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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

JODY THULIN,

Plaintiff and Appellant,

v.

GATEWAY UNIFIED SCHOOL DISTRICT,

Defendant and Appellant.

C066535

(Super. Ct. No. 167034)

There is no dispute that defendant Gateway Unified School District (District) denied the plaintiff whistle-blower an opportunity to appear before its governing board (Board) to explain her accusations of illegality and wrongdoing, threatened her with disciplinary action for insubordination, put her on administrative leave, required her to deal exclusively with its legal department, failed to give her notice the Board was meeting to consider her demotion from assistant superintendent to classroom teacher, and then demoted her in a closed session four months after she sent the Board a letter outlining her concerns. Nor is there any dispute that she had worked diligently for the

District for approximately 15 years and never had been criticized for her job performance.¹ Indeed, she had received stellar reviews.

Plaintiff contends there is a material triable issue of fact whether the District's motive in marginalizing and demoting her was retaliatory. The difficult question posed by this appeal is ascertaining whose motive is determinative. The District insists the new superintendent recommended plaintiff's demotion to enable him to build his own leadership team, a team which would have been hampered by plaintiff's confrontational style. In the District's view, the Board deferred to the new superintendent's prerogative to choose his own team.

The District's simplistic defense masks the reality of its decision making during the relevant four-month period. We conclude that plaintiff offers sufficient evidence to raise a triable issue that the Board president, in conjunction with the old and new superintendent and others, engaged in a pattern of adverse employment actions in retaliation for the whistle-blowing. While she bears a heavy burden of proving her accusations at trial, plaintiff Jody Thulin has satisfied her burden in resisting a summary judgment. She deserves, therefore, a trial on the merits of her retaliation claim. We reverse.

FACTS

The District does not suggest, and the record does not support, any notion that plaintiff was anything other than a hard working, conscientious, and loyal employee who, over a nearly 15-year career, was promoted from special education aide to classroom teacher to assistant principal to director of educational services and eventually to assistant superintendent/chief business official (CBO) for the District. Throughout most of this time, John Strohmayer was her advocate and mentor. As superintendent, in fact, he

¹ Plaintiff had some short breaks in service to write a thesis, take a maternity leave, etc.

recruited her to become his CBO, the fifth in approximately three years. Strohmayer worked for the District for 33 years and was scheduled to retire at the end of June 2009. Plaintiff had no interest in becoming superintendent.

By her own admission, plaintiff “had no background in business and this move represented a tremendous learning curve for me.” She enrolled in the USC School Business Managers program, where she not only completed valuable coursework but developed a “network of highly competent CBOs and other professionals that are currently working all across California school districts.”

Plaintiff was to spend about a year as CBO before her long-term relationship with Strohmayer unraveled and she was sent back to the classroom. Before February 2009 Board President Kenneth Matias believed she had been a team player. The relevant story unfolded in a mere four months.

By early 2009 plaintiff believed Strohmayer, on behalf of the District, had engaged in improper bidding practices, the unlawful expenditures of bond funds, and various financial improprieties. She consulted with the professional network she had built through the USC School Business Managers program. She was advised to resign or to report her concerns to the Board. She chose the latter. She did not intend to make allegations or complaints against Strohmayer, and she “was not looking for him to be disciplined in any way.” Rather, she explained, “I wanted the board to give me direction on how to handle it,” “on how we could resolve the problem.”

According to plaintiff, she confronted Strohmayer but was ignored. By February 5 she needed a stress-related medical leave. On February 11 she submitted a written memorandum describing her concerns in some depth to the superintendent and each of the seven members of the Board. She expressed her apprehension that the memo would reflect poorly on a superintendent with whom she had enjoyed a long-term friendship. But she believed she had “an ethical and legal obligation to this full Board of Trustees to report these issues to you.” She wrote, “I fear that by coming forward with this

information that I will now be the subject of negative attacks and retaliation and that my career here will be in jeopardy.”

Plaintiff would have preferred to meet with the Board in closed session to provide all the information to all the Board members at the same time “so that everyone would hear the same information at the same time so that there could be no miscommunication, misunderstanding, or any question about my motives or my goals in disclosing this information.” Ken Matias, the Board president, and Strohmayer, however, demanded to review the information in advance of any meeting, and when plaintiff, fearing censorship, refused to provide it, she was not allowed to make a presentation to the full Board. Strohmayer threatened plaintiff with disciplinary action for insubordination.

The merits of plaintiff’s concerns are not at issue in this appeal. To provide context and an understanding of the investigation that followed, however, we will describe the essence of each of her concerns. The description that follows reflects her point of view as set forth in the written memorandum she ultimately sent to the Board.

No. 1. Plaintiff did not think the terms of a bond financing had been adequately presented to the Board or to the voters. The voters approved funding for building and renovation. According to plaintiff, the District over-expended funds from its 2002 general obligation bonds and therefore issued certificates of participation (COP) in 2006 and 2007. The 2007 COP, however, could not be prepaid, a fact she believed should have been presented to the Board and disclosed to the voters during the 2008 campaign. By electing the no-prepayment option, the District was able to borrow an additional \$145,000 to \$165,000. Plaintiff disagreed with the superintendent about how to handle the 2007 COP and the financial implications of not prepaying the bond.

