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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

SHERRI “JEAN” PARKS,
Plaintiff and Appellant,

v.

PORT OF OAKLAND,
Defendant and Respondent.

A131903 & A132101
(consolidated)

(Alameda County
Super. Ct. No. RG07361568)

Appellant Sherri “Jean” Parks is employed as a plumber by respondent Port of Oakland (Port). She sued the Port for harassment on the basis of her gender and sexual orientation, for failure to prevent such harassment, and for retaliating against her after she complained of the harassment. The trial court granted the Port’s motion for summary adjudication of the harassment and failure to prevent harassment causes of action, but permitted the retaliation cause of action to proceed to trial.

The jury found that the Port did not retaliate against Parks for complaining that she was being harassed. Accordingly, the trial court entered judgment in favor of the Port. It also denied Parks’s postjudgment motion to tax costs.

On appeal, Parks argues that the trial court erred in granting the Port’s motion for summary adjudication (the Port’s motion), and in sustaining one of the Port’s objections to evidence Parks submitted in opposition to that motion. Parks also contends that the trial court erred in permitting the Port to recover certain disputed cost items. We agree that the excluded evidence was admissible for a limited purpose, but reject all of Parks’s

remaining contentions, and accordingly affirm both the judgment and the order denying the motion to tax costs.

FACTS AND PROCEDURAL BACKGROUND

Parks has over 20 years of experience as a plumber.¹ She began working for the Port's harbor facilities maintenance department on June 4, 2001. Mike Ringbom, Parks's direct supervisor at the Port, described her as "the best technical plumber [he has] ever known," and characterized her skills and work as "excellent." The Port's February 2006 performance evaluation of Parks rated the quality of her work, her dependability, and her initiative and ingenuity as "above standard," a rating reflecting "exceptional performance." (Original capitals omitted.)

Parks is the only female plumber employed by the Port, and during the time she has worked at the Port, it has employed very few tradeswomen. Parks is openly lesbian, and describes herself as not trying to conform to female gender stereotypes in appearance or behavior. Parks describes herself as a union supporter and activist, has participated in at least one union protest at the Port, and has frequently used the grievance procedure provided for by her union contract to challenge actions of supervisors and managers that she considered discriminatory or unfair.

Parks considers her method of communication to be "direct," like that of her male coworkers. Her supervisors, however, have described her attitude on the job as "strident," "belligerent," "openly aggressive," "insubordinate," "emotional," "disrespectful," and "unnecessarily adversarial."

¹ In formulating our narrative of the relevant events, we have resolved all factual issues in appellant's favor, as we must on review of an order granting summary adjudication. (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294 (*Hinesley*); *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 999 (*Birschtein*)). Thus, unless otherwise indicated, statements of fact in this opinion should be construed to mean either that the fact was undisputed for the purpose of the Port's motion, or that appellant produced evidence sufficient to create a triable issue as to the existence of that fact.

In October 2007, Parks filed a complaint with the California Department of Fair Employment and Housing (DFEH) alleging discrimination and harassment on the basis of gender and sexual orientation in connection with her employment at the Port, as well as retaliation against her by the Port for complaining internally about these matters.² On December 17, 2007, Parks filed a complaint against the Port in the Alameda County Superior Court, pleading four causes of action under the California Fair Employment and Housing Act (FEHA, Gov. Code, § 12900 et seq.): (1) gender harassment; (2) sexual orientation harassment; (3) failure to prevent discrimination and harassment,³ and (4) retaliation.

On June 10, 2009, Parks filed a second complaint with DFEH alleging retaliation for the filing of her prior DFEH complaint and her lawsuit, and denial of equal pay on the basis of sex. Parks received a right-to-sue letter, and on September 21, 2009, she filed an amended complaint, which pleaded the same causes of action as the original complaint, but added allegations about events alleged to have occurred during the pendency of the litigation.

The Port's motion was filed on September 15, 2009.⁴ It sought summary judgment, or in the alternative, summary adjudication as to each of Parks's causes of action. The evidence submitted in support of and in response to the Port's motion involved the incidents and Port practices described below, which we have grouped into categories and arranged chronologically within each category, so as to summarize the

² No right to sue letter appears in the record as to this DFEH complaint, but Parks's complaint alleges that she received one, and the Port has not argued that Parks failed to exhaust her administrative remedies. We therefore assume that exhaustion is not an issue.

³ The trial court and the parties have all treated the cause of action for failure to prevent harassment as standing or falling with the causes of action for harassment. (See *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288-289.) References in our opinion to the harassment causes of action should be read to include the cause of action for failure to prevent harassment.

⁴ Parks's amended complaint was filed shortly after the Port's motion, but neither party has raised any issue on appeal in this regard.

factual basis for Parks's contention that she raised triable issues of fact with regard to her causes of action for harassment based on gender and sexual orientation.⁵ For the most part, as will appear from our recitation below, the historical facts are not in dispute, at least for the purpose of the Port's motion; rather, the disputes involve the motive or intent that may be inferred from those facts.

1. **Offensive jokes about women**: Parks alleges that in the work environment at the Port, "offensive, sexist jokes" about "women and women's genitalia" were generally tolerated and "endemic." However, Parks was only able to provide one specific example of this conduct in her discovery responses. The example was an incident that occurred in approximately July 2001, shortly after Parks began working at the Port. Carl Fill, a foreman in the utilities department, told a joke in the lunchroom involving an engineer and a bar, with the word "pussy" (in its slang meaning, referring to women's genitalia) in the punchline. The audience for Fill's joke was a group of Port employees and supervisors that included Tim Mogle and Al Avendano. Parks did not report this, but told Fill at the time that she did not appreciate the joke, and that it was not funny. She did not recall how Fill responded.

2. **Derogatory comments based on gender**: Parks identified the following specific examples of derogatory comments about women by male workers at the Port during the course of her employment there.

a. *Carl Fill*: Fill was Parks's foreman when she started working at the Port. Until Fill's retirement in 2004, Fill frequently made derogatory comments about women to Parks or in her presence, some of which Dave Cuthbertson witnessed. Cuthbertson was the direct supervisor of Fill, and then of Ringbom when the latter succeeded Fill as Parks's foreman. Cuthbertson was aware that Fill made derogatory sexual comments in the workplace, and told Fill he did not like him doing so, but did not discipline Fill for this behavior.

⁵ Parks relied on some of the incidents listed to support her retaliation cause of action as well. On this appeal, Parks does not challenge the jury's verdict rejecting that cause of action.

b. *Ivan Taylor*: In the winter of 2002, Port plumber Ivan Taylor told Parks that she “didn’t know anything before [she] worked” at the Port. Parks did not complain about this statement to anyone.

c. *Complaint to Cuthbertson*: In December 2003, Parks went to Cuthbertson to complain about unfair work assignments,⁶ and in the course of their conversation, mentioned that someone had made a sexist remark to her. Cuthbertson said “he would take care of it,” and asked who had made the remark. Parks declined to identify the culprit. At her deposition, Parks explained that she wanted to keep the conversation focused on her complaint about work assignments, and she thought Cuthbertson knew that she was talking about Fill. Fill was “known as a womanizer and regularly said derogatory statements about women and came on to women.” Parks believed Cuthbertson knew this, “wanted to get rid of” Fill, and was “ready to jump on it” when Parks complained.

d. *Curtis Johnson*: In the summer of 2006, Port contractor Curtis Johnson said to Parks, “I hate women.” As a contractor, Johnson was not an employee of the Port.

e. *Ringbom’s Use of “Bitch”*: In December 2007, at a morning crew meeting, Ringbom used the expression “their bitch” to denigrate the members of a club associated with the Hell’s Angels. Parks complained about this remark to Port management, but did not receive any response.

f. *Cuthbertson*: Dave Cuthbertson, the utilities supervisor at the Port, has referred to Parks as his “favorite female plumber.” In addition, on one occasion, Parks observed Cuthbertson intervening in a discussion among Port workers about a newspaper article and “turn[ing] it toward lewd remarks regarding back page ads for women who work in the sex industry.” Cuthbertson did not recall making any such remarks, but stated that if he did, they were not directed at Parks. Parks complained about this incident to Port management, but did not receive any response.

