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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DEPARTMENT OF FAIR  
EMPLOYMENT AND HOUSING,

Plaintiff and Respondent,

vs.

FLORATECH LANDSCAPE  
MANAGEMENT, INC.

Defendant and Appellant.

A139762

(Alameda County  
Super. Ct. No. RG11568338)

The California Department of Fair Employment and Housing (the DFEH or the Department) brought an administrative charge of disability discrimination against FloraTech Landscape Management, Inc. (FloraTech) on behalf of Placido Rico (Rico), a former employee of FloraTech, before the California Fair Employment and Housing Commission (the FEHC). FloraTech transferred the charge to superior court, where the matter proceeded to a bench trial on the DFEH's complaint. Following trial, the court rendered a statement of decision sustaining the allegations of discrimination, awarding monetary recovery to Rico, and granting attorney's fees and costs to the DFEH. FloraTech appeals from the judgment entered against it. We see no error and will affirm.

**I. BACKGROUND**

The evidence at trial revealed the following. Rico was hired by FloraTech in May 2005, and over the course of his four-and-one-half years as its employee he received

good performance reviews and was promoted. He started as a driver/laborer, was quickly moved into a position as a supervisory trainee, and in 2007 was promoted to a route supervisor. Rico's duties as route supervisor included oversight of a landscape crew on commercial and landscape sites, supervision of tasks assigned to crew members, training crews in the use of landscape equipment, and giving out appropriate equipment and tools to crews. He also did some manual labor, such as digging, pruning, mowing, and lifting fertilizer bags.

Rico's personnel file includes letters of commendation and shows he was granted merit salary increases in July 2005, February 2006, April 2007, and December 2008. Every FloraTech manager who testified at trial—including Brenda Condon, its President and Chief Operating Officer, the manager who eventually made the decision to fire him—conceded that, when he was fired, Rico was a valued employee with a good performance record. There was no evidence that, during his years of employment, any performance issues surfaced suggesting that Rico suffered from any physical limitations, or that he requested any accommodation for a physical disability. Prior to trial, the parties stipulated that “During his employment at FloraTech Mr. Rico never complained to his supervisors or managers of pain, injury, or disability.”

In October 2009, Washington Radiologist Medical Group, a radiology group consulting with Rico's orthopedic surgeon, Dr. Fulton Chen, mistakenly faxed to FloraTech a confidential, one-page medical report entitled “PROCEDURE: LS-SPINE COMPLETE” regarding a recent exam of Rico's spine. The report, cast in the form of abbreviated medical notation without narrative explanation, stated: “Lumbar spine is in anatomic alignment. The patient is status post posterior lumbar fusion from L4 through S1 with pedicular screws in the L4, L5 and S1 levels. Partial bony fusion of an L4-5 and L5-S1 discs also seen. Alignment remains anatomic. Mild diffuse degenerative changes demonstrated. No acute fractures noted.”

When this report was brought to Condon's attention, she called a meeting with Luis Cuellar, the District Manager and Rico's then-current supervisor, and Ivan Orduño, the Vice President of Operations and Rico's supervisor for a period several years earlier.

At the meeting, Condon expressed the view that the document “shows here that Rico has had some serious back surgeries done . . . .” In Rico’s job application, which he submitted to FloraTech in May 2005, he had answered “No” to the following question: “Do you have any physical limitations which would hinder your performance in the position applied for?” Because Rico failed to disclose his back surgery when he applied with FloraTech, Condon concluded Rico had concealed physical limitations that would impede his job performance.<sup>1</sup>

Condon had no medical expertise upon which to base this conclusion, but she testified she telephoned her sister in Boston, whom she described a “certified sports medicine trainer.” Condon’s sister, whose professional credentials beyond her title were never established, told Condon that “Mr. Rico might harm himself if he were to continue” to do the type of physical labor expected at FloraTech. What exactly Condon’s sister knew about Rico’s job duties was never shown. On cross-examination, Condon conceded that her sister did not examine or treat Rico and never spoke to him, and further, that in talking to her sister she never mentioned that Rico had, in fact, been performing his job duties well for four-and-one-half years.

Condon also admitted on cross-examination that, before firing Rico, she made no effort to contact Rico’s doctor, did not ask Rico if he were willing to give her permission to speak to his doctor, did not ask Rico whether he needed any accommodation to perform his duties, and did not arrange to send Rico to a doctor of FloraTech’s choosing to see if he was fit to perform his duties. When she met with Orduño and Cuellar to discuss the fax from Washington Medical Group, she did not know whether Rico, in fact, had any sort of physical disability that would interfere with his job performance. She

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<sup>1</sup> FloraTech’s Employee Handbook states: “The ability to perform vigorous physical activities is required of most employees. The applicant, prior to employment, must disclose physical conditions that may interfere with job performance, and disclose any previous job related injuries and worker’s compensation settlements. A physical examination [at FloraTech’s expense, by its chosen physician] may be required after a job has been offered to an applicant and before the applicant begins work.”

assumed Rico had such a limitation based on the severity of the back condition reported in the fax, based on her understanding of it as a layperson.

The day after FloraTech received the fax from Washington Radiologist Medical Group, Condon called Dean Schenone, FloraTech's Chief Executive Officer. In his testimony at trial, Schenone recounted this telephone conversation as follows. "She told me that there is a situation whereby facts had come in from, I think, Washington Hospital, and showed rather extreme work having been done on Placido's back and they pulled his employment records and found that [¶] . . . [¶] [i]t wasn't disclosed and that his employment application was contrary to that, and we just don't have tolerance for that . . . ." According to Schenone, Condon said she "met with a couple other subordinates and made the decision" to fire Rico "after doing an investigation." Schenone approved the decision.