No. 2. Plaintiff identified several instances in which she believed the District had a conflict of interest and had accepted campaign contributions in exchange for promises of work. A consulting firm agreed to help the District pass a school facility bond with a contingency fee-type agreement. The District would pay nothing if the bond measure

lost, but if it was successful, the firm would serve as the District's financial advisor. Despite the agreement, the firm billed the District \$13,000 for campaign services. Plaintiff refused to pay the invoices. She later discovered the same firm had mishandled campaign funds for other districts.

Nevertheless, according to plaintiff, Superintendent Strohmayer signed a separate contract with an organization that was a mere front for the consulting firm and agreed to pay the organization \$10,000. Plaintiff, the treasurer of the bond campaign, was kept in the dark. Strohmayer and the consulting firm allegedly solicited campaign funds after the election even though the campaign no longer had any debts.

No. 3. Plaintiff also was concerned about violations of bidding laws. As one example, she claimed that the District unlawfully "piggybacked" on another district's bid without putting the purchase of a bus out to bid and without providing the other district all the information it needed at the time it issued its bid. Moreover, plaintiff asserts that the District paid almost \$50,000 more for the bus than the amount listed in the other district's bid.

A second example involved a purchase order for winterization and erosion control. Strohmayer gave plaintiff the purchase order to pay, although the work already had been completed, and consequently, she could not follow Board policy to obtain preapproval. The invoice was in the amount of \$275,550 even though the purchase order request was for \$28,875. Plaintiff complains that because the amount of the invoice required the District to use the competitive bid process and that process had not been followed, she refused to pay the invoice.

A barrage of memos to the Board then followed. Strohmayer felt compelled to defend himself "from what I feel is an unwarranted attack from another employee, Chief Business Official (CBO), Jody Thulin." He contested the truth of her allegations, and a "he said/she said" battle ensued. Both sides wrote more explanatory memos.

Meanwhile, plaintiff repeatedly asked to appear before the Board. Politics and lawyers interceded. The District's lawyer recommended another lawyer in his law firm, Jeffrey Kuhn, to conduct an "independent" investigation of plaintiff's allegations. He ultimately issued a report to the Board. He, too, informed plaintiff she had a right to have complaints against her heard by the Board in open session. On a couple of occasions a meeting was scheduled and then canceled. By contrast, Strohmayer had an opportunity to present his defense to the Board in a closed session. At least two of the Board members, Anderson and Dale Wallace, expressed outrage to Matias and encouraged him to give plaintiff an opportunity to appear before the Board. Matias claimed he would not allow plaintiff to appear before the Board in deference to Strohmayer's due process rights.

Anderson thought it was unfair that Strohmayer could appear before the Board but plaintiff could not. He had several conversations with Matias and Alan Swanson, the District's general counsel, because he was concerned about the "legal ramifications for denying her access to the [B]oard." He reported that Matias was very frustrated with plaintiff and told Anderson that she was behaving like a petulant child. Stymied in his efforts to persuade Matias to allow plaintiff a meeting, Anderson advised plaintiff to get a lawyer because he felt she was being retaliated against and that people were trying to hide information. In his e-mail to plaintiff, he wrote: "So I gathered from that conversation that [Strohmayer, Matias, and Swanson] had spoken and found a way to call off the meeting off [*sic*] to not allow you to present."

Kuhn issued his report at the end of March. The District characterizes the report as a complete vindication of Strohmayer and a rebuke of plaintiff. It is true that Kuhn concluded plaintiff was naive about politics and doing business in a politically charged environment, but the report was hardly a scathing condemnation of plaintiff or the complete vindication of Strohmayer.

For example, Kuhn addresses the allegation of overspending with a notation that cost overruns are common and plaintiff's "limited experience with such projects" might have contributed to her "over-estimation of the amount of control that can be attained over them." But he also admonished the District as follows: "On the other hand, it is important that a district put in place appropriate project and budget management processes and human resources in order to avoid the avoidable cost overruns and the audit exceptions that can otherwise result from the lack of such processes and resources. This investigator believes that everyone concerned would agree that in the past the District has not always been able to put and keep in place such processes and resources, and that has contributed to cost overruns and audit exceptions on some facility construction projects."

The facts surrounding many of plaintiff's alleged improprieties were hotly disputed. Kuhn goes to great length to describe the different recollections each participant had of the key events. Again, we provide but one exemplar reflecting the factual dispute and the investigator's findings. "The inconsistent statements from Ms. Thulin, Superintendent Strohmayr, and Jon Isom concerning who first told whom about the structure of the 2007 COPs during the 2008 bond measure planning and campaign cannot be reconciled. What appears to be clear in hindsight, however, is that there is not a clear record showing that the information about the options actually available to Gateway for the structure of the 2007 COPs or the 2008 General Obligation Bonds was presented to the Governing Board in a meaningful way by the Superintendent, the then-Chief Business Officer, or the financing team. It is this investigator's opinion that such information should have been presented to the Governing Board, and the Governing Board should have then given direction to the staff and the underwriter for the financing as to the Governing Board's preferred structure, and this decision making should have been documented in Gateway's records. The issue here is not whether the substantive decision to structure the 2007 COPs without a prepayment option, or to structure the

2008 General Obligation Bonds as a ‘tax rate extension’ measure were prudent or imprudent decisions; but, rather, whether the process for making those decisions was the most appropriate, transparent, and properly documented under the circumstances.”

