work. That included Jimenez accusing Baeza of lying on her time card. Baeza told Jimenez she had been told to account for all time worked for a client even if she was not with the client. Regarding other instances of alleged dishonesty at defendant's facility, Baeza stated in her declaration that one employee was cited for a time card discrepancy but was not fired. Another employee was hired even though defendant knew the employee had a conviction for welfare fraud, and this employee was eventually fired, but it was only after several months had passed since Baeza told Sandgren that the employee had been fired from a group home for stealing cologne and food. Thus, there is evidence that defendant had tolerated, at least to a certain extent, dishonesty.

Despite its assertion that "me too" evidence is not properly admitted in a summary judgment motion, defendant itself presented evidence regarding employee pregnancy and pregnancy leaves. Jimenez stated in a declaration that when Danette Knight, one of Steve's caregivers, requested a pregnancy leave in the summer of 2005, Jimenez instructed plaintiff to prepare for Knight's absence by finding coverage for Steve during the absence. Knight stated in her declaration that she told plaintiff she was pregnant. Knight stated she became pregnant in early 2005, had her baby in October 2005, worked for defendant during her pregnancy and took a pregnancy leave of absence, and returned to work beginning January 2006. Plaintiff presented a different set of facts. She stated in her declaration that Danette Knight did not tell her she was pregnant, and plaintiff did not learn Knight was pregnant until after plaintiff was fired. Rather, it was a vacation request for Knight that prompted plaintiff and Jimenez to talk

about finding a replacement for Knight, and during plaintiff's employment, she was not told that Knight had requested pregnancy leave.

Kern Tam stated in her declaration that she is defendant's director of human resources, defendant has over 500 employees, and a majority of them are women. "Often, [defendant's] employees become pregnant and work through their pregnancies and afterward." Tam stated defendant often receives requests for pregnancy leaves and routinely grants such leaves. Defendant's employee handbook contains a pregnancy disability policy permitting pregnant employees to take a leave of absence of up to four months. However, Maya Davis stated in a declaration that she began working for defendant in December 2004, and prior to Danette Knight taking a pregnancy leave, Davis did not know of any of defendant's employees who had been granted such a leave.

b. *Case Law Governing the Declarations*

In *Obrey v. Johnson* (9th Cir. 2005) 400 F.3d 691, the plaintiff alleged his employer engaged in a pattern or practice of racial discrimination in promotions to senior management positions. The court found relevant and admissible, pattern or practice evidence in the form of (1) a statistical report showing a correlation between race and promotion,[15] (2) testimony of one fellow worker who recalled conversations in

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[15] The *Obrey* court stated that statistical evidence is helpful to show a pattern or practice of discrimination, but the court did not state statistical evidence is necessary to demonstrate pattern or practice, and it observed that even though the report sought to be used by the plaintiff in that case did not account for the relative qualifications of the

which the employer's officials expressed discriminatory bias against persons of the plaintiff's race, saying they weren't good enough to do the job, and (3) anecdotal evidence of three fellow employees who believed they had suffered race discrimination. The *Obrey* court stated that the latter evidence would require the jury to assess the credibility of the three fellow employees to determine the weight of their testimony (mini-trials on the three employee's own claims of being discriminated against), but that did not constitute undue delay or a waste of time under Federal Rules of Evidence, rule 403. (*Id*. at p. 699.)[16]

In *Estes v. Dick Smith Ford, Inc*. (8th Cir. 1988) 856 F.2d 1097, (implicitly overruled on other grounds in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 237, 242, 244, 259 [104 L.Ed.2d 268, 109 S.Ct. 1775]), *Estes*, an employee who was fired from his job sued for age and race discrimination. The reviewing court reversed a judgment against the employee, finding that the trial court erred in excluding the plaintiff's evidence that "tended to show a climate of race and age bias at Dick Smith Ford." The *Estes* court stated that while it was true that the plaintiff had to prove this his own termination was unlawful, "[a]s a matter of common sense, however, it is hard to see how evidence which suggests that [the employer] discriminated against blacks in

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applicant pool, that factor went to the weight/probative value of the evidence, not its admissibility.