Condon and her fellow managers all testified that the decision to fire Rico was made because he had lied on his employment application, not because he had physical limitations. FloraTech's Employee Handbook prohibits lying on an employment application and makes it grounds for immediate termination. Rico admitted to being aware of this policy, but testified that he had been truthful on his application because "the surgery never affected me, and I did my job." According to Rico, his back condition did not affect his ability to walk, stand, bend, twist or do any assigned work at FloraTech. He believed that Dr. Chen had cleared him to return to work without any restrictions, except that he was told not to do the kind of heavy lifting he did at a previous job in a tire shop.

Condon was asked on cross-examination, "Why do you believe Mr. Rico lied on his job application?" She responded, "The severity of what was written in the report with the particular screws bone infusion and fused disks, in my estimation being an athlete, having done this work, performed it and being in the industry for almost 32 years, I believed and knew that it's dangerous to do this work. He could hurt himself and others. So I believed he would know that and I believe he lied." Condon's belief that Rico's back condition would limit his ability to perform was also evident in documentary

evidence. FloraTech's employee separation form for Rico, completed the day he was fired, refers to his failure to disclose a "previous physical limit (injury) that would hinder his ability to perform work at FloraTech."<sup>2</sup>

On November 2, 2009, one day after Schenone approved Condon's recommendation about what to do, Condon summoned Rico to a meeting with her, Orduño and Cuellar, and terminated him. All three managers testified that, at this meeting, they did not show Rico a copy of the fax from Washington Medical Group or explore whether Rico could continue in his job if some kind of accommodation for any disability were made. At the time he was terminated, Rico was earning \$15 per hour. He looked for work after his discharge, but was unsuccessful. He had a long history of working to support his family, and had never before been fired from a job. He testified to how badly he felt because of his inability to pay his household rent and his need to borrow from family members. His wife and sister testified to the damaging effect his firing had on his psyche, describing how, following his termination, Rico fell into a state of depression.

FloraTech states that, after Rico's termination and as part of the discovery process, it learned certain new details about Rico's condition. Among those later-discovered facts were the following: that Rico's back injury was serious enough to keep him from working at all from 2002 to 2005 while he underwent vocational therapy following his surgery; that Dr. Chen had classified Rico's back condition as "permanent and stationary" for workers' compensation purposes and had restricted Rico to light work involving lifting of no more than 8 pounds (Rico's job required that he be fit enough to lift 50 pounds); and that, when Rico was working for FloraTech, he was taking a

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<sup>2</sup> FloraTech also wrote to the Employment Development Department shortly after Rico was terminated, stating "Mr. Placido (*sic*) was a good employee during his tenure. Unfortunately, it was revealed that he had sustained an injury at his previous employment and suffered from residual effects of the accident. His ability to perform relevant tasks was compromised by those effects . . . . [¶] Once the facts of his injury history were revealed, we determined that he was no longer able to perform his assigned tasks, and that he may risk exacerbating those symptoms by continuing to work in his current capacity."

painkiller, Norco, up to five times a day (Norco is an opiate and carries a warning not to drive or operate heavy equipment, both of which were tasks Rico did for FloraTech).

In February 2011, the DFEH filed an administrative charge before the FEHC alleging that Rico's termination was in violation of the Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq.<sup>3</sup> FloraTech transferred the proceeding to superior court, and in March 2011 the Department filed the complaint in this case. After a five-day bench trial, the court filed a statement of decision on August 21, 2013, finding that (1) FloraTech discriminated against Rico because of his perceived disability, in violation of section 12940, subdivision (a); (2) FloraTech failed to provide Rico reasonable accommodation, in violation of section 12940, subdivision (m), and (3) FloraTech failed to take all reasonable steps necessary to prevent discrimination from occurring, in violation of section 12940, subdivision (k). Because Rico never requested accommodation for any disability, the court denied the DFEH's claim under section 12940, subdivision (n) that FloraTech failed to engage in an interactive process of discussions with Rico about reasonable accommodations. The day after filing its statement of decision, the court entered judgment in favor of the DFEH and against FloraTech, ordering FloraTech to pay Rico \$62,400 in back pay, plus prejudgment interest, and \$50,000 in emotional distress damages. The court further permitted the Department to "seek allowable costs and attorney fees through an appropriate memorandum of costs and/or motion."

This timely appeal followed.

## **II. DISCUSSION**

### **A. Standard of Review**

In reviewing a judgment based upon a statement of decision following a bench trial, "[q]uestions of statutory interpretation, and the applicability of a statutory standard to undisputed facts, present questions of law, which we review de novo." (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765 (*Cuiellette*)). We apply a

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<sup>3</sup> All further statutory citations are to the Government Code unless otherwise specified.

substantial evidence standard of review to the trial court’s findings of fact. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 364 (*Foreman*).)

Under this deferential standard of review, findings of fact are liberally construed to support the judgment and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613 (*Gevorgian*).) A single witness’s testimony may constitute substantial evidence to support a finding. (*Ibid.*) It is not our role as a reviewing court to reweigh the evidence or assess witness credibility. (*Foreman, supra*, 144 Cal.App.4th at p. 365.)

“A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.” (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 (*Arceneaux*).) Specifically, “[u]nder the doctrine of implied findings, the reviewing court must infer, following a bench trial, that the trial court impliedly made every factual finding necessary to support its decision.” (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 48 (*Fladeboe*).)