Nevertheless, it is also true that Kuhn concluded the District had not violated any bidding laws, its consultant during the 2008 campaign did nothing inappropriate, Strohmayer was not to blame for the departure of the four prior CBOs, and plaintiff acted well beyond her authority in hiring advisors to assist with the 2008 general bonds. Plaintiff was not satisfied with Kuhn’s conclusions and recommendations, and requested an investigation by the grand jury and the Fiscal Crisis and Management Assistance Team (FCMAT) as well as an extraordinary audit by Shasta County Superintendent of Schools Tom Armelino.

FCMAT reviewed the information plaintiff and the District provided, but it did not perform an audit and did not resolve factual conflicts or arrive at conclusions of fact. Based on the limited scope of its review, FCMAT did not recommend further investigation, and Armelino, relying at least in part on the FCMAT review, denied plaintiff’s request for an extraordinary audit. Strohmayer wanted to make sure the new superintendent knew of the denial before he interviewed plaintiff.

Meanwhile, Board member Dale Wallace notified plaintiff that the District had no intention of allowing her to return to work because Strohmayer did not agree with her allegations about illegal activity. He encouraged her to notify the District that she was medically cleared to return. Plaintiff informed the human relations department of her intention to return to work but was told she needed to deal exclusively with the legal department. Soon thereafter, she received a letter from Matias informing her she had been put on administrative leave. Matias wrote, “Since resolution of the matters which are the subject of Mr. Kuhn’s investigation report is still pending, the Board of Trustees of the District believes your planned return to work is premature and so has directed that

you be placed on administrative leave with pay and not return to work until such time as resolution of those matters is reached.”

Two other employees who expressed loyalty to plaintiff also suffered consequences. Strohmayer had mentored Nancy Gillum to take his position when he retired but abandoned his support following plaintiff’s disclosures and Gillum’s failure to join in the group condemnation of plaintiff. Moreover, one of plaintiff’s payroll clerks was accused of misreporting her time and was demoted.

With Strohmayer’s scheduled retirement looming, the Board hired Robert Hubbell to replace him. The Board paid him on a per diem basis during the months of May and June to assist in the transition and to assemble his leadership team. Before he was hired, he did not know plaintiff. The Board, however, provided him a copy of the Kuhn report, and he met with Strohmayer on several occasions. On May 27 he and Strohmayer met with the Board for an “[e]valuation of [a]dministrative [p]ersonnel.” Following this meeting, Nancy Gillum informed plaintiff that Strohmayer and others intended to reassign her to a classroom position because they knew she would hate it.

As events continued to unfold, the Board continued to deny plaintiff a hearing, two Board members forewarned her that she was the subject of retaliation, the superintendent threatened to sue her and forbade any District employees from talking to her during working hours, a close colleague informed her she would be demoted to the classroom, and the legal department had taken over for the human relations department in handling her employment status. In this context, she received a phone call on May 29, 2009, from the newly hired superintendent to schedule a meeting at a neutral site.

Believing that the scheduled meeting was disciplinary, plaintiff invited her lawyer to accompany her. Hubbell reacted negatively. He believed it was inappropriate for a potential member of his team to bring a lawyer to the meeting. He would later tell the Board and repeat in his deposition that one of his primary motives in recommending plaintiff’s demotion was precisely because she asked her lawyer to attend their meeting.

However, the lawyer left as soon as he was told the purpose of the meeting was not disciplinary, but an opportunity for the new superintendent to meet the District's administrative staff. Hubbell asked plaintiff the same 10 canned questions he asked each member of his potential leadership team during their respective interviews. The meeting lasted about 30 minutes. It would be the one and only time plaintiff would meet with Hubbell. He testified in his deposition that he did not conduct any further investigation into her qualifications, nor did he talk to any District employees about plaintiff's history with the District, her work ethic, her character, or her effectiveness.

Nevertheless, Hubbell concluded that plaintiff was too "confrontational." As a result, he believed that she would not fit in with his team, in part because she had reported a number of allegations as set forth in the Kuhn report. He was careful not to talk to any members of the Board to obtain their assessments of plaintiff. He insisted he made an unbiased and independent determination that she would not be a team player.

The only agenda item appearing for a Board meeting on June 29 was "Discipline/Dismissal/Release." Plaintiff was not given notice of the meeting. Hubbell recommended that the Board reassign plaintiff to a classroom position. Neither he, nor any of the Board members, considered alternative administrative positions. None of the five attending Board members asked him any questions or probed about his motivation. Most believed it was the new superintendent's prerogative to select his own team. None had any complaints with plaintiff's job performance. They deferred to Hubbell's judgment and voted to reassign plaintiff to show their support for the new superintendent. They did not discuss the Kuhn report or the validity of any of plaintiff's concerns. Board member Anderson was not present at the meeting. The five members who were present voted to support the new superintendent's recommendation, and plaintiff was dismissed from her position as CBO, effective the following day.