⁶ Parks’s complaint about unfair work assignments is discussed *post*.

3. **Derogatory comments based on sexual orientation**: Parks characterized the “bitch” remark and the conversation about newspaper ads for the sex industry, discussed *ante*, as derogatory based on sexual orientation as well as gender. In addition, Parks gave two examples of derogatory remarks regarding sexual orientation made by Port workers.

a. *Tim Mogle*: Parks asserted that in October 2004, while she was on vacation, she was the subject of “vicious gossip” about her sexual orientation, in that when someone asked where she was, temporary Port worker Tim Mogle “responded with an obscene gesture of his tongue between his fingers.” Julius Perkins, a coworker, told Parks about the incident after she returned from vacation. Some time later, Parks opined to Tadeusz (Ted) Mankowski, the harbor facilities manager, that Mogle was homophobic, as well as having “race issues” and being “derogatory to women,” but she did not mention the obscene gesture or any other specific incident. The Port later hired Mogle to work at the Oakland International Airport, which the Port also manages. Parks told Mankowski she objected to the Port hiring Mogle because of his past homophobic, sexist, and racist behavior, but Mogle was hired despite this. Mogle did not have supervisory authority at the Port.

b. *“Man Code”*: In December 2007, at a morning crew meeting, Ringbom referred to a “man code” precluding men from sharing an umbrella. Parks interpreted this reference as homophobic. Parks complained about this remark to Port management, but did not receive any response.

c. *Bulletin Board Postings*: In July 2009, someone posted a document on the bulletin board outside Cuthbertson’s office pointing out that after the federal government seized the Mustang Ranch brothel, the government was unable to operate it successfully. The document, which remained posted for about two weeks, concluded that “Now we are trusting the economy of our country and our banking system to the same nit-wits who couldn’t make money running a whore house and selling whiskey!” Also, in October 2009, someone posted a document on the bulletin board in the Port workers’ lunchroom that was used by the Port to post official announcements. The printout was entitled “22 Ways to Be a Good Liberal Democrat,” and included statements that “You have to

believe that gender roles are artificial but being homosexual is natural,” and “You have to believe that homosexual parades displaying drag, transvestites, and bestiality should be constitutionally protected, and manger scenes at Christmas should be illegal.” Parks took photographs of the document and showed them to the Port’s Office of Equal Opportunity, but the document remained on the bulletin board for at least a month.

4. **Unequal Restroom and Locker Room Facilities**: The Port provides male and female employees with separate restrooms and adjacent locker rooms. Parks’s sex discrimination claim included several issues regarding the women’s facilities.

a. *Entry by male janitors*: The women’s restroom was not private, in that it was used by male janitorial staff as a means of access to the women’s locker room. The male foreman of the Port’s contracted janitorial crew admitted that he occasionally entered the women’s restroom at the Port, but denied that he did so when female Port employees were using it.

b. *Intrusions by Ringbom*: Ringbom “sought conversation with [Parks] while she was using the toilet,” and on more than one occasion, put his foot in the locker room door to keep it open so he could talk to her while she was inside. This behavior made Parks uncomfortable with using the women’s locker room. Ringbom remembered only one such incident, during which he recalled standing in the hallway outside the women’s locker room, knocking on the door, and speaking to Parks, who he thought was just washing her hands. The Port did not dispute Parks’s contention that this was not the only time Ringbom intruded upon Parks while she was using the women’s locker room.

c. *Work uniforms*: Extra work uniforms for male employees were stored in unused lockers in the women’s locker room. Sign-out sheets indicating that a uniform had been issued to a particular employee, whose signature appeared on the sheet, were taped to the doors of the lockers. Parks concluded from this that the Port was permitting male employees to enter the women’s locker room to obtain uniforms, but did not aver that she had actually seen them do so. Joni Mantino, the female Port employee who handles the uniforms, denied that men entered the women’s locker room to try them on, explaining that she brings the uniforms out to the male employees. Mantino did not explain,

however, how the men's signatures came to be on papers located inside the women's locker room. Parks also had a separate problem with her own uniforms being repeatedly delivered to the men's locker room after they were laundered. Parks found it embarrassing and humiliating to have to go to the men's locker room to pick up her uniform. She eventually stopped using the Port's uniform service, and purchased and laundered her own uniforms.

d. *Supply storage*: The women's restroom facilities were not fully available for a period of time, because the janitorial staff admittedly stored supplies in the women's locker room, requiring Parks to turn sideways to enter, and precluding her from sitting down. The cleaning agents and dirty mops used by the janitorial staff made the women's locker room unusable on occasion.

e. *Bad odor*: There were "noxious fumes" in the women's restroom which Parks had not observed to be present in the men's facilities when she entered them to fix plumbing. According to Mantino, however, the same odor was also present in the men's room, and steps were taken to address the problem in both restrooms. Parks did not dispute this.

5. **Unfair Performance Evaluations**: Parks received performance evaluations that she believed were unfair in January, February, October, and December 2006, and January 2008.

a. *January 2006*: The January 2006 evaluation,⁷ though very complimentary of Parks's technical skills and work habits, described Parks as "strident," "disrespectful," and "belligerent," and rated her "short of standard" in the categories of "cooperation and relationships with people" and "ability as supervisor." The Port's previous evaluations of Parks, while she was working under a different supervisor, Mitch Segal, had rated her as standard or above standard in the same categories. Although the January 2006 evaluation stated that Parks was well liked by her colleagues, it also described her as being

⁷ The evaluation in question is dated February 23, 2006, but Parks first received it from Ringbom in January 2006.

“insulting” to them. Cuthbertson believed the evaluation was accurate, and denied that it was based on Parks’s gender or sexual orientation.

b. *February 2006*: In February 2006, Parks attended a meeting with Cuthbertson, Ringbom, and Joni Mantino, facilities support supervisor, to discuss the January 2006 evaluation. At that meeting, Cuthbertson did not provide Parks with specific examples of the behavior underlying the criticisms of her in the January 2006 evaluation. Parks objected to attending a meeting with three management people without a union representative present, and filed a grievance regarding this evaluation. At another meeting about the same evaluation, in June 2006, Mankowski criticized Parks for complaining about the possibility that the Port would hire Mogle.

c. *December 2006*: Parks received “similar unsupported criticisms” in an evaluation dated November 2006, which she received in December 2006. In this evaluation, while Parks was praised for the quality and quantity of her work, she was rated “short of standard” for “cooperation and relationships with people,” in part because of “complaints of [Parks’s] conduct towards other employees.”

d. *November 2007*: An evaluation dated November 2007, which Parks did not receive until January 2008, rated Parks below standard overall, even though she was rated standard in four of the evaluation form’s seven categories, and exceptional in one. The two below standard (also defined as “need to improve”) ratings were for “work habits” and for “cooperation and relationships with people.” When Parks met with Ringbom to discuss this evaluation, he declined to provide specific examples regarding the criticisms. Parks stated in her discovery responses that at this meeting, Ringbom could not explain why Parks’s overall rating did not appear to reflect her ratings in specific categories. Ringbom’s notes, however, indicate that he explained he rated Parks “need to improve” overall, despite her one “exceptional” rating, because her two ratings in that category were “closer to [u]nacceptable.” Ringbom averred that he “believe[d] that [he] answered any questions raised by [Parks] concerning her evaluation,” and denied that the evaluation was based on Parks’s gender or sexual orientation.