## **B. Applicable Principles Under FEHA**

Section 12940, subdivision (a) prohibits an employer from discharging an employee “because of” various kinds of “disability,” including “physical disability.” Under FEHA, the definition of “physical disability” is expansive and includes anything that affects a specific bodily system and “[l]imits a major life activity” such as “working.” (§ 12926, subd. (m)(1)(B)(iii).) But an actual or existing disability is not necessary. FEHA further defines “physical disability” to include: “[h]aving a record or history of a disease, disorder, condition . . . , or health impairment [that constitutes a physical disability], which is known to the employer” (§ 12926, subd. (m)(3)); “[b]eing regarded or treated by the employer . . . as having, or having had, any physical condition that makes achievement of a major life activity difficult” (§ 12926, subd. (m)(4)); or “[b]eing regarded or treated by the employer . . . as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that

has no present disabling effect but may become a physical disability . . . .” (§ 12926, subd. (m)(5).)

There are two types of disability discrimination under FEHA: “(1) discrimination arising from an employer’s intentionally discriminatory act against an employee because of his or her disability (referred to as disparate treatment discrimination), and (2) discrimination resulting from an employer’s facially neutral practice or policy that has a disproportionate effect on employees suffering from a disability (referred to as disparate impact discrimination).” (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1246.) The DFEH’s principal claim in this case, asserted under section 12940, subdivision (a), is for disparate treatment discrimination. California courts analyze disparate treatment disability discrimination claims under a three-stage burden-shifting framework borrowed from federal anti-discrimination law, as enunciated in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*). (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*); see also *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 252–256 (*Burdine*) [explaining application of *McDonnell Douglas* in disparate treatment cases].)

“In the first [*McDonnell Douglas*] stage, the plaintiff bears the burden to establish a prima facie case of discrimination. [Citation.] The burden in this stage is ‘not onerous’ [citation], and the evidence necessary to satisfy it is minimal [citation]. On a disability discrimination claim, the prima facie case requires the plaintiff to show ‘he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability.’ [Citation.]” (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 159–160 (*Wills*).) If the plaintiff succeeds in presenting a prima facie case, the burden of production, but not persuasion, shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. (*Id.* at p. 160.) “This likewise is not an onerous burden [citation], and is generally met by presenting admissible evidence showing the defendant’s reason for its employment decision [citation].” (*Ibid.*)

“Finally, if the defendant presents evidence showing a legitimate, nondiscriminatory reason, the burden again shifts to the plaintiff to establish the defendant intentionally discriminated against him or her. [Citation.] The plaintiff may satisfy this burden by proving the legitimate reasons offered by the defendant were false, creating an inference that those reasons served as a pretext for discrimination. [Citation.]” (*Wills, supra*, 195 Cal.App.4th at p. 160.) “ [E]vidence that the employer’s proffered reasons are pretextual is significant: “Thus, a plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” ’ ’ (*Arteaga v. Brink’s, Inc.* (2008) 163 Cal.App.4th 327, 343 (*Arteaga*), italics omitted.)

The *McDonnell Douglas* test sets up, in effect, a winnowing process that screens out cases patently lacking in merit in the first two steps, as a matter of law. “[B]y successive steps of increasingly narrow focus, the [*McDonnell Douglas*] test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.” (*Guz, supra*, 24 Cal.4th at p. 354; see *Wills, supra*, 195 Cal.App.4th at p. 159.) When there is no direct evidence of discriminatory intent, the *McDonnell Douglas* test is designed to reveal, circumstantially, “ ‘actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were “based on a discriminatory criterion illegal under the [applicable statute].” [Citation.]’ ” (*Ibarbia v. Regents of University of California* (1987) 191 Cal.App.3d 1318, 1327–1328 (*Ibarbia*).

*McDonnell Douglas* is founded on the practical idea that “ ‘ “[p]roving intentional discrimination can be difficult because ‘[t]here will seldom be “eyewitness” testimony as to the employer’s mental processes.’ . . . It is rare for a plaintiff to be able to produce direct evidence or ‘smoking gun’ evidence of discrimination. . . .” . . . [¶] “Consequently, the United States Supreme Court has developed rules regarding the allocation of burdens and the order in which proof is presented to resolve ‘the elusive factual question of intentional discrimination.’ ” (*Arteaga, supra*, 163 Cal.App.4th at

p. 342; see *Burdine*, *supra*, 450 U.S. at p. 255, fn. 8.) Although the ultimate burden of proof on the issue of discriminatory intent always remains with the plaintiff, the analytical path courts take to resolve that issue may vary, depending on the procedural context and the nature of the evidence presented. (See, e.g., *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121 (*Thurston*) [*McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination]; *Arteaga*, *supra*, 163 Cal.App.4th at p. 344 [because on summary judgment “ ‘ ‘ ‘ moving party [must] negate the plaintiff’s right to prevail on a particular issue[,] . . . the burden is reversed in the case of a summary issue adjudication or summary judgment motion ’ ’ ’ ”].)

Drawing a contrast to other kinds of employment discrimination cases, our colleagues in the Fifth District Court of Appeal recently observed that “*disability* discrimination cases often involve direct evidence of the role of the employee’s actual or perceived disability in the employer’s decision to implement an adverse employment action. Instead of litigating the employer’s reasons for the action, the parties’ disputes in disability cases focus on” objectively provable issues such as “whether the employee was able to perform essential job functions, whether there were reasonable accommodations that would have allowed the employee to perform those functions, and whether a reasonable accommodation would have imposed an undue hardship on the employer.” (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 123, italics in original (*Wallace*)). As a result, the *Wallace* court noted, “courts and practitioners should not automatically apply principles related to the *McDonnell Douglas* test to disability discrimination cases. Rather, they should examine the critical threshold issue and determine whether there is direct evidence that the motive for the employer’s conduct was related to the employee’s physical or mental condition.” (*Ibid.*)<sup>4</sup>

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<sup>4</sup> Direct evidence means “evidence which, if believed, proves the fact of discriminatory animus without inference or presumption. Comments demonstrating discriminatory animus may be found to be direct evidence if there is evidence of a causal relationship between the comments and the adverse job action at issue.” (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 550 (*DeJung*)).