Plaintiff was never provided the opportunity to appear before the Board. The president of the Board never spoke to her about her concerns. When asked if plaintiff did

anything wrong by reporting to the Board, Matias responded: “I wouldn’t characterize it as wrong. It was maybe not the appropriate procedure to follow.” He conceded he did not know what procedure she should have followed. Plaintiff resigned and filed the underlying whistle-blower complaint for retaliation. The trial court granted the District’s motion for summary judgment and plaintiff appeals.

DISCUSSION

I

“Swift Blow” and a “Cat’s Paw”

Labor Code section 1102.5, subdivision (b) provides that an “employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.” To establish a prima facie case of retaliation, a plaintiff must show “(1) he or she engaged in a protected activity; (2) the employer subjected the employee to an adverse employment action; and (3) a causal link between the protected activity and the employer’s action.” (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453 (*Akers*).)

The District concedes that plaintiff’s disclosures constituted protected activity under the statute. The dispute is whether the District retaliated. We begin by debunking two premises underlying the District’s motion for summary judgment. The District contends that the only potential adverse action is plaintiff’s transfer to the classroom and the only relevant decision maker is the Board, which, exercising its prerogative, deferred to the wishes of the new superintendent to create his own leadership team. The District’s crabbed view of retaliation has been soundly rejected.

In *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028 (*Yanowitz*), the California Supreme Court accepted an expansive view of what constitutes retaliation under an analogous statute. (*Id.* at pp. 1035-1036; Gov. Code, § 12940, subd. (h).) The

employer's retaliatory conduct there, as here, consisted of a series of acts over time, some subtle and some that were not. The employee complained of unwarranted negative performance reviews; unwarranted criticism; the employer's refusal to allow her to respond to unwarranted criticism; the employer's refusal to allow her to provide necessary resources for an employee, which triggered a negative review; and the employer's solicitation of negative feedback from her staff. (*Yanowitz*, at p. 1055.) The employer insisted that none of these acts constituted an adverse employee action.

The Supreme Court rejected the employer's assertion that it was improper to consider the retaliatory acts collectively, scolding, "[T]here is no requirement that an employer's retaliatory acts constitute *one swift blow*, rather than a series of subtle, yet damaging, injuries." (*Yanowitz, supra*, 36 Cal.4th at p. 1055, italics added.) Despite the fact that the employee had never been transferred, demoted, or discharged, the employer's acts, when considered collectively, could have materially affected the terms and conditions of her employment. (*Id.* at p. 1036.) Thus, "a series of separate retaliatory acts collectively may constitute an 'adverse employment action' even if some or all of the component acts might not be individually actionable." (*Id.* at p. 1058.)

Secondly, the District would have us focus solely on the self-serving declarations of the five voting Board members that their motives were pure; that is to say, they had no intention of retaliating against plaintiff, but rather, they wanted to support their new superintendent's recommendation to remove her as assistant superintendent and CBO to enable him to create a cohesive leadership team. There are at least two reasons to reject the District's narrow view of the decision-making process.

First, "[r]etaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into

account the unique circumstances of the affected employee as well as the workplace context of the claim.” (*Yanowitz, supra*, 36 Cal.4th at p. 1052.) Retaliation “requires a factual inquiry and depends on the employer’s other actions.” (*Akers, supra*, 95 Cal.App.4th at p. 1457.)

Second, there may be a web of actors with varying degrees of influence over a fluid and complicated decision-making process. Committees or boards cannot be used as a mere cover for the retaliatory motives of those with the real power of influence in an organization. *Shager v. Upjohn Co.* (7th Cir. 1990) 913 F.2d 398 (*Shager*) provides a prime example.²

In *Shager*, a “Career Path Committee” fired an older worker and “there [was] no evidence that any of its members harbored any hostility to old workers or preference for young ones.” (*Shager, supra*, 913 F.2d at p. 404.) A young district manager, who was not a member of the committee, apparently did. The question thus presented was whether the manager’s hostility should be imputed to the committee. Penning the now well-worn metaphor of a “cat’s-paw,” the court refused to allow the employer to hide the manager’s hostility behind a sham committee that, as a practical matter, did little.

The court explained: “The committee’s deliberations on the question whether to fire Shager were brief, perhaps perfunctory; no member who was deposed could remember having considered the issue. A committee of this sort, even if it is not just a liability shield invented by lawyers, is apt to defer to the judgment of the man on the spot. Lehnst was the district manager; he presented plausible evidence that one of his sales representatives should be discharged; the committee was not conversant with the possible

² “ ‘Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.’ [Citation.]” (*Johnson v. United Cerebral Palsy/Spastic Children’s Foundation* (2009) 173 Cal.App.4th 740, 757, fn. 10.)

age animus that may have motivated Lehnst's recommendation. If it acted as the conduit of Lehnst's prejudice -- his cat's paw -- the innocence of its members would not spare the company from liability." (*Shager, supra*, 913 F.2d at p. 405.)