6. **Unfair Discipline**: Parks identified a number of incidents in which she believed the Port had disciplined her unfairly, or threatened to do so.

a. *Binder incident*: In November 2006, Parks received a letter of warning for removing certain reference binders from Ringbom's office without notifying him. The binders were maintained for the use of Parks and her coworkers, who confirmed Parks's understanding that workers were permitted to enter Ringbom's office. According to Parks, she called Ringbom on the radio from his office to tell him that she had all the binders except one, and to ask where the other one was. Parks was later denied an extension of time to file a grievance regarding the letter of warning. Parks acknowledged at her deposition that she had removed papers from the binders without telling Ringbom she was doing so. She said she returned the papers later, at Ringbom's request, but admitted she was not sure she had returned all of them. Parks acknowledged that Ringbom's request for the return of the papers had nothing to do with her gender or sexual orientation. Ringbom stated that he issued the letter of warning because of Parks's insubordination, not because of her gender or sexual orientation.

b. *Written reprimand for confrontation*: On January 3, 2007, Parks and Ringbom had an argumentative conversation during which Parks called Ringbom a liar. On January 8, 2007, Ringbom issued a written reprimand stating that during this conversation, Parks had been "contentious, disrespectful and argumentative in a public place and clearly insubordinate." The reprimand also stated that Parks had violated the Port's "Workplace Security Policy," and had attached to it a copy of the Port's "Workplace Violence Policy." It warned that supervisors were required to report violations of these policies. Parks filed a grievance regarding this reprimand.

c. *Personal leave incident*: In January 2007, Ringbom told Parks he wanted to meet with her regarding her improper use of personal leave. Parks explained to Ringbom that he was mistaken, and that she had not taken any improper personal leave. Ringbom agreed and apologized, and the matter was dropped. Parks believed that Ringbom might have acted with a discriminatory motive. There was "a continued pattern of scrutiny" of Parks and her work, and it appeared to Parks that Ringbom "thought he could get [Parks]

on that, and he jumped on it before he looked at the time cards fully.” Parks filed a grievance in regard to this incident.

d. *Suspension for union work*: In May 2007, while at work on Port premises, Parks passed by some other employees who were digging a trench, and had a brief conversation with one of them, Jim Kangas, about whether a task he was performing should have been assigned to a carpenter. Other employees reported that Millie Cleveland, a staff person from Parks’s union, was involved in the conversation. As a result of this incident, Mankowski suspended Parks for three days for doing union work on Port time without informing her foreman, and then misreporting it on her timecard. At his deposition, however, Mankowski could not identify how Parks had misreported anything on her time card. Parks filed a grievance regarding this suspension.

e. *Threatened reprimand*: In May 2007, on Parks’s first day back at work after the suspension, Ringbom told her to meet with him and Mankowski immediately, and bring a union representative. The union representative told Ringbom she was unavailable, but could meet the following day. Ringbom said he would get back to her and Parks, but never did.

f. *June 2007 warning letter*: In June 2007, Cuthbertson issued a warning letter to Parks stating that she had been “harassing” Port contractors and other Port employees. Parks filed a grievance regarding this letter. The primary concern expressed in the letter was Parks’s actions in taking a photograph of a Port landscaping contractor, Curtis Johnson, and his employee while they were working on the Port property. Parks took the photograph, on behalf of her union, in an effort to document the Port’s need to hire a fulltime landscaper rather than contracting out the work. Johnson did not complain to anyone about Parks’s conduct, but Mankowski approached him and asked about it. Port worker Lawrence Dirksen investigated the incident at Mankowski’s request, and ascertained from Johnson that while he felt uncomfortable having his picture taken, he did not feel harassed by Parks’s actions. Cuthbertson’s warning letter acknowledged that Parks had apologized to Johnson after learning that he had complained, but nonetheless asserted that Parks had taken actions “bordering on harassment.” The letter also referred

to incidents in which Parks questioned a temporary Port employee, Richard Billups, and another Port employee who was serving as acting foreman, Kenneth Taylor. In January 2007, Parks asked Billups what he was doing for the Port, in a manner he considered “abusive,” by which he meant she was “not being polite.” Other than that, Billups considered his relationship with Parks to be functional and workable, and he had no problems with her. As to Taylor, Parks had asked him why he had served for so long in the acting foreman position. At the time, Parks was a union steward, and she was investigating complaints about whether the position was being rotated fairly. Taylor did not think he was the appropriate person to ask, as it was not his decision, and he characterized Parks’s manner in asking the question as “aggressive.” He did not think, however, that it was inappropriate for Parks to be looking into the issue.

g. Suspension for being in Port offices after hours: In November 2008, as a result of an incident that occurred in August 2008, Parks was suspended for three days for entering a Port office after hours to check on the status of a leave request she had submitted, and going into Ringbom’s office to check her mailbox, which was inside it. According to Parks, other employees sometimes entered the office after hours and were not disciplined for it. Park entered the office in order to ascertain whether a leave request she had submitted several weeks earlier, asking for time off on the day following her entry into the office, had been approved. The discipline letter stated that while in the office, Parks made a threatening remark to Gerard Higareda, who happened to be working on a binder relating to Parks’s legal action at the time. Higareda said that Parks told him his deposition might have to be taken, but Parks did not recall making that statement, and in any event, Higareda denied that Parks was hostile or threatening to him during this conversation.

7. **Differential treatment:** Parks complained of a number of ways in which she believed the Port or her supervisors had treated her differently from her male colleagues with respect to the terms or conditions of her employment.

a. Note in file regarding union protest: In October 2001, while Parks was still in her initial period of probation after being hired, Cuthbertson placed a note in Parks’s file

regarding her participation in a union protest at the Port involving 20 or 30 employees. Cuthbertson did not place notes in the files of any of the other workers involved in the protest. Cuthbertson told Parks it was not a good idea for her to participate in the protest when she had only worked at the Port for a few months. He characterized Parks's participation in the protest, and her response to his questions about it, as "militan[t]," "belligerent," and "forward."

b. *Denial of overtime*: In March 2003 and September 2006, Parks filed grievances alleging that she should have been given additional overtime work. Parks does not dispute, however, that the Port allocates overtime based on an electronic list generated by a formula that reflects overtime worked, and overtime offered but refused.

c. *Large diameter pipe*: In December 2003, Parks told Cuthbertson that she believed her male colleague, Taylor, had been assigned more of the jobs involving large diameter pipe. Parks acknowledged at her deposition that her basis for this belief was her own personal observations, coupled with Taylor's own complaint that "he was getting assigned jobs unfairly," specifically with respect to jobs involving large diameter pipe, and that "the workload was unfairly distributed." Parks believed Cuthbertson was homophobic, but at her deposition, she could not articulate any reason why she believed he discriminated against her on the basis of sexual orientation in making work assignments. In support of the Port's motion, the Port submitted a statistical analysis, based on the Port's work records, regarding the assignment of work involving large diameter pipe. Parks disputed this analysis, in that the Port's figures were based on the proposition that Taylor and Parks both worked at the Port from the time Parks was hired until August 31, 2006, whereas Parks contended that Taylor, though technically still employed, was actually absent on medical leave starting sometime in 2004. However, Parks did not produce any evidence supporting her contention that the work with large diameter pipe was in fact unfairly distributed. She does not contend, and has not produced any evidence, that work with large diameter pipe is more desirable than the other types of work performed by Port plumbers.

