

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KHOSROW KAMALI,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF
TRANSPORTATION,

Defendant and Appellant.

B247756 consolidated with B250408

(Los Angeles County
Super. Ct. No. BC426247)

ORDER MODIFYING OPINION
AND DENYING REHEARING;
NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on March 17, 2015 be modified as follows:

On page 17, lines 3 and 4 of the first full paragraph, the sentence beginning “Judgment was not” is deleted and the following is inserted in its place:

The judgment entered in favor of Kamali does not expressly mention those causes of action, but Kamali acknowledges they have been extinguished by entry of a final judgment.

There is no change in the judgment. Caltrans’s petition for rehearing is denied.

PERLUSS, P. J.

ZELON, J.

FEUER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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APPEALS from a judgment and an order of the Superior Court of Los Angeles County, David L. Minning, Judge. Judgment affirmed as modified; order is affirmed.

Ronald W. Beals, Chief Counsel, Jerald M. Montoya, Deputy Chief Counsel, Christopher Hiddleson, David C. Rodriguez, Carol Quan, Lisa A. Braham, Steven J. Dadian and Daniel M. Mansueto for Defendant and Appellant.

Law Offices of Rob Hennig, Rob Hennig; Law Office of Robert Racine and Robert Racine for Plaintiff and Appellant.

INTRODUCTION

Defendant California Department of Transportation (Caltrans) appeals from a judgment following a jury trial in favor of plaintiff Khosrow Kamali (Kamali) brought under the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.)¹ alleging Caltrans's failure to provide a reasonable accommodation and failure to engage in the interactive process as to Kamali's mental and physical disabilities. Kamali claimed a mental disability from depression and anxiety he suffered as a result of his work environment and a physical disability from a prior knee injury that limited his ability to walk.

Caltrans contends there is insufficient evidence to support the jury verdict finding that Caltrans failed to provide reasonable accommodation for Kamali's mental and physical disabilities. Caltrans also challenges the jury's finding that Caltrans failed to engage in a good faith interactive process to accommodate Kamali's disabilities. Finally, Caltrans argues that the damage award was excessive and challenges the court's calculation of post-judgment interest.

Kamali cross-appeals from a postjudgment order granting Kamali attorneys fees.²

We modify the judgment with respect to the accrual date for postjudgment interest. We affirm the judgment as modified. We also affirm the attorneys fees order.

FACTUAL BACKGROUND

Kamali contends that he suffered a mental disability from the stress caused by his supervisors at Caltrans's Office of Traffic Investigation (OTI) and that, starting in 2007,

¹ All further statutory references are to the Government Code unless otherwise indicated.

² Kamali also filed a protective cross-appeal to be considered in the event judgment is reversed.

he requested to be transferred out of OTI. Although Kamali provided his supervisors with multiple letters from his doctor supporting a transfer on mental health grounds, Caltrans failed even to discuss a transfer with him until he was finally reassigned in 2011.

Similarly, starting in September 2008, Kamali requested that his supervisor move his workstation closer to the exit and hallway given his difficulty walking, but it took his supervisor 11 months to grant his request while two desks next to the exit remained vacant. Kamali's supervisor insisted that Kamali fill out two internal forms to support his request, ignoring the prior medical notes provided by Kamali's doctors.

We find substantial evidence that Caltrans failed to make a reasonable accommodation for Kamali's disabilities and failed to engage in a good faith interactive process to address those disabilities.

A. Kamali's Position with Caltrans

Kamali started working for Caltrans as a civil engineer in District 7 in 1983.³ Soon after being hired, Kamali was assigned to the position of transportation engineer in OTI. His position involved the investigation of traffic accidents and the roadways on which they occur. He spent about half of his time in the field and half of his time in the office. As part of his investigation, Kamali walked around the accident area to take measurements and visually inspect the area. His investigation work involved dangerous activities including walking alongside a freeway or on embankments and curves. According to Kamali's supervisor Kenneth Young, Kamali never claimed that he was incapable of performing this aspect of his job.

Many of Kamali's complaints concern Sameer Haddadeen, who became Office Chief of OTI on September 1, 2006. Haddadeen supervised 11 to 12 senior transportation engineers, some of whom supervised Kamali at various times. Luu Nguyen supervised Kamali from 1993 until October 2008. Young supervised Kamali

³ District 7 covers the Los Angeles and Ventura areas.

from October 6, 2008 through August 4, 2011. Kamali was then supervised by Jim Riley, followed by Sam Freemprong.

From January 2007 through the time of trial in 2012, Kamali experienced a mental health disability from work-related stress and anxiety and a physical disability from a prior knee injury. We discuss both in turn.

B. *Kamali's Mental and Physical Disabilities*

1. Kamali's Mental Health Disability

In 2002, Kamali was referred to the mental health section at Kaiser Permanente as an outpatient in the stress management program. In January of 2009, Carrie Beth Ganek, M.D. started treating Kamali for symptoms of anxiety and depression, and continued treatment through the time of trial. According to Dr. Ganek, Kamali had been treated with medication for depression since September 2008. Dr. Ganek testified that Kamali's depression and anxiety resulted from stress at work, and she recommended he be transferred because Kamali felt he was being harassed in OTI, and she felt that Kamali could not "improve or function at work." On April 20, 2009, Dr. Ganek wrote a letter stating: "I am Mr. Kamali's treating physician. I believe he is disabled due to work related stress. I request that he be transferred to another department so that he may be able to perform his work without impairment."

As of July 19, 2010, Dr. Ganek increased Kamali's medication "[b]ecause he continued to have depressive symptoms and anxiety that were impacting his functioning." Dr. Ganek said that Kamali's psychiatric medical condition as of this date "seemed to be getting worse."

Dr. Ganek wrote in 2011: "Mr. Kamali's stress diminishes his ability to perform engineering calculations, logical analysis, and exercise judgment. It diminishes his ability to communicate information orally and in writing in an accurate and succinct fashion. It further diminishes his ability to prepare reports. Mr. Kamali could perform all of these job functions with his requested accom[m]odation." She stated further: "Kamali is unable to work with Sameer Haddadeen, Kenneth C. Young, Unus Ghausl, Lewis Yee

and James Riley [but] Mr. Kamali's medical condition does not prevent him from working for any supervisor."

As we discuss below, starting in January 2007, Kamali made numerous requests to be transferred out of OTI to address his depression and anxiety.

2. Kamali's Physical Disability From Knee Injury

Kamali injured his knee in 2005 while playing soccer. When Kamali first injured his knee, his doctor diagnosed a torn meniscus and loss of ligaments. Kamali was told that his options were to use knee braces or to have knee replacement surgery. He was also advised that if he did not have the surgery, the pain would increase over time. Kamali decided to wear braces, which included two steel balls on each side of his left knee. The braces limited his walking and ability to lift. At trial, Kamali testified that he had decided to have the surgery within the following year because the pain had increased significantly.

On September 30, 2008, Kamali's doctor, Jeevan Sam Daniels, D.O., stated in a letter that Kamali "has a chronic anterior crucial ligament tear and meniscal tear which causes chronic pain and reduced range of motion in that knee. His ability to run or walk is significantly limited due to pain from this condition." Dr. Daniels stated again on June 5, 2009 that Kamali "has a chronic anterior crucial ligament tear and meniscal tear which causes chronic pain and reduced range of motion in that knee. His ability to run or walk is significantly limited due to pain from this condition. For safety reasons, he would benefit from being placed closer to exit in case of emergency since he cannot move fast."

As we discuss below, during the period from 2008 to 2011, Kamali complained of difficulty walking, and requested that his supervisors at Caltrans accommodate him by moving his desk closer to the aisle and exit or by allowing him to telecommute.

C. Kamali's Request for Accommodation Based on Mental Disability

1. January 2007 Tardiness Incident and First Discrimination Complaint

Upon becoming Office Chief, Haddadeen began personally checking what time certain employees, including Kamali, arrived at work. On January 18 and 19, 2007, Kamali took approved sick leave and was not at work. Upon his return on January 22, Kamali learned Haddadeen had marked him late on both days and had informed Kamali's supervisor Nguyen of Kamali's "tardiness" on those two days.

On January 24, Kamali met with Haddadeen to explain what happened. Soon after the meeting, Kamali sent an email to Haddadeen about the meeting, saying that he had come to Haddadeen's office "very innocently to really know what is going on, and very calmly ask[ed] you what is going on" Kamali stated, "I had one of my worst experience[s] ever . . . working for Caltrans in 24 years of my service. You raised your voice and instead of answering . . . my questions you ke[pt] asking about Monday 1-22-07 . . . after I said I do not know what you are talking about and asked [you] to answer me you got very upset and point[ed] your finger at me and told me to get out of your room." Kamali also stated in his email: "**WHO DID YOU SEE ON THURSDAY 1-19-2007 COMING 1.5 HOURS LATE** . . . because I was not here on Thursday nor . . . on following Friday"

Later on January 24, 2007, Kamali also met with Haddadeen's supervisor Frank Quon to complain about how Haddadeen had acted at their meeting. At the meeting, Kamali asked Quon for a transfer to District 12, which covers Orange County. This was Kamali's first request for a transfer.