Similarly, in *Bergene v. Salt River Project Agr. Imp. and Power* (9th Cir. 2001) 272 F.3d 1136 (*Bergene*), the employee alleged that her former supervisor told her she would not be promoted if she demanded too much in the settlement negotiations involving her pregnancy discrimination claim. This supervisor did not make the ultimate decision regarding the promotion, but he did play an influential role in the selection process. (*Id.* at p. 1141.) The court found the evidence of his involvement sufficient to defeat a summary judgment. The court wrote, "Even if a manager was not the ultimate decisionmaker, that manager's retaliatory motive may be imputed to the company if the manager was involved in the . . . decision." (*Ibid.*)

Perhaps the most important point for our purposes is that the degree to which the final decision maker's decisions were based on the advice of those who harbored retaliatory motives or were based on an independent investigation is a question of fact. (*Gee v. Principi* (5th Cir. 2002) 289 F.3d 342, 346.) As the court in *Gee* aptly wrote: "We take note, however, of the Supreme Court's explanation that a factfinder may infer the ultimate fact of retaliation from the falsity of the explanation. [Citation.] In such cases, a plaintiff may withstand a motion for summary judgment without adducing additional, independent evidence of retaliation. This case provides a straightforward application of this standard. The Secretary has offered a plausible nonretaliatory explanation for Gee's nonselection. Gee, however, has provided sufficient evidence to cast doubt on his explanation, thereby enabling a reasonable factfinder to conclude that it was false and that the decision not to hire her was already made by the end of the key meeting. Resolution of this dispute is properly within the province of the trier of fact, and therefore summary judgment was inappropriate." (*Id.* at p. 348.)

Of course this is the beginning, not the end, of our analysis. It is essential to define the scope of our examination of plaintiff's evidence, however, as we undertake our appellate duty to ascertain whether there are genuine issues of material fact that the District retaliated against plaintiff for making the protected disclosures of illegality and improprieties. In sum, our task is much broader than the District suggests. We will review the evidence of the District's alleged retaliatory conduct from the time plaintiff made the disclosures until the time she was removed from her position. And we will consider the complicated web of relationships to determine if there is a factual issue of who influenced whom during the four months at issue. But first we will dodge the debate between the parties as to the quantum of evidence the plaintiff must produce to escape a summary judgment in a retaliation case.

II

The McDonnell Douglas Crutch

A retaliation claim may be proved in two different ways. "When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." (*Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1221 (*Godwin*).) Indeed, very little evidence is necessary. (*Ibid.*) " 'Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption.' [Citation.]" (*Ibid.*) Plaintiff provides a litany of evidence she characterizes as "direct" and urges us to eschew the *McDonnell Douglas* crutch used to aid a plaintiff who has only circumstantial evidence to prove retaliation. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-805 [36 L.Ed.2d 668] (*McDonnell Douglas*).) "[F]or of course direct proof of [retaliation] is a permissible alternative . . . to dancing through the *McDonnell Douglas* quadrille." (*Shager, supra*, 913 F.2d at p. 401.)

It is true that a plaintiff also may prove retaliation by circumstantial evidence. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138.) The plaintiff can then

lean on the burden-shifting analysis provided in the well-known *McDonnell Douglas* case and adopted by our Supreme Court in *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68. Initially, the plaintiff bears the mild burden of establishing a prima facie case. “Once established, the defendant must counter with evidence of a legitimate, nonretaliatory explanation for its acts. If the defendant meets this requirement, the plaintiff must then show the explanation is merely a pretext for retaliation.” (*Mokler, supra*, 157 Cal.App.4th at p. 138.)

Plaintiff’s evidence of pretext “must be ‘specific’ and ‘substantial.’ ” (*Godwin, supra*, 150 F.3d at p. 1222.) The District insists plaintiff offered no direct evidence of pretext, and the circumstantial evidence was neither specific nor substantial. In the District’s view, the trial court properly ruled that plaintiff failed to sustain her burden of demonstrating a triable issue that its stated motive to allow the new superintendent the freedom to establish his own leadership team was a mere pretext to hide its true motive to retaliate against her for her protected activity.

The debate over whether plaintiff’s evidence is direct or circumstantial is mere bickering over an issue of no real consequence where, as here, plaintiff’s evidence is certainly substantial and more than satisfies us that there are genuine issues of material fact. We provided a catalogue of that evidence in our summary of the facts told, as we must, in the light most favorable to plaintiff. We evaluate the collective weight of that evidence now.

As an assistant superintendent, plaintiff served at the pleasure of the Board. (See, e.g., *Grant v. Adams* (1977) 69 Cal.App.3d 127, 130-131.) Her employment remained “at will,” and she was subject to dismissal or demotion for no good reason at all. (*Quirk v. Board of Education* (1988) 199 Cal.App.3d 729, 735.) We agree the District offered a legitimate reason for the ultimate adverse action it took against her; that is, a new superintendent can certainly choose new personalities compatible with his or her own style of leadership. And certainly the fact that plaintiff engaged in protected activity

did not immunize her from termination. (*Heinemann v. Computer Associates International* (9th Cir. 2009) 319 Fed.Appx. 591, 595-596.)