## C. Liability for Disability Discrimination

### 1. *McDonnell Douglas* As Applied in This Case

FloraTech argues the trial court erred by not engaging in a full-fledged *McDonnell Douglas* burden-shifting analysis. Had it done so, FloraTech contends, the DFEH would have failed the first step of the *McDonnell Douglas* three-step test because, when Rico was fired, none of Rico's managers knew whether he had an actual disability. We reject this claim of error for two reasons.

First, it is irrelevant that Condon and her colleagues were unaware whether Rico had an actual disability when he was fired. The evidence showed they regarded him as disabled. The protections of FEHA extend not just to discrimination based on actual disability, but to discrimination based on perceived disability as well. (§ 12926, subd. (m)(4); see § 12926.1, subd. (b) [stating legislative intent that California's broad definitions of "physical disability, mental disability, and medical condition" should be construed to protect employees and job applicants "from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling"]; *Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 527, 529 (*Maureen K.*) [protection of Unruh Civil Rights Act (which incorporates FEHA's definition of disability) "extends both to people who are currently living with a physical disability that limits a life activity and to those who are regarded by others as living with such a disability"]; see also *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48 (*Gelfo*).

In its reply brief, FloraTech argues that the "regarded-as-disabled" cases apply only to situations in which the discrimination was based on a mistaken belief that the plaintiff was disabled. That contention is incorrect. FEHA's anti-discrimination protection for "regarded-as-disabled" plaintiffs is not a creature of case law, but is based on the statute itself (§12926, subd. (m)(4)), and on its face the statute is not limited to mistaken perception discrimination. Discrimination based on a mistaken perception of disability is certainly covered by FEHA (*Wallace, supra*, 245 Cal.App.4th at p. 115), but

so is discrimination that is based on an accurate perception of disability founded on stereotypical assumptions about the nature of that disability. (See *Maureen K.*, *supra*, 215 Cal.App.4th at pp. 523–524, 529–530 [patient who was refused surgery deemed disabled as a matter of law in suit against hospital where hospital personnel who knew only that she was HIV-positive assumed it was hazardous to operate on her due to risk of contracting AIDS].)

Second, the trial court found direct evidence of discriminatory motive in this case, thus obviating any need to apply every step of the *McDonnell Douglas* test. (See *Wallace*, *supra*, 245 Cal.App.4th at p. 123; see also *DeJung*, *supra*, 169 Cal.App.4th at p. 550 [“California has . . . adopted the rule that the ‘ “*McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination.” ’ ”].) Citing *Thurston*, *supra*, 469 U.S. 111, the foundational United States Supreme Court case that first made clear *McDonnell Douglas* has no application where direct evidence of discrimination is presented, FloraTech suggests that, for purposes of this rule, direct evidence is limited to evidence of a systematic policy of discrimination. This is, in effect, an argument that *Thurston* should be limited to its facts, since that case involved a written personnel policy that was discriminatory on its face. (*Id.* at p. 121, citing *Teamsters v. United States* (1977) 431 U.S. 324, 358, fn. 44 [“the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination”].) We think FloraTech reads *Thurston* too narrowly. The subsequent cases applying *Thurston*, in California and in the federal courts, have not read its holding as narrowly limited to facially discriminatory policies. (See, e.g., *DeJung*, *supra*, 169 Cal.App.4th at p. 550; *Young v. United Parcel Service, Inc.* (2015) 575 U.S. \_\_\_, 135 S.Ct. 1338, 1345.)

Here, the trial court correctly concluded there was direct evidence that FloraTech’s proffered reason for terminating Rico was “impermissibly linked to” Rico’s perceived disability. (See *Guz*, *supra*, 24 Cal.4th at p. 358 [legitimate nondiscriminatory reasons under *McDonnell Douglas* test are reasons that are “facially unrelated to prohibited bias, and which, if true, would preclude a finding of discrimination”], italics omitted.) Not only did FloraTech believe Rico to be disabled when it fired him, but as the trial court put

it that belief was “embedded in [the] argument that Mr. Rico was dishonest and untruthful.” In practical effect, the court found, these issues were inseparable. Based on documented admissions in FloraTech’s personnel records—admissions that tracked Condon’s explanation of her reason for firing Rico when asked about it on cross-examination—the trial court found the assertion Rico lied on his job application was rooted in a perception that he suffered from a disabling back condition. The line between direct and circumstantial proof may be an elusive one in some cases, but by any reckoning an admitted fact has been directly proved.

Whether the court formally recited the steps of *McDonnell Douglas* or not makes no difference, in our view. From the trial evidence, it was permissible to infer that, at the time of Rico’s termination, (1) he had been performing well for years and thus he could perform the essential duties of his job with or without reasonable accommodations, (2) he was perceived by Condon to have job-impairing physical limitations, which made him a member of a protected class, and (3) based on the employee separation form and Condon’s testimony on cross-examination, he was fired “because of” his perceived impairment, even though he was told he was being fired because he lied on his job application. Encompassed within this proof were the elements of the DFEH’s prima facie case (*McDonnell Douglas* step one) as well as the nondiscriminatory reason FloraTech proffered in response (*McDonnell Douglas* step two). The crux of the case therefore came down to the issue of pretext at the third step of *McDonnell Douglas*. And on that critical issue, the court made an express factual finding that FloraTech’s asserted belief “that [Rico] lied on his application is ‘unworthy of credence.’ ” We conclude there is substantial evidence in the record for this finding.