d. *Acting foreman position*: In late 2004, after Fill retired as utilities foreman, the Port held his position open to permit certain employees to rotate through the position of acting utilities foreman, and thereby gain supervisory experience. The first two rotations were assigned to male workers, one of whom was Ringbom. On April 18, 2005, Parks began serving a rotation in the position. Parks's tenure was interrupted by two vacations totaling 30 calendar days. On July 21, 2005, after Parks had been in the position for over three months, Cuthbertson and Mankowski told Parks her rotation was over, but she refused to vacate the position. Cuthbertson reiterated that Parks needed to step down, because Joan Webster, the Port's human resources director, had determined that for safety reasons, the electricians had to be supervised by a licensed electrician, which Parks was not. Shortly after Parks was told she had to vacate the position, Webster reconsidered her view and decided that Parks could safely supervise electricians and therefore could be reinstated as acting utilities foreman. However, Parks took a day's leave before this decision was communicated to her, and when she returned to work, she resigned from the position and complained that she was being discriminated against and forced to work in a "hostile environment." Parks demanded to see the time records of the two previous occupants of the position so she could verify how long each of them had served. Parks's complaint was forwarded to the Port's Office of Equal Opportunity, which determined that Parks had served at least the same number of calendar days in the position as each of the prior acting utilities foremen, and that Parks's complaint did not have merit.

e. *Lack of equal access to training*: In 2005, while Parks was serving as acting foreman, Cuthbertson did not treat her in the same way that he had treated Ringbom, her predecessor in the position, with regard to training in electrical work. In 2009, after Parks failed to pass a backflow certification examination, Parks asked Ringbom if she could take a one-day training seminar before retaking the examination. Ringbom told her the Port did not have money for the training, but Parks found out three days later that Ringbom himself had been authorized to take a five-day course on the same subject.

f. *Communication restrictions*: In May 2006, Ringbom directed Parks to copy him on emails relating to Port business, and to advise him if she needed to meet with someone other than himself or Cuthbertson. The genesis of Ringbom's directive appears to have been an incident in which Ringbom told Parks to remove a specific backflow device; Ringbom and Parks had a confrontational conversation about the implications of removing the device for water safety; and Parks then communicated about her concerns directly with Port environmental scientist Jeff Rubin, without informing Ringbom she was doing so. Ringbom later explained to Parks that he was responsible for coordinating the work assignments of the employees he supervised, and needed to know if Port tenants asked Parks directly to perform a task for them. Ringbom did not issue such a directive to other employees, but Parks did not produce any evidence that any other employees had failed to inform Ringbom regarding work assignments they had accepted directly from Port tenants. Parks reacted to Ringbom's directive by sending him daily emails listing everyone with whom she might discuss Port business that day. In September 2006, Parks filed a grievance regarding this directive, indicating she believed she was being harassed for calling attention to a possible unsafe water condition at the Port.

g. *Assignment of plumbing work to others*: On September 1, 2006, Parks filed two grievances regarding the conduct of Bill Edwards, a maintenance foreman at the Port, in assigning overtime work that was supposed to be performed by a plumber to a semi-skilled laborer, without first offering it to a plumber, and in doing pipeline repair work himself, when such work should have been carried out by a plumber.

h. *Human Resources appointment*: In January 2007, Parks made an appointment with a representative of the Port's human resources (HR) department to discuss her family medical leave rights. She scheduled the appointment for 11:15 a.m. without first consulting Ringbom. When she asked Ringbom if she could attend the appointment as scheduled, he told her to go at noon on her lunch hour instead. Parks went to the HR department at noon, as instructed, but could not meet with the representative, because the latter was at lunch. Parks was able to meet with the representative a week or two later. Parks believed Ringbom's request that she use her lunch hour for the meeting might have

been discriminatory or retaliatory. Other Port workers were permitted to meet with HR representatives during work hours. However, Parks was unable to identify anything Ringbom said that caused her to believe his request was based on her gender or sexual orientation. Ringbom explained that under Port policy, employees were supposed to request release time in advance when they wished to meet with someone in Port administration, and Parks had not done so on this occasion. Parks was not aware of this policy at the time.

i. *Safety boot policy*: The Port has a policy requiring employees to wear protective footwear, or “safety boots,” while on the job. In July 2007, Cuthbertson “admonished” Parks for wearing shoes other than her safety boots in a Port office. Parks was given a copy of the Port’s policy regarding foot protection, with the provision regarding discipline for noncompliance highlighted. The following day, Parks’s male coworker, Andy Duncan, wore the same type of non-safety boots in the same office, in Cuthbertson’s presence, and Cuthbertson did not take any action of the sort he had taken with Parks. Cuthbertson himself did not consistently wear safety shoes in the office or shop, and “mocked [Parks] regarding his scrutiny of her and the differential treatment.” Cuthbertson acknowledged that he had told Parks to put on her safety boots, but stated that he had issued such instructions to other employees also, regardless of their gender or sexual orientation. Other than the one incident with Duncan and Cuthbertson’s own behavior, Parks did not produce any evidence that Cuthbertson enforced the safety boot policy differently as to Parks than he did with respect to male and/or heterosexual workers.

j. *Time off request*: In December 2007, Parks requested 27 nonconsecutive days off as leave without pay. Parks believed that under the union contract, she was not required to give any reason for this request beyond saying it was for “personal reasons.” Mankowski, however, interpreted the contract to require that such a request satisfy certain requirements, and that “personal reasons” was not a sufficient explanation for this purpose. Mankowski requested that Parks give him additional information about the reason for the request, and Joan Webster asked Parks’s union representative why Parks

needed the time. Mankowski denied that his request for additional information had anything to do with Parks's gender or sexual orientation.

k. *Presence on Port property after work hours*: The Port requires employees to obtain permission if they remain on the worksite after their normal work hours. On two occasions, in March and April 2008, Parks was confronted by supervisors about her being on Port property after working hours. In the March 2008 incident, management investigated Parks, and threatened to discipline her, even though other workers were not similarly treated. In April 2008, Cuthbertson demanded to know why Parks was on the property two minutes after her shift ended. At the time, Parks was filling out her time card in the company of other workers whom Cuthbertson did not treat similarly. Also, as noted *ante*, Parks was disciplined in November 2008 for being in the office after hours during August 2008.

1. *Backflow certification pay*: Parks took and passed a test to qualify for a backflow tester certificate. Parks believed this entitled her to a six percent pay increase. Neither the Port nor its agreement with Parks's union provided for such an increase, and the Harbor facilities department at the Port considers backflow testing and repair to be "a normal part of a plumber's work." Parks does not dispute this.

8. **Treatment by supervisors**: Parks identified other incidents, not involving specific terms or conditions of employment, in which supervisory personnel at the Port treated her in ways she characterizes as discriminatory and/or retaliatory.

a. *Backflow device testing versus repair*: In March 2007, Ringbom directed Parks to repair some backflow devices, but Parks, consistent with her longstanding practice and the instructions of her former supervisor, gave priority to testing new backflow devices over repairing the existing ones. Ringbom sent Parks a memo about the issue, emphasizing that Parks should have consulted him before changing her work assignment, and stating that "[t]his is the same standard" to which he held "all employees who report to me." Parks was not disciplined for this incident, but Mankowski's notes of a meeting with Ringbom about the incident reflect the use of the term "insubordination" to describe her actions.

b. *Communication with other employees:* In April 2007, Parks's former supervisor, Segal, told Parks that Cuthbertson had told him not to talk to Parks.⁸ Cuthbertson's declaration in support of the Port's motion states that he only told Segal not to talk to Parks or anyone else about issues related to Parks's legal claims, and did not tell Segal not to talk to Parks at all. However, Mankowski's notes of a meeting with Cuthbertson on April 12, 2007, reflect that Cuthbertson's concern was the amount of time Parks and Segal were spending in conversation with one another, and the impact on productivity.