Quon testified at trial that Kamali asked for a transfer to District 12, but Quon did not consider the request to be for a reasonable accommodation for Kamali's mental health disability. Quon said Kamali wanted to be closer to home. "I told him that District 12, which was Orange County, was overstaffed and that they had no openings for anyone to transfer there." When asked if it ever came to his attention that Kamali was seeking a transfer after the tardiness dispute in January 2007, Quon testified: "I don't recall, but I think he was always seeking a transfer." Quon testified he never considered

Kamali's transfer request to be a hardship transfer because no hardship transfer had been requested. Quon testified that he had met with Kamali regarding his complaints against Haddadeen probably three times.

Following the January 24 meeting, Kamali sought medical attention and stated that his physician advised him to take two weeks off to rest. Kamali took medical leave starting the next day, which leave lasted through February 8, 2007. During his leave, on January 29, Kamali sent an email to Doug Failing, District Director for District 7, recounting the incident with Haddadeen, including Haddadeen raising his voice and saying, "I do not need people like you." Kamali wrote that this "was a very scary experience" for him. Kamali asked for help to "clear this matter" by having Haddadeen explain his conduct in writing.

On January 31, 2007, Kamali filed his first complaint, an internal employment discrimination complaint, complaining about the behavior of Haddadeen during the January 24 meeting. Kamali alleged harassment, discriminatory conduct (the false tardiness report), and retaliation, based upon his ancestry and national origin as a Persian American. Kamali stated about the incident, "I am scared and worried." In his complaint, Kamali states that he asked Nguyen to "help me to transfer even I am willing to transfer to other District (12)."

On February 14, Kamali complained by email to Quon about the same incident, again saying it was one of the worst experiences he ever had working at Caltrans. Later that day, Quon replied by email that he had scheduled a follow-up meeting with Haddadeen and Nguyen to discuss the matter. As of March 5, 2007, Kamali had no response from Quon about his request to transfer.

On March 6, 2007, Kamali notified Nguyen that his doctor had directed him to stay home for two days to allow time to rest for his anxiety level to decrease. At some point in March 2007, Quon told Kamali that he could not transfer. Kamali then sent an email to the next highest person in the chain of command, Raja Mitwasi.

Kamali met with Mitwasi on March 12, 2007, and requested that Mitwasi transfer him. Subsequently Kamali sent an email to Quon and Mitwasi inquiring about his

transfer request. Kamali testified that all he wanted them to do was “[j]ust move me. Just move me out of the OTI. . . . [T]hey had many . . . opportunities to do that, they just didn’t do it.”

On June 5, 2007, eight senior transportation engineers in OTI wrote a letter to Failing complaining of a “hostile work environment” at OTI including discrimination, harassment and intimidation that had developed since Haddadeen became Office Chief. According to Kamali, one of the eight engineers, Garabed Kevorkian, had a similar experience with Haddadeen, and requested to transfer. Kevorkian was transferred out of OTI to maintenance shortly thereafter.

At trial, Caltrans EEO Manager Marian Woo testified that one of the accommodations Caltrans could have implemented in 2007 for Kamali was an interoffice transfer.

2. Kamali’s 2008 Request To Transfer

In August 2008, OTI was reorganized, and Young became Kamali’s immediate supervisor. On August 1, 2008, Kamali emailed Mitwasi to follow up on their prior conversation about the problems Kamali was having with Haddadeen. Kamali wanted to know why he was not transferred out of OTI as requested, but instead had simply been assigned to a new supervisor in OTI. Kamali wrote in the email, “just get me out of here.” Still, Kamali remained working for Young. During 2008 Kamali had contentious interactions with Young over Kamali’s requests to accommodate his knee injury, discussed further below.

However, Kamali did not take any medical leave during 2008.

3. Kamali’s Continuing Requests To Transfer From 2009 to 2010 and Kamali’s Additional Discrimination Complaints

Kamali testified that going to work in 2009 was like “[w]alking into a torture chamber and in and out. It was horrible.” He felt that Haddadeen was causing him stress. Kamali took medical leave from February 16, 2009 to June 5, 2009.

On March 2, 2009, Kamali filed another discrimination complaint, this time with the Department of Fair Employment and Housing (DFEH),⁴ alleging “differential treatment” by Young, and asking to be moved to another group. On April 15, 2009, Kamali sent an email to Haddadeen again requesting a transfer to work with a different senior engineer. Kamali also noted in his email that another engineer (presumably Kevorkian) had been transferred to the position he was interested in. As noted above, on April 20, 2009, Dr. Ganek wrote a letter for Kamali requesting a transfer because of his stress-related mental disability.

On June 9, 2010, Kamali filed his third complaint with DFEH alleging discrimination. This complaint alleged discrimination from January 2007 through June 9, 2010 based on disability and national origin. In his complaint Kamali states that he was being discriminated against in the form of being denied a transfer.

On August 4, 2010, Kamali was approved for a leave of absence on medical grounds for one year, from August 5, 2010 to August 5, 2011.

4. Kamali’s Return in August 2011 Through 2012

When Kamali returned from medical leave in August of 2011, he was continuing to suffer a mental disability from stress and anxiety. Kamali submitted a request for accommodation for his stress and depression (form 18), by allowing him to telecommute and only come to the workplace when needed for meetings or “business necessity.”

As we note above, in a letter dated August 30, 2011 to supervisor Riley, Dr. Ganek wrote that Kamali suffered from stress and anxiety, and described how this impacted his ability to perform his job. The letter stated that with an accommodation Kamali could perform his job. Dr. Ganek stated further: “Kamali is unable to work with Sameer Haddadeen, Kenneth C. Young, Unus Ghausl, Lewis Yee and James Riley [but] Mr. Kamali’s medical condition does not prevent him from working for any supervisor.”

⁴ Kamali filed a previous DFEH complaint on November 13, 2008, discussed below, based on his physical disability.

At some point in 2011, Caltrans transferred Kamali from Young's unit to James Riley's unit and then to Freemprong's unit. On September 19, 2011, Caltrans denied Kamali's request to telecommute on the basis that "[t]he essential functions of your position as a transportation engineer necessitates your presence in the office."

5. Status of Kamali's Mental Disability at Trial

Kamali took additional leave in 2012 from February 28 through October 5. Kamali returned to work on October 8, 2012. At that time, he reported to Freemprong, and not to Young or Haddadeen. Kamali testified that he returned to work because he had exhausted all his vacation, sick leave, and other time off, and needed to support his family. However, the conditions continued to cause him anxiety and he felt he would need to retire. Kamali testified that it was difficult to concentrate at work because he was still on the same floor as Haddadeen, and sat even closer to him than he previously did. He testified as to his mental state, "I constantly have anxiety I expect something to happen to me every day because these people [have] done a lot of stuff to me." When asked, "Do you think you can continue to work at Caltrans?" Kamali answered, "Given this condition, no."

Dr. Ganek testified that Kamali was continuing to suffer from anxiety and depression from "work stress." She testified: "I believe I saw him about six weeks ago I recall that he was extremely anxious at work and he's almost formed post-traumatic stress disorder from the job, and going into work is a trigger for him. He's having nightmares, and the anxiety has gotten much, much worse and he . . . was still depressed and seems to not really be getting much better." Dr. Ganek opined as to Kamali's current condition, "I think it is getting worse." She added that the stressor was "work."

D. Request for Accommodation Based on Kamali's Physical Disability

In August 2008, Young assumed supervision of Kamali. On September 29, 2008, Young assigned work stations for staff as part of a reorganization of the unit. According

to Kamali, he was assigned to the desk furthest from the exit and away from the handicap elevator. Kamali believed Young placed him at this desk so Young would stay close to Kamali and see whether Kamali was there or not.

When Kamali received the new seating assignment, he requested that Young move him to a work station closer to the exit, approximately 10 feet from the hallway, because of his knee disability. Kamali saw that two desks next to the hallway were vacant and asked Young if he could be assigned to one of the desks. In response, on September 29, Young sent an email to Kamali asking him to provide a doctor's note about his knee disability "indicating how placing you approximately 10 feet from the hallway will alleviate your knee versus being approximately 38 feet from the hallway." At that time, Young did not request that Kamali complete any forms.