At oral argument, FloraTech put a new spin on its argument that the DFEH could not have made out a *McDonnell Douglas* prima facie case had the trial court more fully analyzed the issue. Pointing to evidence it obtained in discovery which, it claims, shows that Rico was taking Norco up to five times a day, FloraTech now contends that Rico was never qualified to perform his job safely. FloraTech concedes its decision to terminate Rico was not based on this rationale, but relies on the after-acquired evidence doctrine.

(See *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 428 (*Salas*) [the “doctrine of after-acquired evidence refers to an employer’s discovery, *after* an allegedly wrongful termination of employment or refusal to hire, of information that would have justified a lawful termination or refusal to hire”], italics in original.) Thus, FloraTech argues, had the court carried out a complete *McDonnell Douglas* analysis, it would have concluded that Rico was never qualified for his job in the first place. We are not persuaded. Under *Salas*, after-acquired evidence cannot be used in the *McDonnell Douglas* burden-shifting analysis to defeat liability for discrimination under FEHA outright. (*Horne v. District Council 16 Internat. Union of Painters & Allied Trades* (2015) 234 Cal.App.4th 524, 540 (*Horne*) [“the clear import of *Salas* is that after-acquired evidence is simply irrelevant during all phases of the three-stage burden-shifting approach designed to establish liability”].) At most, after-acquired evidence may be used in the form of an equitable defense to limit available relief. (*Horne, supra*, 234 Cal.App.4th at p. 540 [“*Salas* makes clear that after-acquired evidence is only relevant in the damages phase of a FEHA proceeding”].)

2. *The Basis For The Trial Court’s Finding That FloraTech’s Proffered Nondiscriminatory Reason For Firing Rico Was “Unworthy Of Credence”*

FloraTech next attacks the trial court’s credibility finding against it at the third step of *McDonnell Douglas* as too summary in nature and lacking in foundation. We disagree. “A trial court rendering a statement of decision under Code of Civil Procedure section 632 is required only to state ultimate rather than evidentiary facts. A trial court is not required to make findings with regard to detailed evidentiary facts or to make minute findings as to individual items of evidence.” (*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1525.) FloraTech also argues that the DFEH never proved any sort of “animus” toward Rico, but this contention rests on a flawed understanding of the issue of intent in disability discrimination cases. Although FloraTech may take umbrage at the trial court’s finding of discriminatory motive, the law does not require proof of ad hominem maliciousness. For all forms of discrimination,

direct proof of discriminatory animus may be probative of intent—though it is not required, since discrimination is so often proved circumstantially—but to the extent relevant in this context the animus we focus upon is toward the disability, not the person. (*Gelfo, supra*, 140 Cal.App.4th at p. 54, fn. 14 [“To support a claim of disability discrimination, a plaintiff need only show ‘animus’ directed at the disability. [Citation.] It is of no moment that the employer has no ill will against the plaintiff (or anyone else with a bad back).”].)<sup>5</sup>

Relying primarily on *Guz, supra*, 24 Cal.4th 317, and *Granillo v. Exide Techs, Inc.* (C.D. Cal. 2011) 2011 U.S. Dist. Lexis 130669, \*67 (*Granillo*), FloraTech argues the trial court applied an incorrect legal standard in evaluating the validity of its proffered nondiscriminatory reason for Rico’s termination. According to FloraTech, these and other cases stand for the proposition that the court should have looked only to whether Rico’s firing was motivated by an honest belief that Rico lied on his job application, regardless whether it turned out to be right. (See *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 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.”].) The honest belief standard is not a license to treat someone perceived to be disabled arbitrarily, based on “stereotypical assumptions underlying society’s views of those with disabilities.” (*Smith v. Chrysler Corp.* (6th Cir. 1998) 155 F.3d 799, 804–805 (*Smith*).) In rejecting FloraTech’s claim that Condon was honestly motivated by job application fraud, the court made the following key factual findings: FloraTech (1) “did not investigate the extent of Mr. Rico’s injury before it decided to fire him,” (2) “decided to fire Mr. Rico immediately after having read his

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<sup>5</sup> See *Wallace, supra*, 245 Cal.App.4th at pp. 131–132 (“ ‘[A]nimus’ is an imprecise term that can cause confusion when used in disability discrimination cases with direct evidence that the employer’s motive for taking an adverse employment decision was the plaintiff’s actual or perceived disability. To avoid this confusion, courts and practitioners would be better served by limiting their use of the terms ‘animus’ and ‘ill will’ to employment discrimination cases involving proof of an illegitimate motive by circumstantial evidence.”).

medical report, without consulting [his] physician” or Rico himself, and (3) relied “on the views of its managers (none with medical training) that all persons with back injuries have physical limitations that impede them from working.” Given these findings—all of which are supported by substantial evidence—the trial court was entitled to disbelieve FloraTech’s claim that it fired Rico for lying. (See *Smith, supra*, at pp. 807–808 [“When the employee is able to produce sufficient evidence to establish that the employer failed to make a reasonably informed and considered decision before taking its adverse employment action, thereby making its decisional process ‘unworthy of credence,’ then any reliance placed by the employer in such a process cannot be said to be honestly held.”].)