c. *Meeting with Facilitator:* In June 2007, Mankowski notified Parks that the Port wanted her to attend a series of meetings with an outside facilitator in order to "enhance interpersonal coordination" and improve the communications between Parks and Ringbom. Mankowski declined to give Parks the assurance she requested that her statements during the facilitation would not be used against her for disciplinary or evaluation purposes, so Parks refused to participate without a union representative present, which the Port would not allow. As a result, Mankowski threatened to discipline Parks for insubordination, though he did not in fact do so.

d. *Workplace Violence Incident Report:* On December 17, 2007, Cuthbertson and Ringbom filled out and filed a Port of Oakland form called a "Workplace Violence Incident Report" regarding Parks. According to Ringbom, he did not believe Parks actually posed a physical threat to herself or others, but nonetheless filed the report because he learned from a training session that he was required by Port policy to do so when an employee "exhibited certain signs which [Port supervisors] were taught might lead to workplace violence." Ringbom denied that the report had anything to do with Parks's gender or sexual orientation. The Port retained an outside consultant to interview Cuthbertson and Ringbom regarding the report. The consultant concluded that Parks did not pose a threat of workplace violence, but that "managing [her] was very difficult," and that Cuthbertson and Ringbom filed the report because they "wanted their frustration reported and acknowledged." The consultant "did not perceive that [Cuthbertson and

⁸ The admissibility of this evidence is discussed *post*.

Ringbom's] frustrations masked an impermissible motive." Other than hiring the consultant, the Port did not take any action due to the filing of the report.

e. *Ringbom's reaction to question about his whereabouts*: In August 2009, Ringbom informed Parks's crew that he would not be at work on the following day. On the day Ringbom was expected to be out, he called Parks on the radio to instruct her to shut off a valve due to a water leak. When Parks asked Ringbom whether he was at work, he "replied in a manner that was irritated and hostile," and asked Parks whether she understood that Ringbom was her foreman and when he told her to do a job, she needed to go do it.

f. "*Shadowing*": Cuthbertson appeared to Parks on various occasions to be "shadowing her at work"; similarly, Mankowski appeared to Parks to be watching her and taking notes.

9. **Union issues**: Parks identified a number of incidents in which she believed she was unfairly treated by Port managers in connection with her involvement in her union.

a. *August 2007*: In August 2007, Mankowski observed Parks, who was a union steward, speaking with the chapter president of the union about a grievance. According to Parks, Mankowski falsely told maintenance supervisor Bill Morrison that Parks had been involved in this conversation for half an hour. Mankowski did not recall the exact conversation, but denied that it had anything to do with Parks's gender or sexual orientation, as opposed to her union activity.

b. *June 2009*: In June 2009, Parks was seen talking to Cecilia Meza, a Port carpenter. Meza's foreman, Bill Edwards, later admonished Meza that Parks should not be talking about union business on Port time. As far as Parks knew, Edwards did not know what the subject of Parks's and Meza's conversation was. Edwards denied that his comment to Meza was based on Parks's gender or sexual orientation; rather, it was based on her union activities.

DISCUSSION

A. Evidentiary Issue

The Port filed formal objections to the evidence submitted by Parks in connection with the Port's motion. The trial court ruled on all of the objections in its order granting summary adjudication. On appeal, Parks contends that one of these rulings was in error.

Specifically, in her declaration opposing the motion, Parks testified that her coworker and former supervisor, Segal, told her that Cuthbertson had told him not to speak to her. The Port objected to this portion of Parks's declaration as hearsay, and the trial court sustained the objection.

Parks argues that the statement was offered to show its effect on her, and for that purpose, it is not hearsay. To that extent, Parks is correct. Segal's statement to Parks is relevant to whether Parks experienced her work environment as hostile, and it is admissible for that limited purpose, which does not require that Segal have been telling the truth about what Cuthbertson said. (See *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 591-592 [murder victim's statements about ex-husband's abusive conduct, though inadmissible to show ex-husband committed acts victim described, were properly admitted to show victim's state of mind about ex-husband and reasons for terminating relationship]; *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 520-521 [state of mind of plaintiff in harassment case is relevant to whether hostile work environment existed]; see generally 1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 5, p. 788 ["out-of-court statements not offered to prove the truth of the matter stated are not regarded as hearsay"].)

On the other hand, the Port is correct that Segal's statement was hearsay to the extent it was introduced to prove that Cuthbertson *actually* told Segal not to speak to Parks. (See, e.g., *People v. Thoma* (2007) 150 Cal.App.4th 1096, 1103 [police officer's testimony at preliminary hearing was generally admissible under prior testimony exception to hearsay rule, but officer's testimony that nurse told him crime victim was in surgery could not be used to prove seriousness of victim's injuries, because nurse's out-of-court statement was inadmissible to prove truth of its contents].) Using the evidence

for that purpose requires reliance on the truth of Segal's out-of-court statement to Parks about the content of his conversation with Cuthbertson, and thus violates the hearsay rule.

Parks also correctly points out that Cuthbertson's own declaration said he told Segal not to talk to Parks *about her legal dispute* with the Port. But the implications of Cuthbertson's giving such an instruction are very different from those urged by Parks. If a supervisor tells employee Smith not to speak *at all* with employee Jones, this may, in context, tend to show that the supervisor contributed to creating a hostile work environment for Jones. But if Jones is contemplating legal action against the employer, it is perfectly reasonable for the supervisor to instruct Smith not to discuss Jones's *legal claims* with Jones, in an effort to preclude Smith from saying anything that could potentially affect the employer's future litigation position. Under the latter circumstances, the issuance of such an instruction does not tend to establish the existence of a hostile work environment.

Accordingly, for the purpose of reviewing the trial court's ruling on the merits of the Port's motion, we treat this portion of Parks's testimony as admissible, but solely for the purpose of showing that Segal *told* Parks Cuthbertson had instructed him not to talk with her. Segal's hearsay statement cannot be relied upon for its truth, and thus does not controvert Cuthbertson's direct testimony that what he told Segal was only to refrain from speaking to Parks about her legal dispute with the Port.

B. Summary Adjudication

1. Standard of Review and Applicable Law

Because this is an appeal from an order granting summary adjudication, we review the record *de novo*. (*Birschtein, supra*, 92 Cal.App.4th at p. 999.) As the moving party, the Port "bears the burden of persuasion that there is no triable issue of material fact and that [it] was entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) "A motion for summary [adjudication] shall be granted when '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.'" [Citation.] A moving defendant is entitled to judgment as a matter of law when the

defendant shows without rebuttal that one or more elements of the plaintiff's case cannot be established or there is a complete defense to that cause of action. [Citations.] [¶] On appeal after a summary [adjudication] has been granted, we review de novo the trial court's decision to grant summary [adjudication] and are not bound by the trial court's stated reasons.⁹ [Citations.] In reviewing the summary [adjudication], we apply the same three-step analysis used by the trial court: we (1) identify the issues framed by the pleadings; (2) determine whether the moving party has negated the opponent's claims; and (3) determine whether the opposition has demonstrated the existence of a triable, material factual issue. [Citation.] Like the trial court, we view the evidence in the light most favorable to the opposing party and accept all inferences reasonably drawn therefrom. [Citation.]" (*Hinesley, supra*, 135 Cal.App.4th at p. 294.)