The problem with the District's argument, however, is that the demotion and transfer was not the only adverse employment action plaintiff suffered, and a reasonable jury, based on the collective acts taken by a variety of persons wielding power in the District, could infer a retaliatory motive hiding behind what would otherwise have been a legitimate reason for ultimately transferring her back to the classroom.

First, there is the issue of timing. The proximity in time between the protected activity and the allegedly retaliatory conduct can give rise to an inference of a causal link between the two. (*McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 388.) Plaintiff wrote her initial letter to the Board expressing her concerns over the District's financial practices in mid-February 2009. Then Superintendent John Strohmayer immediately threatened disciplinary action for insubordination. Plaintiff asked time and time again for a meeting with the Board to explain her concerns. Even the lawyer hired by the District to investigate those concerns advised her to exercise her statutory right to appear before the Board. Yet, while Strohmayer was able to appear before the Board, plaintiff was not. Board President Ken Matias refused her repeated requests. Meetings to give her the opportunity to appear were scheduled and then canceled. By the time the Board considered the new superintendent's recommendation to demote and transfer plaintiff, she was given no notice at all. Only four months had lapsed between the time she made her disclosures and when she was gone. We believe a jury could reasonably infer an improper motive, and if an improper motive can be drawn, there must be a trial.

The District contends the timing is inconsequential because a new superintendent was hired in May and he remained unbiased and untainted by the course of events that preceded his tenure at the District. He claims he did not seek or obtain counsel about plaintiff from anyone at the District and he did not know any of the players in the dispute

before he was hired. Thus, his involvement, according to the District, dispels any possibility of retaliation, for his motives were pure and his distance from the nasty drama insulated him from even the appearance of impropriety.

The District's argument presupposes that the new superintendent was the only actor, that the demotion or transfer was the only adverse action, and that there were no other reasonable inferences to be drawn from the events that occurred before he came, to up and through the Board meeting in which the decision was made to transfer plaintiff back to the classroom. We conclude that none of these premises withstands scrutiny.

We have already mentioned that Strohmayer threatened plaintiff with disciplinary action for insubordination in making her disclosures and Matias refused to allow her to appear in closed session before the Board. Just as we need not determine whether each act separately constitutes an adverse action, we also need not limit our analysis of motive exclusively to the new superintendent. Indeed, there is evidence to suggest that Strohmayer and Matias conferred regularly. Two of the other Board members, Dave Anderson and Dale Wallace, both informed plaintiff that Strohmayer and Matias, and perhaps others, were retaliating against her and had no intention of allowing her to return to work. As the acting superintendent at the time and as the acting president of the Board, both Strohmayer and Matias were in positions that enabled them to materially affect the terms and conditions of plaintiff's employment. Thus, there is a reasonable inference to be drawn that plaintiff's fate was sealed before the new superintendent was even hired.

Anderson's and Wallace's insights proved accurate. Strohmayer instructed all employees not to talk to plaintiff, thereby ostracizing and marginalizing her from her coworkers and subordinates. Matias wrote a letter informing her that she would not be allowed to return to work from her leave due to the pending investigation. And of course, as mentioned above, Matias continued to refuse to allow plaintiff to appear before the Board, even over the vehement protestations of other Board members. Additionally,

Nancy Gillum, who herself had been a candidate to replace Strohmayer before the fallout from plaintiff's disclosures, also reported to plaintiff that following a meeting between the old and new superintendents in late May, Strohmayer and others intended to send her back to the classroom because "she's going to hate it."

This is not to say that a jury will necessarily make all the inferences that favor plaintiff's position. The District counters the inferences plaintiff draws with inferences of its own. For example, the District argues that plaintiff could have appeared in open session, Strohmayer's influence was waning as he neared retirement, Matias was following the advice of counsel, and so on. But the conflicting inferences to be drawn from the evidence only highlight the need for a trial wherein jurors will have the benefit of live testimony and the opportunity to assess the witnesses' credibility. We cannot predict whom they will believe and what inferences they will draw. Clearly, however, a retaliatory pattern can be reasonably inferred from the collective acts of Strohmayer and Matias leading up to and including the final decision to demote plaintiff.

Consistent with the Supreme Court's directive to "consider plaintiff's allegations collectively under a totality-of-the circumstances approach" (*Yanowitz, supra*, 36 Cal.4th at p. 1052, fn. 11), we conclude there is substantial evidence to support plaintiff's allegations that Hubbell was not alone in seeking to retaliate and the demotion was not the only act that constituted an adverse employment action. Nor do we accept the District's attempt to sanitize its new superintendent and to divorce him from the internal politics of the District.