*Gelfo, supra*, 140 Cal.App.4th 34, a disability discrimination case involving a plaintiff with a back injury, is instructive here. In that case, the plaintiff was laid off by his former employer, Lockheed Martin Corporation (Lockheed), as part of a reduction in force while he was suffering from a back injury he had sustained in the workplace. (*Id.* at pp. 39–40.) An offer of an alternative job was withdrawn when Lockheed learned that Gelfo was subject to restrictions imposed by his workers’ compensation physician. (*Id.* at pp. 40–42.) Gelfo then sued for disability discrimination under FEHA. (*Id.* at p. 44.) On appeal from a jury verdict for Lockheed, the appellate court reversed, finding in part that the trial court’s special jury instruction on disability discrimination erroneously focused the jury on whether Lockheed’s understanding of Gelfo’s back injury was “mistaken,” rather than simply whether it believed he had such an injury. (*Id.* at pp. 44, 52.) Lockheed argued on appeal, among other things, that it held no belief at all about the extent of Gelfo’s injury, but simply decided not to hire him based on information from medical reports in his personnel file that his back injury was not yet fully healed. (*Id.* at p. 49, fn. 11.) The *Gelfo* court rejected this argument, explaining, “Lockheed cannot simply point to the medical reports in Gelfo’s file, and automatically absolve itself of liability under FEHA. A policy requiring an employee be ‘100 percent healed’ before returning to work,” while it may be neutral on its face, is nonetheless a per se violation under both FEHA and its federal counterpart, the Americans with Disabilities Act (42

U.S.C. § 12101 et seq.) “because it permits an employer to avoid the required individualized assessment of the employee’s ability to perform the essential functions of the job with or without accommodation.” (*Id.* at p. 49, fn. 11.) The same can be said about FloraTech’s treatment of Rico. Condon and her colleagues jumped to the conclusion that Rico lied about his back condition, and failed to do an “individualized assessment” before taking adverse action against him.

### 3. “Risk Of Future Injury” Defense

FloraTech argues the trial court erred in rejecting its defense that Rico’s firing was justified because keeping him employed, which would have required him to continue to drive vehicles and operate heavy equipment, presented an unacceptable risk of injury to himself and to others. (See Cal. Code Regs., tit. 2, § 11067 (former § 7293.8), subd. (c).) We see no error here. In view of the cursory manner in which Condon arrived at her conclusion about the extent of Rico’s impairment and her unsubstantiated prediction it would affect his job performance—despite a four-and-one-half year track record to the contrary—the trial court correctly rejected FloraTech’s “risk of future injury” defense. (See *Raytheon Co. v. Fair Employment & Housing Com.* (1989) 212 Cal.App.3d 1242, 1252 [in FEHA disability discrimination case “employer has the burden of proving the defense of the threat to the health and safety of other workers by a preponderance of the evidence”].)

The FEHA implementing regulations provide that “it is no defense to assert that an individual with a disability has a condition or disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not endanger the individual with a disability or others.” (Cal. Code Regs., tit. 2, § 11067, subd. (d).) Factors pertinent to risk of injury under this standard include duration of the risk, nature and severity of potential harm, likelihood that potential harm will occur, imminence of potential harm, and relevant information about the past work history of the employee in need of accommodation. (Cal. Code Regs., tit. 2, § 11067, subd. (e).) “The analysis of these factors should be based on a reasonable

medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.” (*Ibid.*)

Substantial evidence supports the trial court’s conclusion that “FloraTech did not investigate any of [the relevant] factors,” and thus that it failed to carry its burden of proving up a risk of injury defense. FloraTech insists it “complied with these regulations when it acted promptly to rectify a potentially dangerous and criminal situation and take FloraTech vehicles and machinery out of Mr. Rico’s hands.” To the extent FloraTech claims it was concerned about potential criminal consequences—a contention which appears to be based on after-the-fact information acquired in discovery about Rico’s on-the-job use of the painkiller Norco—that consideration formed no part of the decision-making process that led to Rico’s firing and cannot be used as a basis for a risk of injury defense in hindsight.<sup>6</sup>

4. “Same Decision” Defense Under *Harris v. City of Santa Monica*

FloraTech next contends the California Supreme Court’s decision in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203 (*Harris*), requires reversal. We disagree. *Harris* holds that, in a “mixed motive” case, where the adverse employment decision was motivated by more than one reason, only one of which was discriminatory, the applicable test for causation is whether the discriminatory motive was a “substantial factor” in the employer’s decision. (*Id.* at pp. 211, 215, 232, 241.) Proof sufficient to meet this test warrants a finding of liability under FEHA, but if the employer can prove the same

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<sup>6</sup> For the first time in its reply brief, FloraTech cites *Finegan v. County of Los Angeles* (2001) 91 Cal.App.4th 1, and *Camp v. Jeffer, Mangels, Butler and Marmaro* (1995) 35 Cal.App.4th 620, in support of an argument that, under the doctrine of unclean hands, Rico is ineligible for any relief here because he managed to conceal his back injury and create the appearance of performing well only because of his drug use. (See *Salas, supra*, 59 Cal.4th at p. 428.) We deem this argument to be forfeited for failure to raise it in a timely manner. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 [for “[o]bvious reasons of fairness,” declining to consider issue raised by appellant for first time in reply brief].)

adverse decision would have been made independently of the discrimination, the available remedies are limited. (*Id.* at pp. 232–235, 241.) While declaratory relief, injunctive relief and attorney’s fees remain available to the plaintiff, make-whole relief—damages, backpay, and reinstatement—is not, since it would constitute a windfall to the plaintiff. This is not a “mixed motive” case. (*Ibid.*) The parties agree that the “true” reason for Rico’s firing was either FloraTech’s version (Rico was dishonest) or the DFEH’s version (Rico was perceived to have a bad back), but neither party argues that a mix of discriminatory and legitimate reasons motivated FloraTech’s decision to fire him.<sup>7</sup>