On October 1, 2008, Kamali provided a note from his physician, Dr. Daniels, dated September 30, describing the ligament and meniscus tears to his knee. The letter concluded: "His ability to run or walk is significantly limited due to pain from this condition." Young sent Kamali an email confirming he received the doctor's note, but stating that he "will evaluate your concerns and we will look to provide you with any necessary accommodations" once he completed his evaluation of Kamali's request. That day, Young said to Kamali: "You look fine to me." Young testified that he did not grant Kamali's request to move at that time "because we needed additional clarification on what his limitations were specifically."

Young testified that Kamali should have completed forms 18 and 19, but he conceded that he did not initially provide the forms to Kamali. On October 9, 2008, Young gave form 18 to Kamali and told him that once he filled out the form and returned it to Young, then Young would provide him with form 19 to be completed by his doctor.

On November 13, 2008, Kamali filed a complaint with DFEH stating he was harassed because of his "unaccommodated physical disability," and on the basis of national origin/ancestry by his manager Haddadeen who "stated that he doesn't need Persian/Iranian people like me working for him" Kamali's complaint states that he was harassed, denied transfer, and denied accommodation.

As noted above, Kamali was on medical leave from February 16, 2009 through June 5, 2009. When he returned on June 9, 2009, Kamali provided Young with a note dated June 5, 2009 from Dr. Daniels, again identifying Kamali's knee injuries in detail and their effect on Kamali's mobility. Dr. Daniels stated that "[f]or safety reasons, he would benefit from being placed closer to exit in case of emergency since he cannot move fast."

On June 10, 2009, Kamali returned form 18 to Young. In form 18, Kamali again requested he be placed at the "closest location to exit" and he be moved both "for safety reason" and also because his "walk is significantly limited." In this form, he references the letters from his doctor, dated September 30, 2008 and June 5, 2009. Young testified that as of that date he still did not approve Kamali's request because form 19 needed to be completed by Kamali's physician, and Young subsequently gave the form to Kamali.

On June 30, 2009, Kamali sent an email to Young again requesting accommodation for his physical disability. Kamali noted that five desks remained empty, and reminded Young that he had already provided letters from his doctor dated September 30, 2008 and June 5, 2009. Young replied by email: "[P]lease fill out the Reasonable Accommodation forms provided to you. The sooner you provide the appropriate document, the sooner an evaluation can take place to address your concerns and/or medical needs."

Kamali returned the completed form 19 to Young on July 29, 2009. In the form, Dr. Daniels wrote: "Suffers from a chronic condition with pain provoked by walking prolonged distances & would benefit from shorter walking distances at work place such as to restroom, elevator & exits."

Young granted Kamali's requested accommodation on August 18, 2009 by moving his assigned desk. This was 11 months from Kamali's first request on September 29, 2008. According to Kamali, during this period the work station had been empty. Kamali testified that the move took ten minutes—he just picked up his books and paperwork and moved. The only major issue was moving the computer.

Young testified he could have moved Kamali's desk sooner but only if he had "disregarded our policy in regards to reasonable accommodation." It appears from his testimony that Young was referring to completing forms 18 and 19. At trial, Caltrans EEO Manager Woo testified that one of the accommodations Caltrans could have implemented in 2007 was to relocate a desk or a cubicle to assist an employee with a disability.

PROCEDURAL BACKGROUND

A. First Amended Complaint and Motion for Summary Judgment

Kamali filed this lawsuit against Caltrans on November 19, 2009.⁵ On April 26, 2010, Kamali filed the first amended complaint that was the operative complaint at trial. He alleged seven causes of action, each based upon violation of FEHA, including for harassment (first cause of action); discrimination based upon his national origin of Iranian/Persian descent (second cause of action); discrimination based on medical disability (third cause of action); retaliation based on disability (fourth cause of action); failure to provide reasonable accommodation (fifth cause of action); failure to engage in a timely good-faith interactive process (sixth cause of action); and failure to prevent harassment, discrimination or retaliation (seventh cause of action).

Caltrans later filed a motion for summary judgment or summary adjudication. Caltrans argued that there was insufficient evidence to support each of Kamali's claims. After a hearing on April 19, 2011, the court granted summary adjudication as to Kamali's second cause of action for discrimination based on national origin and his fourth cause of action for retaliation. The motion was denied as to the other causes of action.

⁵ Kamali had previously obtained a right-to-sue notice dated November 24, 2008 from the DFEH.

B. Jury Trial

A jury trial was conducted from October 15, 2012 through November 16, 2012. In addition to the evidence described above, the jury also heard testimony from Kamali's expert witnesses concerning damages and FEHA compliance.

1. Damages Evidence

On October 29, 2012, Jules Kamin, an economist and damages expert, testified for Kamali. Kamin testified that his first task was to review the payment records to calculate Kamali's losses from the medical leave time he took because of his "emotional distress," and to place a value on it. Kamin also looked at the value of Caltrans's contribution to benefits Kamali lost when he took time off. With regard to Kamali's pension, he assumed Kamali would take an early retirement to maintain an income flow. Kamin testified that, because of early retirement, the pension benefit formula would not be as generous as with a normal retirement. Kamin calculated the loss from the revised pension formula and the cost to restore the service credit Kamali lost because of his medical leave.

Kamin reviewed Kamali's monthly time and earnings reports, including tax information, from January 2007 through March 2012.⁶ Kamin used information and tools provided on the California Public Employee Retirement System (CalPERS) website to calculate the cost for Kamali to restore his lost service credits. He also used the CalPERS information to calculate Kamali's pension under a normal retirement scenario as compared to early retirement. From the Wall Street Journal, he obtained a discount rate to calculate the present value of the losses. Kamin prepared trial exhibit 11 showing the calculations on which he based his opinions.

⁶ While Kamin testified that he reviewed time reports starting from January 2008, it appears he actually reviewed information from January 2007 because he calculated lost pay from 2007.

During the period from January 2007 until trial, Kamali's authorized medical leave totaled 615 work days. Kamin calculated the value of Kamali's lost pay based on a daily rate of pay to be \$195,206.68. Adding the lost employer's contribution to Social Security, lost employer's health insurance contribution, and the cost to restore lost service credit, Kamin calculated the total past loss at \$263,983.

As to future economic damages, Kamin testified that if Kamali retired early at the end of the year, he would have an annual pension of \$54,512.06. Kamali stated that his plan had been to retire at the normal retirement age of 65. According to Kamin, if Kamali retired at 65, he would have an annual pension of \$78,822.23. Kamin calculated Kamali's life expectancy, and used it to calculate the discounted present value of Kamali's future pension loss at \$605,602. Kamin testified that with retirement as of December 31, 2012, the present value of the economic loss that Kamali suffered would be \$869,585.

2. Expert Testimony Regarding Caltrans's Compliance with FEHA

Donna Jan Duffy testified as an expert on employment law on behalf of Kamali. Duffy testified that there are standard practices in the Human Resources (HR) field. She stated her opinion that "Caltrans . . . seriously deviated from its own declared policies and procedures regarding disability and other forms of discrimination, prevention, and correction, as well as standard practice in the HR field." Duffy also stated her opinion that, as to Kamali, Caltrans "seriously deviated from its own declared policies and procedures, as well as standard practice in the HR field, regarding achieving a reasonable accommodation through engaging in the required interactive process."

In Duffy's opinion, Caltrans did not educate its managers, supervisors and other employees, particularly in the area of disability discrimination. According to Duffy, "[t]here was this lack of understanding, which I think is a lack of education, by supervisors and by managers and by even higher-ups, such as Mr. Quon or Mr. Failing or other people who were involved in Mr. Kamali's employment, to fail to take responsibility" for resolution of Kamali's issues.

Duffy testified that there are five steps to the interactive process to develop a reasonable accommodation, and that none of the steps was followed by Caltrans with respect to Kamali. “[T]he idea that you have to fill out some specific form” is “absolutely counter” to the “overall attitude of cooperation and good faith” that should be part of the process.

3. Caltrans’s Motion for Nonsuit

At the close of Kamali’s case, Caltrans made a motion for nonsuit as to all causes of action remaining after the summary judgment motion. The court granted Caltrans’s motion as to the national origin portion of Kamali’s harassment claim, and denied it as to all other causes of action. Caltrans appeals the court’s denial of the nonsuit motion as to the remaining causes of action.⁷

C. The Verdict and Judgment

The jury returned the special verdict on November 16, 2012, and the judgment was filed on December 21, 2012. The jury found that Kamali had a physical and a mental disability under FEHA. They also found that Kamali was able to perform the essential job functions of a Caltrans engineer if a reasonable accommodation was provided. They found that Caltrans subjected Kamali to an adverse employment action. The jury found that Caltrans failed to provide a reasonable accommodation for Kamali’s mental and physical disabilities, and it failed to engage in a good faith interactive process to accommodate those disabilities.