The elements of a cause of action for gender or sexual orientation harassment against an employer under FEHA are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome harassment; (3) the harassment complained of was based on the plaintiff's gender or sexual orientation; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) agents of the employer, such as the plaintiff's supervisors or managers, either personally engaged in the harassment, or knew or should have known of the harassment and failed to take prompt corrective action. (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1377; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 (*Jones*) ["when an employee seeks to hold an employer responsible for a hostile environment, the employee must show that the employer knew or should have known of the harassment in question; an employer's knowledge can be demonstrated by showing the pervasiveness of the

⁹ Because we review the trial court's ruling de novo, and are not bound by its reasoning, it is immaterial whether the trial court, in reaching its decision, took adequate account of the California Supreme Court's opinion in *Roby v. McKesson* (2009) 47 Cal.4th 686 (*Roby*), which was decided after the completion of briefing on the Port's motion, but before the hearing.

harassment, which gives rise to an inference of knowledge or constructive knowledge”]; see also *id.* at pp. 608-609 & fn. 6 [employer is strictly liable for actions of its agents or supervisors, and is liable for actions of plaintiff’s coworkers if agents or supervisors knew or should have known of harassing conduct and failed to take immediate and appropriate corrective action].)

FEHA’s prohibition against harassment on the basis of gender or sexual orientation includes protection from a broad range of conduct, including, as Parks alleges here, the creation of a work environment that is hostile or abusive. (See *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 202-203.) Claims of a hostile or abusive working environment due to harassment arise when a workplace is “permeated with ‘discriminatory intimidation, ridicule, and insult[.]’ [citation] that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment[.]’ [citation]” (*Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21.) “ ‘For . . . harassment to be actionable, it must be sufficiently severe or pervasive “to alter the conditions of [the victim’s] employment and create an abusive working environment.” [Citation.]’ [Citation.]” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130 (*Aguilar v. Avis*).)

In other words, harassment “ ‘cannot be occasional, isolated, sporadic, or trivial’ ”; instead, “ ‘the plaintiff must show a concerted pattern of harassment of a repeated, routine, or a generalized nature. [Citation.]’ [Citation.]” (*Aguilar v. Avis, supra*, 21 Cal.4th at p. 131.) Thus, in order to establish a claim for workplace harassment, “ ‘[t]he plaintiff must prove that the defendant’s conduct would have interfered with a reasonable employee’s work performance and would have seriously affected the psychological well-being of a reasonable employee and that [the plaintiff] was actually offended.’ [Citation.]” (*Id.* at pp. 130-131.)

An employer seeking summary adjudication of a harassment cause of action based on the absence of a causal connection between the alleged harassing acts and the plaintiff’s membership in a protected class bears the burden of proving that no reasonable jury could infer such a connection from the evidentiary record as a whole. (See *Begnal v.*

Canfield & Associates, Inc. (2000) 78 Cal.App.4th 66, 77 [“ ‘ “[D]eterminations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder” ’ ”].) Moreover, as our Supreme Court made clear in *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, we must consider the employer’s overall course of conduct as a whole, because an adverse employment action may consist not of “one swift blow,” but rather of “a series of subtle, yet damaging, injuries. [Citations.]” (*Id.* at p. 1055.) Indeed, “[a]s a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer’s motion for summary judgment. This is because ‘the ultimate question is one that can only be resolved through a searching inquiry—one that is most appropriately conducted by a factfinder, upon a full record.’ [Citation.]” (*Chuang v. University of California Davis* (9th Cir. 2000) 225 F.3d 1115, 1124.)

In assessing whether a reasonable jury could infer discriminatory motive or intent, we must accept Parks’s version of the relevant historical facts, even if supported only by her own declaration. (*Estate of Housley* (1997) 56 Cal.App.4th 342, 359 [“the sole declaration of a party opposing a summary judgment motion which raises a triable issue of fact is sufficient to deny that motion”]; see also *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1075 [testimony of even one witness, if believed by jury, is sufficient to support verdict, even if witness is a party]; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; see also Evid. Code, § 411.) We are not, however, bound to accept Parks’s conclusions or speculations as to the motive or intent behind those historical facts. (See *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1240; *Hayman v. Block* (1986) 176 Cal.App.3d 629, 638-639.)

On a defense summary judgment motion in a FEHA case, “[i]f the employer has met its burden [to rebut a prima facie showing of discrimination] by showing a legitimate reason for its conduct, the employee must demonstrate a triable issue by producing substantial evidence that the employer’s stated reasons were untrue or pretextual, or that the employer acted with a discriminatory animus, such that a reasonable trier of fact

could conclude that the employer engaged in intentional discrimination or other unlawful action. [Citations.] ‘[S]peculation cannot be regarded as substantial responsive evidence.’ [Citation.] In order to raise an issue as to the employer’s credibility, the employee must set forth specific facts demonstrating ‘such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could rationally find them ‘unworthy of credence.’ ” [Citation.] [¶] . . . [E]ven though we may expect a plaintiff to rely on inferences rather than direct evidence to create a factual dispute on the question of motive, *a material triable controversy is not established unless the inference is reasonable*. And an inference is reasonable if, and only if, it implies the unlawful motive is *more likely* than defendant’s proffered explanation. [Citation.]” (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038 (*Cucuzza*), italics omitted & added.) Thus, our task is to determine whether the record presented on the summary judgment motion could have persuaded a reasonable jury to infer, despite the Port’s explanations regarding the actions about which Parks complains, that these actions were in fact motivated by her gender and/or sexual orientation.

2. Analysis

Much of the evidence Parks relies on to support her harassment claims consists of personnel actions taken by Ringbom and/or Cuthbertson in their capacity as Parks’s supervisors—that is, the items summarized *ante* under the headings of unfair performance evaluations, unfair discipline, and differential treatment. Under *Roby*, *supra*, 47 Cal.4th 686, personnel decisions by a supervisor are properly considered as evidence of harassment, but only if “the supervisor used those official actions as his means of conveying his offensive message.” (*Id.* at p. 708.)

In the present case, however, Ringbom and Cuthbertson deny any discriminatory or harassing intent with regard to these actions, and with a few minor exceptions, the Port has proffered plausible justifications for them that do not reflect any discriminatory

animus.¹⁰ Thus, as indicated by the authorities cited *ante*, in order to rely on these actions to defeat the Port's motion, Parks had the burden to show that a reasonable jury could find, based on the evidence as a whole, that the Port's justifications for its actions were only pretexts, and that their real purpose was to harass Parks on the basis of her gender and/or sexual orientation. (See, e.g., *Cucuzza, supra*, 104 Cal.App.4th at p. 1038.)

Aside from Cuthbertson and Ringbom's personnel actions themselves, however, the evidence on which Parks relies consists of: (1) the issues regarding the restroom and locker room facilities; (2) the evidence regarding the reaction of Port personnel to Parks's union activity; and (3) the presence in the Port workplace of jokes, derogatory remarks, and other offensive material relating to women and/or homosexuals. In assessing whether a reasonable jury could discredit the Port's justifications for its personnel actions, we must take into account the weight that a reasonable jury could assign to this independent evidence.

As to the restroom and locker room facilities, Parks did raise a triable issue of fact regarding whether the facilities were equally clean and accessible compared with those furnished to male employees. On the other hand, Parks does not dispute that the inequalities of cleanliness and access—that is, the offensive odors, and the interference with access caused by the storage of supplies—were temporary. It is also undisputed that they did not prevent her from using the facilities altogether.

Parks also raised triable issues of fact regarding whether the women's facilities were subject to intrusion by male Port workers (particularly Ringbom) and janitors. However, Parks did not provide evidence that any male ever actually entered the women's facilities while she was using them. More importantly, Parks did not provide any evidence that the Port created these conditions intentionally in order to mistreat Parks in particular, or women in general, or that she complained about these issues to the Port, and it refused to address them. In short, the evidence as to the restroom and locker room

¹⁰ The trial court concluded that Parks raised triable issues of fact regarding *retaliatory* animus on the Port's part, but that is a separate issue, and is not before us on this appeal.

facilities does not provide sufficient support for Parks's overall picture of the Port as a hostile working environment for women and lesbians.