Under *Harris*, to be sure, it is permissible for an employer to present a “same decision” defense as a contingent back-up. (*Harris, supra*, 56 Cal.4th at p. 240 [“there is no inconsistency when an employer argues that its motive for discharging an employee was legitimate, while also arguing, contingently, that if the trier of fact finds a mixture of lawful and unlawful motives, then its lawful motive alone would have led to the discharge”].) Thus, where there is proof that a discriminatory motive was a substantial motivating factor in a challenged employment decision, the employer may deny discrimination outright, as FloraTech does, but at the same time attempt to limit its exposure by arguing in the alternative that it would have made the same decision anyway, absent the discriminatory motive. FloraTech advances a “same decision” defense in the alternative on appeal,<sup>8</sup> arguing that, even if “for the sake of argument, . . . FloraTech was

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<sup>7</sup> See Appellant’s Opening Brief at page 20 (“This is not a ‘mixed motive’ case, where there are both discriminatory and nondiscriminatory motives for dismissing the employee”); Respondent’s Brief at page 33 (“[T]his is not a ‘mixed motive’ case”).

<sup>8</sup> At trial, FloraTech primarily argued, as it does on appeal, that when Rico was fired, Condon and her colleagues did not actually know whether he was disabled and honestly believed he had lied on his job application. Near the end of closing argument, however, FloraTech’s trial counsel briefly contended that “if for some reason you find in favor of the plaintiff on any of the causes of action, it’s the position of the defendants that you cannot award lost wages to [Rico] as a form of damages [because] . . . according to Dr. Chen’s testimony, he should not have been working in a position he had with FloraTech.” While there was no citation to *Harris*, which was decided only weeks before

liable for disability discrimination against Mr. Rico, he was not entitled to back pay, because he could not perform his job.” According to FloraTech, “The only evidence in the record concerning Mr. Rico’s physical condition is the testimony of Dr. Fulton Chen,” who determined Mr. Rico “to be permanently and stationary disabled for Workers Compensation purposes,” and restricted him to performing “light work” with a “maximum lifting capacity” of eight pounds and no “heavy work” involving “repetitive bending and stooping.” In addition, FloraTech cites Labor Code section 4664, subdivision (b), which provides that “[i]f the applicant has received a prior permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury.”

Labor Code section 4664, subdivision (b), does not apply here, since this is not a case involving a “subsequent injury” following a prior one that was deemed permanently disabling. And, as the DFEH points out, the fact that Rico did his job from 2005 to 2009, and did it well, supplies substantial evidence for the fact that he could have continued to do it from 2009 to 2011, the backpay period. Although the trial court made no express finding of fact on this issue, we must imply one in support of the judgment since there is no indication in the record that FloraTech either requested an express finding or drew the court’s attention to its omission in the statement of decision. (See *Fladeboe, supra*, 150 Cal.App.4th at p. 59 [“Securing a statement of decision is the first step, but is not necessarily enough, to avoid the doctrine of implied findings. Litigants must also bring ambiguities and omissions in the statement of decision’s factual findings to the trial court’s attention—or suffer the consequences.”].)

#### **D. Emotional Distress Damages**

Even if we uphold the trial court’s finding of discrimination and sustain Rico’s eligibility for make-whole relief, FloraTech argues, we should reverse the award of damages for emotional distress. In support of this attack on the emotional distress award, FloraTech first advances the argument the DFEH’s proof is insufficient as a matter of law

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trial, or any further articulation of factual or legal support for the argument, we deem counsel’s brief closing remarks on the point to be sufficient to preserve it.

to meet a standard drawn from tort cases involving emotional distress damages. (See *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001 [elements of tort of intentional infliction of emotional distress are “ “ “(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct’ ” ’ ”].) The DFEH points out in its responding brief, however, that it did not plead any tort claims or seek emotional distress damages for tortious conduct; in reply, not surprisingly, FloraTech abandons the argument that the DFEH’s proof did not meet the stringent standards for emotional distress damages in tort cases. Thus, FloraTech’s attack on the award of emotional distress damages comes down to whether the trial court’s award of \$50,000 is supported by sufficient evidence.

We conclude it is. There is no ready formula for the proportionality of emotional distress damages in FEHA cases. As the FEHC has explained in its administrative precedent, emotional distress injury in discrimination cases is inherently personal, and thus the testimony of the complaining party about his or her injury is the starting point in a review of the evidence. (*Dept. Fair Empl. & Hous. v. Aluminum Precision Prod., Inc.* (March 10, 1988) Cal.F.E.H.C. Dec. No. 88-05 [1988 WL 242635, \*9; 1988 CAFEHC LEXIS 19, \*22–23].) Also salient is the “testimony of other percipient witnesses—such as friends, relatives, and co-workers—to assist in measuring the extent of injury and the reliability of the complainant’s own account.” (*Ibid.*) Similarly, on judicial review in FEHA cases, courts evaluating emotional distress damages often look to the testimony of the affected party as it may be corroborated by friends and relatives, to support an award of emotional distress damages. (See *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 812.)