⁷ Caltrans appears to argue in its appeal both that there was not substantial evidence to support the jury’s verdict and that as a matter of law the claims for reasonable accommodation and failure to engage in the interactive process on which the jury returned verdicts lack merit. Because we find that substantial evidence supported the jury’s verdict and the damages award, the court did not err in denying Caltrans’s motion for nonsuit, motion for judgment notwithstanding the verdict, and motion for new trial.

The jury did not reach verdicts as to Kamali's claims for harassment (first cause of action); discrimination based on medical disability (third cause of action); and failure to prevent harassment, discrimination or retaliation (seventh cause of action). Judgment was not entered on these causes of action.⁸

D. Damages

The jury awarded Kamali \$263,983 in past economic loss, \$300,000 in future economic loss, and \$100,000 in past non-economic loss.⁹ The court entered judgment against Caltrans "in the amount of the jury verdict for **\$663,983.00**, with interest . . . at the rate of seven percent (7%) per annum, from the date of [the] judgment until paid." The court ordered that Kamali was entitled to his reasonable attorneys fees and costs.

E. Caltrans's Postjudgment Motions

On January 10, 2013, Caltrans filed a motion for judgment notwithstanding the verdict or, in the alternative, for partial judgment notwithstanding the verdict. On January 25, 2013, Caltrans filed a motion for new trial. Caltrans claimed in both motions that substantial evidence did not support the verdict in Kamali's favor for the reasonable accommodation and the interactive process issues; the court erred in refusing to allow Caltrans's counsel to cross-examine Duffy and excluding Caltrans's videotape evidence of Kamali's condition; excessive damages; and Kamali's lack of credibility as a witness.

⁸ Caltrans argues that "[i]f the Court of Appeal construes the judgment as awarding damages for those causes of action," the judgment should be reversed as inconsistent with the verdict. Because we find the damages awarded by the jury to be supported by the evidence on the causes of action for failure to accommodate and the failure to engage in the interactive process, we do not find the judgment inconsistent with the verdicts.

⁹ The past economic loss amount the jury awarded is the same amount calculated by Kamin. The future economic loss is approximately half of the \$605,602 loss Kamin calculated.

Caltrans also argued in both motions, as part of its argument that substantial evidence did not support the verdict, that an alleged disability based on a person being unable to perform work for a particular supervisor does not constitute a “qualified disability” under which the employee would be entitled to a reasonable accommodation.¹⁰

The trial court issued a minute order dated February 21, 2013, denying Caltrans’s motion for a new trial, motion for judgment notwithstanding the verdict, or alternatively for partial judgment notwithstanding the verdict, and motion for reduction of judgment for collateral source payments paid to Kamali.

Caltrans filed a notice of appeal from the judgment on March 22, 2013. On April 12, 2013 Kamali filed a notice of cross-appeal from the judgment, challenging the court’s order granting Caltrans’s motion for summary adjudication, and denial of Kamali’s motion for terminating sanctions.¹¹

F. Kamali’s Motion for Attorneys Fees

Kamali filed a motion for attorneys fees in the amount of \$3,639,238.31 on March 21, 2013 pursuant to section 12965, subdivision (b), and related sections of

¹⁰ At oral argument, counsel for Caltrans argued that it failed to raise this issue at trial but did raise it in its posttrial motions. On appeal, Caltrans argues that this is a legal issue that should be decided by the court not subject to the “substantial evidence” standard of review. However, a review of the motions filed in the trial court show that Caltrans made this argument to buttress its position that there was not substantial evidence to support the jury’s verdicts. We likewise discuss this argument below as part of our analysis of whether there was substantial evidence to support the jury’s verdict.

Further, in a post-argument letter to the court, Caltrans corrects its prior representation during argument that it did not raise this issue during trial. Caltrans now points out that the trial court rejected Caltrans’s requested instruction 18 on this issue. Because Caltrans does not raise instructional error on appeal, we do not address the trial court’s failure to give this instruction.

¹¹ In Kamali’s brief, he describes this as a “protective cross-appeal if and only if this Court remands this case back to trial.” Because we affirm, we do not reach the issues raised in the cross-appeal.

FEHA. In response, Caltrans argued that “the maximum reasonable amount of \$780,660.80” should be awarded. (Underscoring omitted.) Caltrans argued further that because Kamali only prevailed on two out of eight claims, this amount should be cut by 50 percent to \$390,330.40. After a hearing on June 11, 2013, the trial court entered an order awarding Kamali attorneys fees in the amount of \$889,280. Kamali filed a notice of appeal from the attorneys fees order on July 31, 2013. Caltrans filed a notice of cross-appeal from the order on August 16, 2013.¹²

DISCUSSION

A. Standard of Review

Where a party challenges the sufficiency of the evidence supporting a jury verdict, we apply the substantial evidence standard of review. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188 [affirming jury verdict for employer on reasonable accommodation claim]; cf. *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) We must “view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor.” (*Bickel, supra*, at p. 1053; accord, *Wilson, supra*, at p. 1188; see also *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 969 [“[w]e may not reweigh the evidence and are bound by the trial court’s credibility determinations”].)

B. FEHA’s Interactive Process and Reasonable Accommodation Requirements

FEHA prohibits discrimination by an employer against an employee with a physical or mental disability, except where the disability causes the employee to be “unable to perform his or her essential duties even with reasonable

¹² The appeal from the judgment was filed as case No. B247756. The appeal from the attorneys fees order was filed as case No. B250408. By order of this court dated October 10, 2013, the appeals were consolidated under case No. B247756.

accommodations” (§ 12940, subd. (a)(1); see *Green v. State of California* (2007) 42 Cal.4th 254, 262.) FEHA provides further that it is an unlawful employment practice for an employer “to fail to make reasonable accommodation for the known physical or mental disability of an . . . employee” unless the accommodation would cause “undue hardship” to the employer.” (§ 12940, subd. (m).) As the Supreme Court held in *Green*: “Indeed, the Legislature has never indicated the intent to compel an employer to employ such a person who could not perform the essential job duties with or without reasonable accommodation.” (*Green, supra*, at p. 266.)

Under FEHA, a reasonable accommodation is any ““modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.”” [Citation.]” (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 968-969 [trial court erred in granting summary judgment for school district where district failed to place disabled teacher in second grade classroom to accommodate her disability]; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1010 [summary judgment for Art Institute of California (AIC) properly granted where AIC allowed Scotch additional time to obtain master’s degree because of medical condition but holding AIC was not required to give Scotch priority in teaching lower level classes].)

FEHA includes as examples of reasonable accommodation, “[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, . . . and other similar accommodations for individuals with disabilities.” (§ 12926, subd. (p)(2).) Further, “[i]f the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.] A reassignment, however, is not required if ‘there is no vacant position for which the employee is qualified.’” (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1223 [employer not required to create full-time position to accommodate physical disability of police officer]; accord, *Swanson v. Morongo Unified School Dist., supra*, 232 Cal.App.4th at p. 969

[employer has “‘affirmative duty’ to reasonably accommodate a disabled employee,” which “duty is a “‘continuing’” one that is “‘not exhausted by one effort’”].)

FEHA requires the employer to participate in a good faith interactive process with the disabled employee in order “to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee,” to identify or formulate a reasonable accommodation crafted for that employee.” (§ 12940, subd. (n).) The employer must engage in this process “to explore the alternatives to accommodate the disability. . . . Failure to engage in this process is a separate FEHA violation independent from an employer’s failure to provide a reasonable disability accommodation, which is also a FEHA violation.” (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424.)

The elements of a failure to accommodate claim are “(1) the plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff’s disability. [Citation.]” (*Scotch v. Art Institute of California, supra*, 173 Cal.App.4th at pp. 1009-1010.) The plaintiff employee bears the burden of showing that he or she was able to do the job with a reasonable accommodation. (*Green v. State of California, supra*, 42 Cal.4th at p. 262; accord, *Lui v. City and County of San Francisco, supra*, 211 Cal.App.4th at p. 971.)

C. Caltrans Failed to Provide a Reasonable Accommodation for Kamali’s Depression, Stress and Anxiety

Kamali requested as a reasonable accommodation for his depression, stress and anxiety that Caltrans transfer him out of OTI or, in the alternative, allow him to telecommute from home. Caltrans claims that Kamali did not suffer from a mental disability, but rather, only wanted a different supervisor. Caltrans also argues that Kamali failed to identify a position he could perform as a reasonable accommodation. Finally, Caltrans argues that it provided Kamali a reasonable accommodation by allowing him 615 days of medical leave. We find Caltrans’s arguments lack merit.

1. *Depression and stress constitute a mental disability under FEHA.*

FEHA defines ““mental disability”” to include: “(1) Having any mental or psychological disorder or condition, such as . . . emotional or mental illness . . . that limits a major life activity. For purposes of this section: [¶] . . . [¶] (B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.” (§ 12926, subd. (j)(1)(B).) Further, FEHA specifically includes “clinical depression” as one of its enumerated “mental disabilities.” (§ 12926.1, subd. (c).)