The District would have us ignore the crucial fact that he was given a copy of the Kuhn report, an investigative report commissioned by the Board, even before he was hired for the position. The Board therefore made plaintiff's allegations of illegality and financial mismanagement well known to Hubbell before he accepted the position. Hubbell candidly admitted he was influenced by the Kuhn report and the author's analysis was one of the reasons he recommended that plaintiff be removed from his

administrative team. Although the jury is certainly free to accept Hubbell's declaration that he insulated himself from the influence of others, there is ample evidence from which a reasonable juror might draw a contrary inference, particularly in light of the minimal contact Hubbell had with plaintiff, his failure to investigate her qualifications beyond what was mentioned in the Kuhn report, and the subtle and not-so-subtle messages he may have taken from Strohmayer and Matias.

A juror, for example, might find it unlikely that a new superintendent would seek to remove a valuable veteran employee after only a brief question-and-answer session using canned questions applicable to his administrative team. Hubbell, of course, admitted to the Board and in his deposition that he did not believe plaintiff would fit into his team because she brought an attorney to the initial meeting he scheduled with her. He found such behavior "confrontational." But a juror might infer that plaintiff brought the lawyer only because she feared the purpose of the meeting was the commencement of a disciplinary action since she had been denied an appearance before the Board for months and, once assured the only purpose was for the superintendent to have an opportunity to meet her, her lawyer immediately left the meeting. Again, viewing the totality of all the circumstances, including the workplace context of the claim, we conclude the jury could draw a reasonable inference that Hubbell's decision-making process was tainted by the politics of retaliation.

Plaintiff had been a faithful servant of the District for many years and presented as a trusted steward of the District's finances. She had no ambition to ascend higher; she did not covet the position of superintendent. She sought additional training and support to master the skills she needed as the CBO for the District. She testified in deposition she did not intend to bring a complaint or charge against Strohmayer, a man who had been her friend and mentor for many, many years, but she sought the Board's direction on how to handle a variety of issues that appeared to her to be either illegal or improper or both. Thus, a jury might conclude that plaintiff was motivated by her personal code of ethics,

not ambition, and that her purported naiveté, inexperience, and temperament were words carefully chosen to mask a retaliatory motive.

Moreover, it is not certain how the Kuhn report would be regarded. The jury might question how independent the investigation was given that Jeffrey Kuhn is one of the city attorney's partners and the city attorney had been intimately involved in the District's decisions to deny plaintiff an appearance before the Board and to put her on an administrative leave. Even Kuhn did not characterize plaintiff's concerns as baseless. To the contrary, he admonished the District to establish better policies and procedures. The jury, however, might accept the District's position that the Kuhn report vindicated Strohmayer and cast some aspersions on plaintiff, in particular that she was naive, inexperienced, and had overstepped her authority. Because there are many different inferences to be drawn from the report and about the report, a trier of fact, and not a Court of Appeal, must decide which of those inferences should be drawn.

In sum, a review of the totality of circumstances that occurred between mid-February, when plaintiff wrote her initial letter to the Board describing her concerns, and late June, when five members of the Board accepted the new superintendent's recommendation to remove her as an assistant superintendent and CBO, provides an ensemble sufficient to defeat summary judgment because a jury reasonably could infer the District's allegations constituted a trumped-up campaign to justify its retaliatory responses to her. Plaintiff provided specific and substantial evidence of a number of acts by a number of powerful people in the District who collectively threatened her, ostracized her, marginalized her, denied her notice and a hearing, and ultimately removed her from her position.³ This evidence, if accepted by a trier of fact, would be sufficient to sustain a

³ Our conclusion does not rely on the admissibility of any of the contested e-mails improperly obtained from the District. There is the necessary quantum of evidence to defeat the summary judgment in the absence of all e-mails.

jury finding that the District's asserted reasons for transferring her were pretextual. We are therefore compelled to reverse the summary judgment granted to the District.

III

The Cross-Appeal

In its cross-appeal, the District contends the trial court abused its discretion by denying its motion to dismiss the action as a terminating sanction for misconduct during discovery. We can find no abuse of discretion.

A. A Few Relevant Facts

In June 2009 Kendall Lynn, an African American, was the director of technology for the District. Advised by Hubbell that layoffs in the technology department appeared likely, Lynn consulted with Robert Thurbon, who was then representing plaintiff. The layoff became a reality on August 17. Lynn then made a backup copy of every e-mail in the District's system, including 39,312 e-mails and over 100,000 pages. Although he realized he needed authorization before he could access and copy the e-mails, he copied them without anyone's authorization or approval. Thurbon filed separate wrongful termination lawsuits on behalf of both Thulin and Lynn; Thulin for whistle-blower retaliation and Lynn for racial discrimination.

In May 2010 Lynn informed Thurbon that he possessed e-mails he believed were relevant to his case. Thurbon told Lynn he could send the e-mails to his office and he would review them at a later date. Lynn sent the e-mails on a thumb drive, and Thurbon's staff copied them onto the law firm's computer system. He claims he researched whether Lynn properly acquired the e-mails and determined that because Lynn was director of information and technology, he was acting within the course and scope of his employment at the time he copied the e-mails.