In this case, Rico testified about the emotional toll his termination had on his feelings of self-worth, as well as the financial toll suffered by his family as a result of it. Lorena, his wife of 23 years, testified to the change in Rico’s demeanor after the termination. Before he was fired, Rico enjoyed walking, dancing, and working in the

yard. After his termination, Lorena testified he no longer wanted to engage in those activities, he seemed stressed and depressed, and he preferred to stay in his room with the door closed. Rico's sister, Maria, similarly testified to changes in his demeanor after his firing. She said that his previously upbeat disposition abruptly changed after he was fired, that he began to spend time isolated and locked up in his room, and that he appeared to be "frustrated," "depressed," and "very angry." On the evidence presented, we conclude the amount of emotional distress damages "was not excessive as a matter of law in light of the evidence presented at trial and the deference due the trial court's exercise of its discretion." (*Iwekaogwu v. City of Los Angeles, supra*, 75 Cal.App.4th at p. 821.)

#### **E. Attorney's Fees and Costs**

FloraTech claims that the attorney's fees award should be reversed. It argues that the operative complaint in this case, filed by the DFEH on March 29, 2011, did not seek an award of attorney's fees, and that the DFEH did not give notice of an intention to seek attorney's fees until March 19, 2013 (a few weeks before trial commenced), when the DFEH's counsel notified FloraTech that the DFEH would make an oral motion on the first day of trial to amend the complaint to add a prayer for attorney's fees and costs, based on recently enacted legislation. (See § 12965, subd. (b), as amended by Stats. 2012, ch. 46, § 45.)

FloraTech now argues that the trial court "erroneously disregarded [its] argument that, by allowing the amendment on the day of trial, FloraTech was foreclosed from using California Code of Civil Procedure section 998" because such an offer to compromise could have been made before trial started. This argument misapprehends what happened procedurally. The trial court did not grant leave to allow a day-of-trial amendment to the complaint. It ruled that no such amendment was necessary. But even if we construe FloraTech's argument more broadly, in the spirit in which it appears to be intended—the nub of the argument appears to be that tardy notice of the DFEH's intention to seek attorney's fees and costs prejudiced FloraTech's ability to make a section 998 offer—we are not persuaded.

As the DFEH points out, “a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” (Code Civ. Proc., § 1032, subd. (b).) And attorney’s fees, if authorized by statute, as they were here under Government Code section 12965, subdivision (b), are included as part of the costs a prevailing party may recover under Code of Civil Procedure section 1032, subdivision (b). (Code Civ. Proc., § 1033.5, subds. (a)(10)(B), (c)(5).) Because attorney’s fees are recoverable as an element of costs, rather than as an element of damages, they need not be expressly demanded in a complaint. (See *Faton v. Ahmedo* (2015) 236 Cal.App.4th 1160, 1169.) Thus, the trial court correctly ruled that no amendment was necessary. FloraTech could have made a section 998 offer at any time before trial, taking into account whatever potential exposure it faced. Senate Bill 1038, which amended section 12965, subdivision (b) to authorize an award of attorney’s fee to the DFEH, went into effect January 1, 2013, having been enacted June 27, 2012. (See § 12965, subd. (b).) All parties were charged with notice of this change in the law, and if FloraTech wished to take into account any increase in exposure resulting from it when evaluating whether to make a section 998 offer, it was free to do so as of the date of Senate Bill 1038’s enactment.

**F. Reasonable Accommodations, Interactive Process Concerning Reasonable Accommodations, And Steps Necessary To Prevent Disability Discrimination**

Last, FloraTech argues, the “trial court faults [it] for failing to enter into an interactive process with Mr. Rico, to explore reasonable accommodations, and to take all reasonable steps necessary to prevent discrimination from occurring.” Although FloraTech does not articulate this argument in much depth, the argument, to the extent we can discern it, appears to be an undifferentiated attack having three prongs: The court erred by awarding relief against it (1) under section 12940, subdivision (m) (duty to make reasonable accommodations), (2) under section 12940, subdivision (n) (duty to engage in interactive process of discussion regarding reasonable accommodations), and (3) under section 12940, subdivision (k) (duty to take all reasonable steps to prevent disability discrimination in the workplace).

Turning first to section 12940, subdivision (m), the premise of this thread of the argument—that FloraTech was not obligated to consider reasonable accommodations unless Rico first disclosed he was disabled and requested accommodations—is legally incorrect. Once FloraTech perceived Rico to be disabled, it had an independent duty to consider accommodating him under section 12940, subdivision (m), whether he raised the issue proactively or not. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954 [rejecting contention “that the disabled employee must first come forward and request a specific accommodation before the employer has a duty to investigate such accommodation”].) Having found a violation of section 12940, subdivision (a) based on perceived disability, the court correctly found a violation of section 12940, subdivision (m) as well, in light of Rico’s summary firing without any consideration of the issue of accommodating him.

Next, with respect to section 12940, subdivision (n), FloraTech overlooks the fact that it prevailed on the section 12940, subdivision (n) interactive process claim. It has not been aggrieved by the judgment on that issue, and thus we decline to address it. (Code Civ. Proc., § 902.) Finally, with respect to section 12940, subdivision (k), FloraTech makes no specific legal argument directed to whether the trial court was correct to find that its practice of inquiring of job applicants about their workers’ compensation histories and about their disabilities in general was illegal under FEHA. (See Cal. Code Regs., tit. 2, § 11070 (former § 7294.1), subd. (b).) We deem any argument on this issue to have been waived and decline to address it. (Cal. Rules of Court, rule 8.204(a)(1)(B) [appellate briefs must “support each point by argument and, if possible, by citation to authority”].)

### **III. CONCLUSION AND DISPOSITION**

The judgment is affirmed. Costs will be awarded to respondent.

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Streeter, J.

We concur:

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Reardon, Acting P.J.

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Rivera, J.