“Numerous cases under state and federal law have held that depression and its related manifestations can meet the definition of disability under antidiscrimination laws. [Citations.]” (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1592-1593 [“major depression” constitutes mental disability under FEHA]; see also *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 258-259 [post-traumatic stress disorder meets definition of mental disability under FEHA and stricter American with Disabilities Act (ADA) test].)

2. *Kamali’s depression, stress and anxiety were not merely “personnel issues.”*

Caltrans maintains Kamali’s asserted mental disability did not relate to a job function, but rather, constituted a personnel issue stemming from the managerial style of Kamali’s supervisors. Caltrans relies on federal cases under the ADA (42 U.S.C. § 12101 et seq.) to support this argument, including *Weiler v. Household Fin. Corp.* (7th Cir. 1996) 101 F.3d 519, in which the court concluded that the employee was only unable to perform her job for one supervisor, but because she could do the work for other supervisors, she was not ““disabled”” under the ADA. (*Id.* at p. 525.) The court held: “Weiler claims she can do her job, but not while being supervised by Terry Skorupka. If Weiler can do the same job for another supervisor, she can do the job, and does not qualify under the ADA.” (*Ibid.*)

While California courts often look to the ADA and federal cases interpreting it for guidance in interpreting FEHA, the California “Legislature intended to provide plaintiffs

with broader substantive protection under the FEHA.” (*Green v. State of California, supra*, 42 Cal.4th at p. 265.) As the Legislature has declared: ““Although the federal act provides a floor of protection, this state’s law has always, even prior to passage of the federal act, afforded additional protections.’ [Citation.]” (*Ibid.*)

Significantly, under FEHA, a mental disability is defined as one “that limits a major life activity.” (§ 12926, subd. (j)(1).) By contrast, in *Weiler*, the court focused on the stricter ADA definition of a mental disability as one that ““substantially limits”” a person from participating in major life activities. (*Weiler v. Household Fin. Corp., supra*, 101 F.3d at p. 523.) FEHA makes this distinction clear: “the Legislature has determined that the definitions of ‘physical disability’ and ‘mental disability’ under the law of this state require a ‘limitation’ upon a major life activity, but do not require, as does the federal [ADA] of 1990, a ‘substantial limitation.’ This distinction is intended to result in broader coverage under the law of this state than under that federal act.” (§ 12926.1, subd. (c).)

The other cases relied upon by Caltrans, other than *Arteaga v. Brink’s, Inc.* (2008) 163 Cal.App.4th 327, are similarly in the federal ADA context. Caltrans cites *Arteaga* for its holding that “FEHA does ‘not guarantee employees “a stress-free working environment”” and ““is not a shield against harsh treatment at the workplace.””” (*Id.* at p. 344.) *Arteaga* is distinguishable. There the court found that Arteaga’s symptoms of pain and numbness did not prevent him from performing his job duties where he spent most of the day riding in the back of an armored vehicle, and the principal impact from his condition was that it limited his ability to play soccer. (*Id.* at pp. 346-347.) In addition, the court found that the employer terminated Arteaga for a legitimate, nondiscriminatory reason—its investigation into multiple incidents of missing cash on Arteaga’s work shifts. (*Id.* at pp. 334, 336-337.)

Moreover, in this case, Kamali suffered from more than common “work stress.” His medical history of depression, stress and anxiety are well-documented, beginning with his first referral to a Kaiser Permanente health facility for stress management in 2002. Kamali was prescribed medical leave from work numerous times over a four-year

period. His mental health physician Dr. Ganek consistently wrote letters to Caltrans stating that Kamali suffered from disabling depression, stress and anxiety and recommended a transfer to improve his mental health.

Dr. Ganek wrote that Kamali's depression, stress and anxiety limited one of his major life activities, his ability to work efficiently and effectively if he came to the OTI office. Thus, this was not a simple case of Kamali only seeking a new supervisor. Rather, Kamali's mental health issues predated the 2007 incident with Haddadeen, and it appears that the work environment in OTI under Haddadeen, Young, and other supervisors was a "trigger" that caused Kamali to suffer from depression and anxiety. Dr. Ganek at trial described the trigger of work in OTI as "almost" a form of post-traumatic stress disorder.

Caltrans's counsel at oral argument cautioned that upholding the jury's verdict would send a message that any employee who does not like his or her supervisor can merely get a doctor's note that the employee was suffering stress from the supervisor and needed a new transfer. While certainly there can be abuses of FEHA under any scenario, in this case there was substantial evidence that Kamali suffered from severe depression and anxiety that prevented him from performing his work, that was triggered in part by the actions of his supervisors.

We therefore hold that substantial evidence supports a finding that Kamali suffered from a "mental disability" as defined in FEHA.

3. *Caltrans had the burden to determine whether there was an available position that Kamali could perform.*

Caltrans next claims that Kamali failed to meet his burden to provide evidence of an available position he could perform if a reasonable accommodation was provided. Contrary to Caltrans's assertion, the obligation is on the employer to make affirmative efforts to determine whether a position is available to accommodate the employee's disability. (*Swanson v. Morongo Unified School Dist.*, *supra*, 232 Cal.App.4th at p. 969;

Cuiellette v. City of Los Angeles (2011) 194 Cal.App.4th 757, 766-767; *Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at pp. 264-265.)

As the court held in *Jensen* in rejecting the employer's argument: "It . . . represents an improper attempt to shift the entire burden of locating a suitable vacant position to the disabled employee." (*Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 265.) Jensen had applied for positions but she was turned down for those positions as unqualified. The court found that the fact Jensen was turned down "begs the question of whether there were other vacant positions within the Wells Fargo organizational structure of which she was unaware or unknowledgeable which might have met her limitations and qualifications." (*Id.* at pp. 264-265, fn. omitted.)

The court in *Jensen* held further, citing to the Ninth Circuit's decision in *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1113: "Employees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. Putting the entire burden on the employee to identify a reasonable accommodation risks shutting out many workers simply because they do not have the superior knowledge of the workplace that the employer has." [Citation.]" (*Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 265.) Moreover, "when reassignment of an existing employee is the issue, the disabled employee is entitled to preferential consideration." (*Ibid.*)

In this case, it was not Kamali's burden to find an available engineer position at Caltrans that would accommodate his mental disability. Caltrans never investigated into whether there was an available position for which Kamali was qualified outside of OTI or in another district before concluding that Caltrans could not provide a reasonable accommodation for Kamali. The only evidence that Caltrans even considered a transfer was the single statement by Quon to Kamali that there were no open positions in District 12, for which Kamali had expressed an interest. Quon testified, however, that he did not consider Kamali's request to transfer to be a request for reasonable accommodation. This one comment by Quon did not satisfy Caltrans's obligation to investigate into available positions outside of OTI.

4. *Caltrans did not satisfy its obligation to provide a reasonable accommodation by allowing Kamali to take medical leave.*

Lastly, Caltrans contends that it satisfied any duty it had to provide a reasonable accommodation to Kamali by allowing him to take extended leaves of absence totaling 615 work days while keeping his job open. Caltrans relies on *Wilson v. County of Orange, supra*, 169 Cal.App.4th 1185, in which the court discussed medical leave in the context of a reasonable accommodation. The court held: “[A] reasonable accommodation can include providing the employee accrued paid leave or additional unpaid leave for treatment . . .’ provided it is likely that, at the end of such leave, the employee will be able to perform his or her employment duties. [Citations.]” (*Id.* at pp. 1193-1194.)

The facts in *Wilson* differ significantly from those here. Wilson was assigned to the stressful “Red Channel” in a countywide coordinated emergency communications system for law enforcement and public safety agencies. (*Wilson v. County of Orange, supra*, 169 Cal.App.4th at p. 1189.) Wilson suffered from a rare blood disease. When Wilson told her hematologist about the high stress associated with working the Red Channel, the doctor wrote a letter stating that Wilson could not work in her current position at the Red Channel. (*Id.* at pp. 1189-1190.) In December 2004, Wilson went on unpaid leave until March 2005. During the leave period, the County’s personnel attempted to accommodate Wilson by presenting various alternative positions that were available, all of which Wilson declined for non-disability related reasons. (*Id.* at pp. 1190-1191.) The appellate court affirmed a jury verdict for the County on Wilson’s FEHA claim, finding in light of the County’s numerous efforts to offer her alternative positions that there was “abundant evidence supporting a finding the County provided Wilson a reasonable accommodation and engaged in a good faith interactive process to arrive at that accommodation.” (*Id.* at p. 1193.)