As for the remarks, gestures, and bulletin board postings on which Parks relies, the case law makes clear that a claim of harassment or a hostile work environment cannot rest on a handful of off-color jokes and derogatory remarks, over a period of several years, which were made primarily by the plaintiff's coworkers rather than supervisors. (See, e.g., *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 282-284, 295; *Jones, supra*, 152 Cal.App.4th at p. 1377.) Parks does not allege that any of her supervisors or coworkers at the Port propositioned her sexually or addressed her personally using derogatory terms. While some of the conduct displayed by Port workers can certainly be seen as reflecting generalized sexism or homophobia, it was not severe or pervasive enough to constitute actionable harassment. (See *Manatt v. Bank of America* (9th Cir. 2003) 339 F.3d 792, 798-799.) Moreover, it does not contribute significantly to a showing that the personnel actions taken by Ringbom, Cuthbertson, and Mankowski were motivated by gender or sexual orientation bias, rather than by the legitimate reasons proffered by the Port in support of its motion.¹¹

Parks argues that an inference of sexism and homophobia on the part of Ringbom, Cuthbertson, and Mankowski can be drawn from their use of terms such as "strident," "emotional," "aggressive," "belligerent," and "disrespectful" in describing Parks and her behavior on the job. Parks did not introduce any evidence, however, that there were male and/or heterosexual Port employees who behaved as she did, but were not described in similar terms. Indeed, it is undisputed that Mankowski used the term "emotional" to describe Cuthbertson as well as Parks. Moreover, Parks herself acknowledges that she "frequently challenge[d] her managers and supervisors." For example, Parks called Ringbom a liar; refused to participate in a facilitation process without a guarantee that nothing she said would be used against her; refused to step down from the acting foreman

¹¹ The evidence indicates that some of the actions of Parks's supervisors may have been tinged with animosity towards Parks's union activism, but union militants are not a protected class under FEHA.

position when asked to do so; and reacted to Ringbom's directive that she keep him informed about her interactions with Port employees and tenants by sending him daily emails listing everyone with whom she might discuss Port business that day, even after he explained to her that he just wanted her to coordinate with him regarding her work assignments. In light of these facts, we are not convinced that a reasonable jury could conclude that these terms were veiled discriminatory references to Parks's gender or sexual orientation, as opposed to legitimate descriptions of her behavior.

The cases on which Parks relies are distinguishable. The first such case, *Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061, was a retaliation case in which the plaintiff and another female employee were fired nine days after the plaintiff complained to her employer about a pay disparity between herself and male coworkers. The Ninth Circuit reversed a summary judgment in favor of the employer, finding that the timing of the plaintiff's dismissal was "highly probative" of her claim that the employer's ostensible reasons for the termination were pretextual, particularly when considered together with evidence that a male manager called the plaintiff a "slut," "bitch," and "whore" and was adamant that the employer should fire her. (*Id.* at pp. 1069-1070.) Almost as an afterthought, the court mentioned that "management repeatedly echoed the all too familiar complaints about assertive, strong women who speak up for themselves: 'difficult,' 'negative attitude,' 'not a team player,' 'problematic.'" (*Id.* at p. 1072.) Thus, *Stegall* does not stand for the proposition that managers' use of such language to describe a female employee is necessarily evidence that management's treatment of the employee is attributable solely to gender bias.

In *Lindhal v. Air France* (9th Cir. 1991) 930 F.2d 1434, the plaintiff, a woman over 40, was denied a promotion that went to a younger man. In reversing summary judgment for the employer, the Ninth Circuit noted the evidence showing that the manager who awarded the promotion to the man relied on gender stereotypes in assessing the candidates' qualifications. (*Id.* at p. 1439.) The court relied primarily, however, on its conclusion that the employer's ostensible reasons for preferring the man were not borne out by the facts. (*Id.* at pp. 1438-1439.) Specifically, the court pointed to the

evidence that the man “may not have been the best person to lead the group,” which “suggest[ed] that leadership ability may not have been the real reason for choosing” to promote the man rather than the plaintiff. (*Id.* at p. 1439.) The court also relied on the evidence that there were differences in the employer’s promotion practices when women candidates were involved. (*Ibid.*) Thus, *Lindhal* does not stand for the proposition that the use of gender-stereotyped language alone is sufficient to defeat an employer’s motion for summary judgment in a gender or sexual orientation discrimination case.

Parks also relies on *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228 (*Price Waterhouse*), superseded by statute on another ground as stated in *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 94. Unlike the plaintiff in *Price Waterhouse*, however, Parks was never told by Port representatives to dress or act in a more feminine manner. (See *Price Waterhouse*, at p. 235.) Thus, unlike in *Price Waterhouse*, here there is no direct evidence that Parks’s supervisors’ criticism of her behavior stemmed from the fact that she was a woman or a lesbian, rather than from the behavior itself.

Finally, Parks relies on *Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945 (*Rehmani*). In that case, the Sixth District reversed a trial court order granting summary adjudication in favor of the employer on an employee’s causes of action alleging workplace harassment on the basis of national origin and religion. The plaintiff, a Muslim born in Pakistan, complained to his employer’s human resources department that his Indian coworkers were uncooperative toward him, failed to support him, were rude to him, and humiliated him. Based on “the totality of the circumstances,” the Sixth District concluded that a reasonable jury could find that “the conduct of the alleged harassers was sufficiently severe or pervasive to create a hostile or abusive working environment,” and that the “employer failed to take appropriate steps to curb the verbal abuse [the plaintiff] allegedly suffered.” (*Id.* at pp. 951-952; see *id.* at p. 959.)

The circumstances on which the court relied included numerous instances of overtly derogatory remarks based on the plaintiff’s national origin and religion, particularly after a Pakistani terrorist attack occurred in India. A coworker told the plaintiff that “ ‘Pakistan and Afghanistan need[ed] to be bombed and wiped out’ ”

because of terrorist activity that was spreading to India. (*Rehmani, supra*, 204 Cal.App.4th at p. 953.) When the plaintiff asked an Indian coworker to help him with a task, the worker asked the plaintiff to confirm that the plaintiff would not blow up the coworker, and the human resources director told the plaintiff to consider it a joke. (*Ibid.*) Another coworker told the plaintiff that Pakistan was “a messed up country” with “lots of terrorism” and asked why “you people” did not do something about it; again, the human resources director brushed off the plaintiff’s complaint. (*Ibid.*) When the plaintiff took a sick day on September 11, 2009, an Indian coworker told other employees that the plaintiff was “out ‘celebrating 9/11 and planning terrorist attacks.’ ” (*Id.* at pp. 953-954.) One of the plaintiff’s Indian coworkers treated not only the plaintiff, but also other non-Indian workers, in an angry and disrespectful manner, but did not behave the same way toward his fellow Indians. (*Id.* at pp. 955-956.) The plaintiff also supplied numerous other examples of “rudeness, taunting, and intimidation from Indian [workers] toward their non-Indian colleagues,” and incidents of preferential treatment of Indian employees, some of which were reported to the employer’s human resources director by other employees during her investigation of the plaintiff’s complaints. (*Id.* at pp. 957-958, fn. omitted; see also *id.* at p. 958, fns. 6, 7.)

The remarks and conduct alleged in *Rehmani, supra*, 204 Cal.App.4th 945, were far more objectionable, and far more overtly hostile to the plaintiff individually, than the remarks of which Parks complains in the present case. Furthermore, the employer in *Rehmani* did not even argue that the anti-Pakistani remarks made to the plaintiff could be justified as factual statements prompted by the plaintiff’s own conduct or individual personality. In the present case, on the other hand, Parks’s managers at the Port had a basis in fact for using the terms Parks characterizes as sexist, such as “strident” and “militant,” to describe her behavior, without reference to her gender or sexual orientation.