[16] Federal Rule of Evidence, rule 403 is similar to California Evidence Code section 352. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

hiring would be irrelevant to the question of whether it fired a black employee because of his race." (*Id*. at p. 1103.) The court held the same analysis applied to plaintiff's evidence that the employer treated white customers better than black customers, and that one of the employer's managers, whom the plaintiff asserted participated in the decision to fire the plaintiff, told racist jokes about blacks and referred to black customers and the plaintiff himself as "damn niggers." (*Id*. at p. 1104.)

The *Estes* court observed that a wholesale exclusion of such evidence "can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives." (*Estes*, *supra*, 856 F.2d at p. 1103.) The court then went on to quote from *Riordan v. Kempiners* (7th Cir. 1987) 831 F.2d 690, where the court observed that the law tries to protect workers from being treated more harshly than they would be if they were, for example, " 'a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for . . . firing . . . a worker who is not superlative. A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.' " (*Estes*, *supra*, 856 F.2d at p. 1103.) The *Estes* court observed that such "[c]ircumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices—evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of

whether a given employer was more likely than not to have acted from an unlawful motive." (*Estes*, *supra*, 856 F.2d at p. 1103.) The court also stated that the employer had "confuse[d] the sufficiency of evidence to establish a violation with its admissibility. Evidence of prior acts of discrimination is relevant to an employer's motive in discharging a plaintiff, even where this evidence is not extensive enough to establish discriminatory animus by itself." (*Id*. at p. 1104.) The court added that although the jury might not have accepted the plaintiff's version of events at work, "he should have been allowed to present this evidence at trial." (*Ibid*.)

The *Estes* court also noted that while exclusion of any one of the pieces of evidence might not have been sufficiently prejudicial to require a reversal of the judgment, cumulatively the exclusions "ma[d]e a significant difference to Estes's chances of persuading the jury. In effect, the District Court limited Estes to proving [his employer's] discriminatory intent solely from the facts of his own discharge. Here, as in most discrimination cases, the facts of the discharge were inconclusive. [The employer's] explanation that Estes was discharged for poor performance was facially plausible and difficult to refute. Although Estes could respond that [the employer] had changed its initial explanation, and Estes had been an adequate employee, these facts did not, without some other evidence of discriminatory animus, present a tangible reason for disbelieving [the employer's] account of its motives. [¶] Estes's offer of proof concerning [the employer's] workplace and prior discriminatory acts could have provided this other evidence." (*Estes*, *supra*, 856 F.2d at p. 1105.)

Estes was cited with approval in *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1480 (*Heyne*), where the plaintiff presented a prima facie case of quid pro quo sexual harassment by the owner of the restaurant where she worked, who fired her the day after she refused his proposition, and the owner asserted a legitimate reason for the firing, to wit, that the plaintiff was late in opening up the restaurant on two consecutive mornings. The *Heyne* court held the trial court committed prejudicial error in excluding the testimonial evidence of several other female employees at the restaurant who allegedly were also sexually harassed by the owner. The *Heyne* court stated: "It is clear that an employer's conduct tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer's general hostility towards that group is the true reason behind firing an employee who is a member of that group." (*Id*. at p. 1479.) The *Heyne* court cited a prior United States Supreme Court case that noted an employer's mental processes seldom can be presented by eyewitness accounts and therefore evidence that the employer has a discriminatory attitude in general is relevant and admissible to prove discrimination. (*Id*. at pp. 1479-1480.) The *Heyne* court observed that although the employer's alleged harassment of other female employees could not be used by the plaintiff to prove that the employer propositioned her on the night before she was fired, that is, could not be used to show his character in order to prove that he acted towards the plaintiff in conformity with that character, it was admissible to prove his motive or intent in discharging the plaintiff. If the plaintiff could show that the employer sexually harassed other employees, such evidence would be relative and probative of his general disrespect and sexual objectification of his

female employees, and such an attitude is relevant to the issue of his motive for firing the plaintiff. (*Id*. at p. 1480.) The probative value of the evidence is especially high because of the difficulty of proving the employer's state of mind. (*Ibid*.)[17]