The holding in *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, also relied on by Caltrans, is likewise distinguishable. In *Hanson*, the court found that Lucky Stores’ accommodation of Hanson’s physical injury by allowing him 16 months of

medical leave time was a reasonable accommodation where his broken wrist was believed to be a temporary injury, and upon his return Lucky Stores made significant efforts to find Hanson an alternative job to accommodate his continuing injury. Lucky Stores offered Hanson the job of meat clerk (instead of his former position as meat cutter), which he rejected. (*Id.* at pp. 220, 227-228.) The court held: “We hold that a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform his or her duties.” (*Id.* at p. 226.)

In this case, Kamali lost wages, benefits and sick pay for his 615 leave days. He would not have suffered those losses if his request to transfer from OTI had been facilitated. Kamali’s doctor wrote to his OTI managers that a transfer was all he needed to work effectively. The fact that Quon arranged a prompt transfer for OTI engineer Kevorkian, who also disliked working under Haddadeen, suggests that a transfer for Kamali would also have been feasible.

There was substantial evidence to support the jury finding that Caltrans failed to provide Kamali with a reasonable accommodation for his mental disability.

E. Reasonable Accommodation for Knee Disability

1. Kamali’s knee injury was a “physical disability” under FEHA.

Under FEHA, a “physical disability” is defined as a condition that affects the “musculoskeletal” systems in such a manner that it limits a major life activity, including “physical, mental, and social activities and working,” because “it makes the achievement of the major life activity difficult.” (§ 12926, subd. (m).) Kamali presented substantial evidence, including two letters from his physician, to show that he had a knee injury for

which he had to wear braces and that limited his ability to walk, thereby falling within FEHA's definition of a "physical disability." This was not disputed at trial.¹³

2. Kamali was qualified to perform the essential functions of the position.

Caltrans did not argue that Kamali was not qualified to perform the essential functions of his position as a transportation engineer. Instead, Caltrans argued that Kamali had not presented evidence that, absent the move of his desk, Kamali could not perform an essential job function. To the contrary, Kamali was not required to endure pain from a longer walk to the hallway or exit or risk the danger of not being evacuated in case of an emergency in order to work at his position at Caltrans. Substantial evidence supported this element.

3. Caltrans failed to provide a reasonable accommodation by waiting 11 months to move Kamali's desk.

Substantial evidence supports the jury's finding that Caltrans failed to provide a reasonable accommodation for Kamali's physical disability. In September 2008, Kamali requested a work station closer to the exit, about 10 feet from the hallway, because of his difficulty walking caused by his knee injury. Young could have approved the move on the day he received the October 1, 2008 letter from Kamali's physician detailing his injury and how it was debilitating to Kamali. At that time there were two vacant desks within 10 feet of the exit. Young refused to allow Kamali to move, telling him, "You look fine to me." Kamali instead was assigned to a desk that was about 38 feet away from the hallway and exit.

Kamali was still not moved when he provided a second letter from Dr. Daniels, dated June 5, 2009. Rather, Young insisted that Kamali complete forms 18 and 19 to

¹³ We discuss below Caltrans's argument that the court should have allowed Caltrans to introduce a videotape at trial purportedly showing Kamali walking freely without an apparent disability prior to trial.

support his request for a reasonable accommodation. It was not until August 18, 2009—when Kamali had completed both forms—that Caltrans approved his request for a reasonable accommodation. The same two desks remained vacant during the 11-month period it took for Caltrans to approve the request. When Kamali was finally allowed to move his desk, the entire move took 10 minutes, and required little effort other than to move his computer.

“A single failure to reasonably accommodate an employee may give rise to liability, despite other efforts at accommodation.” (*Swanson v. Morongo Unified School Dist.*, *supra*, 232 Cal.App.4th at p. 969.)¹⁴ Here, Kamali made multiple requests, to no avail. Substantial evidence supported the jury’s finding that Caltrans failed to provide a reasonable accommodation for Kamali’s physical disability.

4. *The trial court acted within its discretion to exclude a videotape of Kamali.*

Caltrans contends that the trial court erred in excluding a surveillance videotape taken of Kamali that Caltrans sought to introduce in the middle of the trial. Caltrans asserted that the videotape showed Kamali moving around without any problems with his knee. However, Kamali’s counsel had requested videotapes as part of Kamali’s discovery requests, but Caltrans had failed to state that it claimed Kamali did not have a physical disability or produce the videotape prior to trial. Caltrans first revealed the existence of the videotape midtrial on November 1, 2012. Caltrans responds that the videotapes were created in 2011 and September 2012 after the close of discovery. Even if the videotape was created in September 2012, there is no excuse for not informing

¹⁴ Caltrans also argues that Kamali’s claim for failure to accommodate his physical injury could not support a damage award because Kamali did not take time off as a result of his knee injury. However, Kamin’s calculation of past economic damages only considered medical leave taken by Kamali for “emotional distress,” and therefore we must assume the jury did not consider Kamali’s physical disability in making its award for economic damages. However, Kamali’s claim with respect to accommodation of his knee injury could properly be the basis of his past non-economic damages.

opposing counsel of its existence prior to the start of trial in October 2012, instead opting to raise the videotape midtrial.

“We review a trial court’s evidentiary rulings for an abuse of discretion.” (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1026.) We find the trial court did not abuse its discretion in light of the inability of Kamali to respond to the late videotape and the limited relevance of the videotape given the significant evidence from Dr. Daniels of Kamali’s injury. While exclusion of evidence should be the last resort as a sanction, in this case Caltrans did not even challenge Kamali’s physical disability prior to trial. Thus the surprise admission of a videotape on this issue midtrial would cause great prejudice to Kamali, while not offering significant probative value in light of the medical evidence to the contrary.

Further, even if the court’s exclusion were error, we find it harmless under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, 837 of whether it was “reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.) Given the multiple written statements by Kamali’s physician as to his knee injury combined with Caltrans’s callous refusal to consider Kamali’s request merely to move to a different desk, we find it is not reasonably probable that Caltrans would have obtained a more favorable result if the jury had seen the videotape.

F. Caltrans’s Failure to Engage in Good Faith Interactive Process

1. *FEHA required Caltrans to engage in a good faith interactive process with respect to Kamali’s mental and physical disabilities.*

FEHA provides a separate cause of action against employers for failure to engage in a “timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee” (§ 12940, subd. (n); see *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 983; *Wysinger v. Automobile Club of Southern California, supra*, 157 Cal.App.4th at p. 425; *Gelfo v. Lockheed Martin Corp.*

(2006) 140 Cal.App.4th 34, 61.)¹⁵ As the court held in *Nadaf-Rahrov*, “[I]t is the responsibility of both sides to keep communications open and neither side has a right to obstruct the process.” (*Nadaf-Rahrov, supra*, at p. 987 [finding Neiman Marcus failed to engage in interactive process by refusing to discuss available positions with Nadaf-Rahrov until she provided medical release].) Further, “[a]lthough it is the employee’s burden to initiate the process, no magic words are necessary, and the obligation arises once the employer becomes aware of the need to consider an accommodation.” (*Gelfo, supra*, at p. 62, fn. 22 [employer had duty to engage in interactive process with Gelfo to discuss reasonable accommodation even if it believed Gelfo did not suffer from disability as defined by FEHA].)

2. *Caltrans failed to engage in the interactive process with respect to Kamali’s mental disability.*

Kamali made repeated requests to transfer from OTI and provided multiple reports from his doctor supporting his mental health need for a transfer. Kamali’s supervisors failed to discuss with Kamali any accommodation for the depression, anxiety and stress he was suffering from his work environment. The only discussion of this issue was the one conversation Quon had with Kamali in which he told Kamali there were no openings in District 12. Further, Quon was not even aware that Kamali was making a request for a reasonable accommodation. This single conversation Quon had with Kamali did not satisfy Caltrans’s obligation to engage in the interactive process.

¹⁵ The First District in *Nadaf-Rahrov* disagreed with the holding by this district in *Wysinger* that an employee could maintain a cause of action for failure to engage in the interactive process even absent evidence that a reasonable accommodation was possible. (See *Nadaf-Rahrov v. Neiman Marcus Group, Inc., supra*, 166 Cal.App.4th at p. 983.) We need not reach this issue here because Kamali presented evidence of possible accommodations, including a transfer out of OTI for his mental disability and movement of his desk to address his physical disability. Specifically, Kamali presented evidence that Caltrans transferred Kevorkian upon request from OTI to maintenance and that there were vacant desks near the exit that could accommodate Kamali’s physical needs.

Therefore substantial evidence supports the jury's finding that Caltrans failed to engage in an interactive process with Kamali to identify possible reasonable accommodations for Kamali's mental health disability.