On June 14 Lynn informed Thurbon there were e-mails from Strohmayer showing that " 'what the District did to Jody was bad.' " At his deposition on June 23, Lynn

admitted that all the e-mails were District property and he was not authorized to access them.

Nevertheless, four days later Thurbon instructed Thulin to search the e-mails on his office computer to determine if they were responsive to the District's request for production of documents. He did not inform the District or its lawyers that he possessed the e-mails. Thulin identified 147 e-mails she considered responsive to the District's request and gave Thurbon three e-mails she believed were relevant to her opposition to the motion for summary judgment. According to Thurbon, his associate produced the 147 e-mails without reviewing them.

Thulin's deposition began the following day, which was June 29, 2010. Deadlines were looming. The hearing on the motion was scheduled for July 12. Discovery would be cut off on July 19, with the trial scheduled for August 17. Thurbon had no further depositions scheduled and no other discovery requests pending.

During the deposition, Thulin testified about e-mails between the District and its attorneys. Thurbon did not intervene to admonish his client not to disclose privileged information contained in the e-mails. The District learned, for the first time, that Thurbon was in possession of its e-mails.

On June 30, 2010, the District appeared ex parte to seek a temporary restraining order compelling Thurbon to return all copies of the e-mails and to refrain from using any of the information he acquired from their improper acquisition. Finding the e-mails were wrongfully obtained, the court granted the temporary restraining order and thereafter granted the District's request for a preliminary injunction. The trial date was continued and the discovery deadline was extended. The court entered a permanent injunction compelling Thurbon to return all copies of the 147 e-mails and ordering Thurbon and Thulin not to use, discuss, or disseminate the e-mails. Thurbon would not reveal how he acquired the e-mails.

At the conclusion of the hearing on the preliminary injunction, one of Thurbon's partners served the District with various discovery requests, including a request for admissions and for production of documents. The requests included specific language targeting the e-mails that had been wrongfully acquired.

Thurbon gave the e-mails to an independent lawyer to determine which documents were privileged. On August 23 Thurbon submitted all the e-mails to the court, identifying the documents the independent counsel determined were nonprivileged public records as well as the sealed documents he determined were potentially privileged. The court refused to review any e-mails "unless they have been lawfully obtained through proper discovery." Thurbon insisted then, as he does now, that he did not read any of the e-mails other than the three "smoking guns" he attached to the opposition to the motion for summary judgment.

On September 9, 2010, the court denied the District's request to dismiss Thulin's lawsuit because Thulin herself was not guilty of any wrongdoing. The court granted the lesser evidentiary sanction preventing the use of the stolen e-mails at trial. Finally, the court granted the District's motion to disqualify Thurbon and his law firm from representing Thulin in the lawsuit.

The trial court explained: "Thurbon's conduct was deliberate and egregious. He made a deliberate decision to give the e-mails to Thulin despite the fact that the manner in which they were obtained was questionable."

B. No Abuse of Discretion

Because a trial court's discretion to grant or deny terminating sanctions is so broad, appellate review is astonishingly narrow. We must draw all inferences in support of the trial court's ruling without either reweighing the evidence or reevaluating the credibility of witnesses. (*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 765.) To reverse, we must find " 'manifest abuse exceeding the

bounds of reason.’ [Citation.]” (*Ibid.*) Such a narrow scope of appellate review offers us the welcome opportunity to provide a refreshingly brief analysis.

To be clear, plaintiff’s lawyer and coworker were guilty of wrongdoing; plaintiff was not. Her coworker, the director of technology, copied the e-mails from the District’s system and her lawyer asked her to review hundreds of e-mails. There is absolutely no evidence to suggest she was complicit in any way. There is certainly an abundance of evidence to support the trial court’s finding that she was guilty of no wrongdoing. Her lawyer has now been disqualified and the coworker is pursuing an entirely different action for racial discrimination.

The District finds the theft of the e-mails so egregious as to warrant a dismissal of the lawsuit. It insists that plaintiff’s knowledge of the contents of the e-mails compromises the integrity of the proceedings and renders a fair trial impossible. But, as even the District recognizes, terminating sanctions are a drastic remedy to be used sparingly. (*Trail v. Cornwell* (1984) 161 Cal.App.3d 477, 488-489.) “It is well established ‘the purpose of the discovery sanctions “is not ‘to provide a weapon for punishment, forfeiture and avoidance of a trial on the merits’ ” . . . but to prevent abuse of the discovery process and correct the problem presented’ ” (*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 301.)

We agree with plaintiff that the trial court is well equipped to control the admissibility of evidence to insure the District obtains a fair trial. Moreover, as plaintiff points out, the District has now conceded that the majority of the e-mails are not confidential or privileged and has made them public in response to a writ petition. We cannot say the trial court abused its discretion by refusing to dismiss the action when plaintiff is innocent of any wrongdoing and the court has more measured remedies available to protect the District and the integrity of the judicial process.

DISPOSITION

As to plaintiff's appeal, the judgment is reversed and the case is remanded for further proceedings; we affirm the judgment as to the District's cross-appeal. Plaintiff shall recover costs on appeal.

RAYE, P. J.

We concur:

HULL, J.

BUTZ, J.