In short, even viewing the personnel actions taken against Parks in light of her direct evidence as to the existence of sexism and homophobia in the Port workplace, we are not persuaded that a reasonable jury could have found that the Port’s stated reasons

for those actions were pretexts for gender or sexual orientation discrimination.¹² Nor are we convinced that the direct evidence of sexism and homophobia, standing alone, was sufficient to convince a reasonable jury that the Port created or tolerated a hostile work environment for women or lesbians. Accordingly, Parks has failed to show that she raised triable issues of material fact as to whether the Port’s personnel harassed her on the basis of her gender or sexual orientation. The trial court’s order granting the Port’s motion as to Parks’s first three causes of action must, therefore, be affirmed.

C. Costs

The cost items Parks contends should not have been awarded consist of: (1) fees for expediting transcripts of depositions taken close to trial that Parks argues could have been taken earlier; (2) fees for expediting transcripts for depositions taken well in advance of trial; (3) \$525 for “litigation support”; (4) \$640 for handling, delivery, and messenger fees (apparently for deposition transcripts); and (5) \$532 for various other expenses charged by deposition reporters, including parking; a holiday per diem; fees for different transcript formats; a transcript production fee; and charges for all but one session of Parks’s deposition that Parks contends are excessive and unexplained.

As Parks acknowledges, on review of the trial court’s order denying Parks’s motion to tax costs, we apply an abuse of discretion standard. (*Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557 (*Seever*)). Because “ ‘the right to recover costs is purely statutory’ ” (*Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, 439, superseded by statute on other grounds as stated in *Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011, 1017), we look first to the applicable statutory language in determining whether the trial court abused its discretion.

¹² In arriving at this conclusion, we have considered all of the evidence proffered by Parks in support of her harassment causes of action, regardless of time frame. Accordingly, we need not and do not address the question whether some of that evidence should be excluded from consideration due to its remoteness in time.

The statutory provisions relevant to the issues on appeal are various subdivisions of Code of Civil Procedure section 1033.5 (section 1033.5).¹³ Subdivision (a)(3) authorizes costs for “[t]aking, video recording, and transcribing necessary depositions . . . , and travel expenses to attend depositions.” Subdivision (a)(14) authorizes costs for “[a]ny other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal,” but this broad language must be read in light of subdivision (b), which lists five specific categories cost items that may *not* be awarded. Under subdivision (c)(4), an item not specifically allowed under subdivision (a) or disallowed under subdivision (b) nevertheless may be recoverable in the trial court’s discretion.

All cost awards, however, are subject to the limitation of subdivisions (c)(2) and (c)(3) of section 1033.5. These subdivisions provide that “[a]llowable costs shall be *reasonably necessary* to the conduct of the litigation rather than merely convenient or beneficial to its preparation,” and that “[a]llowable costs shall be *reasonable in amount*.” (§ 1033.5, subs. (c)(2), (c)(3), italics added.) (See *Seever, supra*, 141 Cal.App.4th at pp. 1558-1559 & fn. 5; see also, e.g., *Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 Cal.App.4th 592, 604-605 [fees of discovery referee may be awarded as costs in trial court’s discretion, but must be reasonably necessary rather than merely convenient or beneficial, and must be reasonable in amount].)

Where cost items are challenged as not reasonably necessary or unreasonable in amount, the standard of review places a particularly heavy burden on the appellant, because “ ‘[t]he determination of reasonableness is peculiarly within the trial court’s discretion. [Citation.] ‘Whether a cost is ‘reasonably necessary to the conduct of the litigation’ is a question of fact for the trial court, whose decision will be reviewed for

¹³ Section 1033.5 was amended effective January 1, 2012, to add a new subdivision (a)(12). The amendment did not change the text of the existing subdivisions, but it resulted in the renumbering of former subdivision (a)(13) so that it is now subdivision (a)(14). (Stats. 2011, ch. 409, § 3, pp. 4397-4398.) To avoid confusion, we refer to the subdivision number used in the version of the statute currently in effect.

abuse of discretion. [Citations.]” [Citation.]’ [Citation.]” (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 77.) “To the extent the [costs] statute grants the [trial] court discretion in allowing or denying costs or in determining amounts, we reverse only if there has been a “clear abuse of discretion” and a “miscarriage of justice.” ’ [Citations.]” (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 52.)

The trial court denied the motion without hearing argument, as Parks did not contest the tentative ruling. The court’s order expressly found that the challenged costs were “recoverable and reasonable.” Given that this was a particularly fact-intensive issue, and the trial court was familiar with the issues involved, Parks has a heavy burden on appeal to demonstrate that the court abused its discretion in making this finding. For the reasons set forth in the Port’s brief on appeal, there is sufficient evidence of the necessity of these costs to support the trial court’s exercise of its broad discretion in finding them reasonable.

Parks cites *Hsu v. Semiconductor Systems, Inc.* (2005) 126 Cal.App.4th 1330 (*Hsu*), a decision by a differently constituted panel of this Division, for the proposition that extra fees for expediting deposition transcripts are not recoverable under section 1033.5, subdivision (a)(3).¹⁴ *Hsu* recognized, however, that “the extra cost for expediting transcripts *may* be allowed . . . in the exercise of the trial court’s discretion” under section 1033.5, subdivision (c)(4). (*Hsu, supra*, 126 Cal.App.4th at p. 1342, italics added.) Thus, *Hsu* does not stand for the proposition that expedited transcript fees are *never* recoverable as statutory costs; rather, it holds that such costs are awarded as a

¹⁴ In *Hsu*, the parties had a contract which, according to the prevailing party, allowed him to recover costs in excess of those allowed by section 1033.5. In posttrial proceedings, the trial court expressed skepticism as to the recoverability of certain expedited deposition fees under section 1033.5, but awarded them under the contractual provision. This court reversed, holding that a party claiming costs under a contractual provision must plead and prove those costs at trial, which the prevailing party in the case had not done. (*Hsu, supra*, 126 Cal.App.4th at pp. 1341-1342.) Given the trial court’s view that the expedited deposition fees did not satisfy the criteria for a discretionary award, this court declined to affirm the award on the alternative basis that the costs were recoverable under section 1033.5, subdivision (c). (*Id.* at p. 1342.)

matter of discretion under subdivision (c) of section 1033.5, rather than as of right under subdivision (a)(3). Here, the trial court exercised its discretion to make such an award, relying expressly on subdivision (c)(4). *Hsu* is therefore distinguishable.

Parks also cites *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1104 (*Science Applications*) for the proposition that the cost of creating a litigation database, and the associated extra costs for electronic copies of deposition transcripts, are incurred for convenience, rather than out of necessity, and therefore are not recoverable. However, in *El Dorado Meat Co. v. Yosemite Meat and Locker Service, Inc.* (2007) 150 Cal.App.4th 612, 620 (*El Dorado*), the court pointed out that *Science Applications* declined to award such costs because they were “more expensive methods of doing things that could be done by less expensive, low-tech means, and therefore they were not reasonably necessary” (*El Dorado, supra*, 150 Cal.App.4th at p. 620.) The *El Dorado* court concluded that where “using computers and suitably trained personnel” to create an exhibit “was more efficient than any low-tech method of doing the same thing,” the associated costs were allowable in the discretion of the trial court. (*Ibid.*) We agree, and Parks has not persuaded us that the award of such costs in the present case was an abuse of that discretion.

For all of the reasons outlined above, Parks has not met her burden on appeal to demonstrate that the trial court’s denial of her motion to tax costs was an abuse of discretion.

DISPOSITION

The judgment and the order denying Parks’s motion to tax costs are affirmed. The Port shall recover its costs on appeal.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.