3. *Caltrans failed to engage in the interactive process with respect to Kamali's physical disability.*

Likewise, as to Kamali's physical disability, Young's insistence that he could only accommodate Kamali's request upon submission of forms 18 and 19 violated Caltrans's obligation to engage in good faith in the interactive process to explore alternatives to Kamali's physical placement in the office. Indeed, Caltrans's insistence on Kamali completing the forms before even discussing a possible move is similar to the refusal by Neiman Marcus to discuss possible jobs until its employee provided a medical release, which the court in *Nadaf-Rahrov* found could support a jury finding the company violated its duty to engage in the interactive process. (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th at p. 986.)

Here there was substantial evidence supporting the jury's finding that Caltrans failed to engage in the interactive process as to Kamali's physical disability.

G. Past Damages

Caltrans argues that the jury's award for past damages is not supported by the evidence because the jury awarded the full amount requested by Kamali, which was based on Kamin's testimony as to the value of 615 days of medical leave. Caltrans contends that the calculation of the 615 days includes medical leave taken as early as January 25, 2007, but that Kamali's first request to transfer as an accommodation was in the spring of 2009. As we discuss above, there was substantial evidence showing that Kamali requested a transfer to accommodate his stress and anxiety resulting from his meeting with Haddadeen on January 24, 2007. It was on the same day that Kamali requested that Quon transfer him to a different unit. Kamali took medical leave starting

on the following day, January 25, 2007. Therefore Caltrans's argument as to past damages lacks merit.

H. *Future Damages*

Caltrans contends the jury's award of future damages is not supported by substantial evidence and is contradicted by law. Caltrans asserts that Kamali is not entitled to future damages because by the time of trial, Caltrans granted Kamali's reasonable accommodation requests, except to telecommute, and he was still working at Caltrans.

It is undisputed that Kamali continued to work at Caltrans through the time of trial. However, Kamali testified he returned to work because he had exhausted all his time off, but that he planned to retire early because of his continuing anxiety at work. Dr. Ganek similarly testified that Kamali was continuing to suffer from anxiety and depression from stress at work.

Caltrans also argues that the award of future damages is tantamount to awarding indefinite paid leave, which is not supported by FEHA, citing to *Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th at pages 226-227. As we discuss above, *Hanson* is distinguishable in that the employer offered Hanson a reasonable accommodation as a meat clerk in light of his wrist injury, but he refused the position. In light of his refusal, the court found that the accommodation by Lucky Stores to allow Hanson 16 months of medical leave to recover from his injury was reasonable. (*Ibid.*)

Here the award of future damages is based on the failure of Caltrans to provide a reasonable accommodation to Kamali, resulting in continued stress, anxiety and depression. While Caltrans ultimately moved Kamali to a different supervisor—four years after his first request—by then his condition was getting worse, and he could no longer function in that position. By the time of trial, Kamali had returned to Caltrans, but was continuing to suffer from severe depression and anxiety. Whether this resulted from sitting near Haddadeen on the same floor or from suffering through four years under the same supervisors who were triggering his anxiety since 2007, there was substantial

evidence that he could not continue to work for Caltrans, even under the conditions present as of 2012. Under these circumstances, there was substantial evidence to support the jury's award of future damages.¹⁶

I. Interest on the Judgment

The judgment provides that Kamali is entitled to a monetary recovery from Caltrans “in the amount of the jury verdict for \$663,983.00, with interest thereon at the rate of seven percent (7%) per annum, from the date of this judgment until paid.” Caltrans points out correctly that, by statute, where interest is to be paid by the state, interest does not begin to accrue until 180 days after the date of the judgment. (§ 965.5, subd. (c).)

Kamali argues that “it is a violation of the equal protection of the laws under the U.S. Constitution to a six-month delay of interest solely applying to the State of California in superior court.”¹⁷ Kamali provides no further support for its argument. As an economic regulation, the equal protection clause requires that differential treatment under a statute bear a “‘rational relation to the purposes of the legislation.’ [Citation.]” (*People ex rel. Dept. of Transportation v. Diversified Properties Co. III* (1993) 14 Cal.App.4th 429, 449 [finding rational relation for different post-judgment interest awarded in action by state for condemnation].) While neither side cites to the purpose behind the 180-day statutory delay, it is fair to assume the statute is intended to allow the state additional time to obtain the funds to pay a judgment given the constraints on state government.

¹⁶ We also note that the jury awarded Kamali less than half of the future wage loss amount calculated by Kamin. Kamin testified that “the discounted present value of the [future] loss . . . comes to \$605,602.” The jury awarded \$300,000 for future economic damages. Further, Caltrans never called an expert at trial to refute Kamin's calculations.

¹⁷ Kamali also argues that this issue was not raised in the trial court, and was therefore waived. Caltrans did object to the calculation of interest prior to entry of judgment.

We have authority to modify the judgment so that it conforms to the statutory requirement. (Code Civ. Proc., § 43; Cal. Rules of Court, rule 8.264(c)(1).) We therefore modify the judgment to specify that interest will begin to accrue 180 days after the date of the judgment.

J. Attorneys Fees

Kamali challenges the attorneys fees order awarding \$889,280 to Kamali’s attorneys rather than the \$3,639,238.31 they requested.¹⁸ Kamali contends that no evidence supports the trial court’s “draconian” reduction in the fees requested. Kamali also claims that the trial court did not calculate the attorneys fees properly because the court did not use the lodestar method, with adjustment by a multiplier. Kamali requests that we reverse the attorneys fees and costs order and remand for the trial court to hold a hearing to apply the lodestar method. We disagree and affirm the attorneys fees order.

Under FEHA, the trial court “in its discretion, may award to the prevailing party . . . reasonable attorney’s fees and costs . . .” (§ 12965, subd. (b).) “The FEHA is, inter alia, a statutory expression of the fundamental policy against employment discrimination. [Citation.] ‘[S]ection 12965 [attorney] fees are intended to provide “fair compensation to the parties involved in the litigation at hand and encourage[] litigation of claims that in the public interest merit litigation.’” [Citation.]” (*Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 609-610; accord, *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 394.)

We review the attorneys fees order under the deferential abuse of discretion standard. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 [“the trial court has broad authority to determine the amount of a reasonable fee”]; *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1249; *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 832.) As our Supreme Court held in *PLCM Group*: ““The

¹⁸ Kamali’s attorneys fee request was based on a lodestar of \$2,079,564.75 and a multiplier of 1.75.

“experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong”—meaning that it abused its discretion. [Citations.]” (*PLCM Group, Inc.*, *supra*, at p. 1095.)

As this district held in *Taylor*: ““““[T]he appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.” [Citations.]” [Citation.] . . . We defer to the trial court’s discretion “because of its ‘superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.’ [Citation.]” [Citation.]’ [Citation.]” (*Taylor v. Nabors Drilling USA, LP*, *supra*, 222 Cal.App.4th at p. 1249.)

The court in *PLCM Group* summarized the traditional approach courts have taken in setting attorneys fees: “[T]he fee setting inquiry in California ordinarily begins with the ‘lodestar,’ i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. ‘California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys’ fee award.’ [Citation.] The reasonable hourly rate is that prevailing in the community for similar work. [Citations.] The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.]” (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1095; accord, *Taylor v. Nabors Drilling USA, LP*, *supra*, 222 Cal.App.4th at p. 1249.)

Under the lodestar method, “application of a lodestar multiplier is *discretionary*; that is, it is based on the exercise of the court’s discretion after consideration of the relevant factors in a particular case.” (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1240; accord, *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138.)

In this case, the trial court stated in its ruling on attorneys fees that it used the lodestar method in arriving at the amount of the award but did not apply a multiplier. The court opened the attorneys fees hearing by stating: “[T]he award for reasonable attorneys fees in this matter . . . is \$889,280. . . . I am not going to specify a specific rate

per lawyer I did use lo[de]star. I did not . . . put a multiplier in there. Two out of eight causes of action in a case of this nature It was my view of the activities undertaken by the plaintiff’s counsel and defense counsel in this matter, that drew me to the conclusion that . . . these are reasonable attorneys’ fees for this matter.”¹⁹

While our review of the trial court’s determination would have been facilitated by a more detailed explanation of the basis of the award, the trial court’s failure to provide one does not require reversal. (*Taylor v. Nabors Drilling USA, LP, supra*, 222 Cal.App.4th at p. 1249.) ““We find no California case law . . . requiring trial courts to explain their decisions on all motions for attorney fees and costs, or even requiring an express acknowledgment of the lodestar amount. The absence of an explanation of a ruling may make it more difficult for an appellate court to uphold it as reasonable, but we will not presume error based on such an omission.”” (*Id.* at p. 1250.)