Other courts have used the same analysis to find that similar evidence was relevant and admissible. In *Shattuck v. Kinetic Concepts, Inc*. (5th Cir. 1995) 49 F.3d 1106, an age discrimination suit brought by a fired employee, the court observed that even though a failure to promote cause of action was time barred, a vice-president's prior comment to the plaintiff that the plaintiff's age was the reason he was not being promoted was relevant to the issue of the motivation for firing the employee. (*Id*. at p. 1109.) Also relevant and admissible was evidence that (1) after the plaintiff was fired, defendant's executives stated plaintiff's age was the reason he was fired, and (2) other employees were discriminated against on the basis of their age. Regarding the

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[17] In *People v. Ewoldt* (1994) 7 Cal.4th 380, the court addressed evidence of uncharged acts admissible under Evidence Code section 1101, subdivision (b) to prove the actor's intent in committing a charged act. "Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' [Citation.]" (*Id*. at p. 394, fn. 2, italics omitted.) " 'The recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such act . . . ' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*Id* at p. 402.) As noted in footnote 12, *ante*, subdivision (b) of section 1101 applies to the admission of evidence of crimes, *civil wrongs*, and other acts to prove, among other things, intent and motive. The crimes, civil wrongs and other acts can be uncharged conduct. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402, fn. 6.)

latter, the court said: "There is no proscription of evidence of discrimination against other members of the plaintiff's protected class; to the contrary, such evidence may be highly probative, depending on the circumstances." (*Id*. at pp. 1109-1110.) In *Spulak v. K Mart Corp*. (10th Cir. 1990) 894 F.2d 1150, 1156, disapproved on another point in *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 615-617 [123 L.Ed.2d 338, 113 S.Ct. 1701], the court stated that "[a]s a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent." The court observed that such evidence by a plaintiff's fellow employees is "probative of the defendant's discriminatory intent and create[s] a fact question on the issue of pretext." (*Ibid*.) *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, disapproved on another point in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664, is a sexual harassment case in which the court held that testimony regarding the defendant's area vice-president's sexual harassment of other employees was admissible to show the defendant employer's knowledge of the misconduct.

Most recently, the United States Supreme Court, in an age discrimination case, took up the question of the admissibility of evidence from several former employees of the defendant who claimed that they too were discriminated against because of their age. (*Sprint/United Management Co. v. Mendelsohn* (2008) 128 S.Ct. 1140) Unlike the case before us, these other employees had not worked in the same department, nor been supervised by the same people, as the plaintiff. The court framed the issue on appeal as follows: "[W]hether, in an employment discrimination action, the Federal Rules of

Evidence require admission of testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff." (*Id*. at p. 1144.) The court's answer was that admissibility "is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." Thus, contrary to the analysis of the Supreme Court's holding that is proffered by the defendant in the instant case, there was no wholesale rejection of such "me too" evidence by the court, and the case does not support defendant's assertion that the "me too" evidence presented by plaintiff in this case should be rejected.

CONCLUSION

Defendant presented a legitimate reason for firing plaintiff. It asserted that plaintiff falsified time records. Plaintiff, in turn, presented evidence of a prima facie case that she was fired for an impermissible reason—her pregnancy. Because she also presented substantial evidence of pretext or discriminatory animus in her firing, she raised a triable issue of material fact regarding the true reason that she was fired. Therefore, the summary judgment must be reversed.

DISPOSITION

The summary judgment from which plaintiff has appealed is reversed and the cause is remanded for further proceedings in conformance with the views expressed herein. Costs on appeal to plaintiff.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.