As the courts have held, the trial court is not required to issue a statement of decision with respect to a fee award. (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1140 [no statement of decision required for attorneys fee award in anti-SLAPP action]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294 [statement of decision not required for court’s granting of attorneys fees under private attorney general fee provision in Code Civ. Proc. § 1021.5]; accord, *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 67 [“[w]e find no California case law . . . requiring trial courts to explain their decisions on all motions for attorney fees and costs, or even requiring an express acknowledgment of the lodestar amount”].)

While the trial court had no obligation to prepare a statement of decision, counsel for Kamali could have requested specific findings on attorneys fees, but failed to do so. Absent a request for more detailed findings, ““[a]ll intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown.”” [Citation.]” (*Ketchum v. Moses, supra*, 24 Cal.4th at

¹⁹ As noted above, the first amended complaint alleged seven causes of action (not eight), but the court was correct that Kamali only prevailed on two.

p. 1140 [noting that Ketchum failed to request a statement of decision with specific findings on attorneys fees]; accord, *Maria P. v. Riles*, *supra*, 43 Cal.3d at pp. 1295-1296 [upholding trial court fee award finding, “[b]ecause they failed to furnish an adequate record of the attorney fee proceedings, defendants’ claim must be resolved against them”].) ““In the absence of evidence to the contrary, we presume that the trial court considered the relevant factors. [Citation.]”” (*Taylor v. Nabors Drilling USA, LP*, *supra*, 222 Cal.App.4th at p. 1250.)

While the court did not provide an explanation of what lodestar it used, and failed to explain either the number of hours or the hourly rate it applied, the court did make clear that it had reviewed the voluminous pleadings filed with respect to the attorneys fees motion. The trial court had an opportunity to review volumes of documents provided in support of Kamali’s motion and Caltrans’s opposition to the motion. Kamali’s attorneys, Robert E. Racine and Rob Hennig, submitted declarations with attached detailed time and costs records, declarations from others who participated in activities for the case, and declarations of Kamali’s attorneys fees experts, Carol A. Sobel and V. James Desimone.

Further, Caltrans presented a declaration of more than 100 pages from its expert, Andre E. Jardini, in opposition to Kamali’s motion. Jardini relied upon a 2012 survey of hourly rates performed by the National Law Journal and ALM Legal Intelligence (ALM survey), and concluded that the median rate in California of an attorney with 31 years experience (applicable to Kamali’s counsel Racine) was \$325 per hour and with 19 years experience (applicable to Kamali’s counsel Hennig) was \$310 per hour.²⁰ Caltrans argued for a blended rate of \$307.25 that gave an advantage to plaintiffs by not considering the hourly rates of the more junior attorneys.

²⁰ Kamali’s experts Sobel and Desimone provided support for the hourly rate of \$725 requested by Racine and \$635 requested by Hennig. Desimone declared, “The hourly rates requested by Mr. Racine and Mr. Hennig are well within the range charged by attorneys of similar competence and skill in Los Angeles [C]ounty in my experience.” Sobel provided a similar declaration.

Jardini also stated his opinion in his declaration that the hours charged for each attorney were excessive, in some instances including too many hours for a particular task, in other instances reflecting duplication of effort by attorneys, and elsewhere containing errors in billing. Jardini outlined why he believed that the total hours calculated by Kamali's attorneys should be reduced, concluding that the actual reasonable hours Kamali's attorneys should have billed were 2,540.80. Multiplying this by Jardini's recommended hourly rate of \$307.25, Caltrans argued that the maximum fee recovery should have been \$780,660.80. Caltrans went one step further and argued that this number should be cut in half to \$390,330.40 because Kamali only recovered on two of eight of his causes of action.

Kamali responded to Caltrans's position and the Jardini declaration in its reply, submitting a supplemental declaration of Hennig addressing the ALM survey and Jardini's opinion that the rates sought by Kamali's attorneys were too high and the hours excessive.

Kamali claims that the trial court used Caltrans's calculations to arrive at the final amount. The trial court did not specifically mention relying on the Caltrans's expert's calculations, but the court had discretion to do so if, in its estimation, this was a fair calculation of the value of the legal services performed in the case. (*PLCM Group, Inc. v. Drexler, supra*, 22 Cal.4th at pp. 1095-1096.)

In light of the detailed analysis by Caltrans's expert Jardini of the fees and hours claimed by Kamali's counsel, if the trial court did rely on Jardini's calculations, we cannot say that it was "clearly wrong" in doing so under the circumstances. (*PLCM Group, Inc. v. Drexler, supra*, 22 Cal.4th at p. 1095.) Indeed, if the court relied on calculations made by Caltrans's expert, this would support the attorneys fee award, which was more than \$100,000 above what Caltrans's expert opined was supported in this case.

In addition, the trial court made clear that it considered for its calculation of a lodestar that the jury only returned verdicts for Kamali on two of eight causes of action

alleged in the first amended complaint.²¹ Under California law, “[a]lthough fees are not reduced when a plaintiff prevails on only one of several factually related and closely intertwined claims [citation], ‘under state law as well as federal law, a reduced fee award is appropriate when a claimant achieves only limited success’ [citations].” (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 989-990 [upholding significant reduction in attorneys fees where plaintiff prevailed on single FEHA retaliation claim]; cf. *Wysinger v. Automobile Club of Southern California, supra*, 157 Cal.App.4th at p. 431 [finding no abuse of discretion where trial court awarded fees for entire FEHA lawsuit where plaintiff prevailed on only some claims in light of excellent results and “‘intertwined’” claims].)

In this case, the principal claims on which Kamali did not prevail related to his allegations of discrimination and harassment on the basis of his national origin (Iranian/Persian). It may well be that Kamali’s attorneys spent most of their time litigating Kamali’s two successful claims for failure to accommodate his mental and physical disabilities. However, the determination as to the proper allocation of fees where a party prevails on only some claims is properly left to the sound discretion of the trial court. There is ample evidence in the record for the court to have evaluated the relationship between success on the two claims and the work performed in this case. “The trial court [is] in the best position to understand the relationship between the claims and to determine whether time spent on a related claim contributed to [plaintiff’s] objectives at trial.” (*Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 423.) As we note above, the court’s determination ““will not be disturbed unless the appellate court is convinced that it is clearly wrong”—meaning that it abused its discretion. [Citations.]” (*PLCM Group, Inc. v. Drexler, supra*, 22 Cal.4th

²¹ The court granted summary adjudication as to the cause of action alleging discrimination based on national origin. The court also granted Caltrans’s motion for nonsuit as to the national origin portion of Kamali’s harassment claim, and the jury deadlocked on three causes of action, resulting in verdicts on only two causes of action.

at p. 1095.) We are not convinced that the trial court was “clearly wrong” in reducing the award on the basis of Kamali’s degree of success.

The court also found that a multiplier was not warranted. Our Supreme Court has considered the following factors in deciding whether to apply a multiplier, including (1) the novelty and difficulty of the case; (2) the attorneys’ skill in presenting the issues; (3) the amount involved and degree of success achieved; (4) the extent to which the case precluded the attorneys from accepting other work; and (5) the contingent nature of the work.²² (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1132; *Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

With respect to the trial court’s decision not to apply a multiplier, we again lack findings as to the court’s reasoning. While it is likely that litigation of this case over a three-year period prevented Kamali’s attorneys from taking on other work and that the work was in the form of contingency work, we also note that the case did not present novel or difficult issues, or a result generally benefiting the public interest. The trial court was in a better position to assess the skill level of the attorneys presenting the case and degree of success relative to the claims litigated. Therefore we do not find the court abused its discretion by not applying the requested multiplier.

Given the extensive record before the court and the court’s application of its own expertise and experience handling this case over a three-year period, we cannot say that the trial court abused its discretion in calculating the attorneys fees award. (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at pp. 1095-1096; *Taylor v. Nabors Drilling USA, LP*, *supra*, 222 Cal.App.4th at p. 1249.)

²² Jardini discussed in his declaration why a multiplier was not appropriate in this case, including because (1) any award would come from public funds, citing *San Diego Police Officers Assn. v. San Diego Police Department* (1999) 76 Cal.App.4th 19, 24 [applying a fractional multiplier of .20 to the attorneys fees requested due to limited success, no contingency fee involved and award “would ultimately be borne by the taxpayers”], (2) the case was not novel or difficult, and (3) the case did not serve a public benefit, citing *Serrano v. Unruh* (1982) 32 Cal.3d 621, 648 [“litigation will have no widespread public benefit”].

DISPOSITION

The judgment is hereby modified to delete the phrase in the last full paragraph, “with interest thereon at the rate of seven percent (7%) per annum, from the date of this judgment until paid” and to substitute the following language: “with interest thereon at the rate of seven percent (7%) per annum, from 180 days after the date of the judgment until paid.” The judgment is affirmed as modified. We also affirm the order for attorneys fees. Kamali is entitled to his costs on appeal.

FEUER, J.*

We concur:

PERLUSS, P. J.

WOODS, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.