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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LUIS SANDOVAL,

Plaintiff and Respondent,

v.

AUTOZONE, INC.,

Defendant and Appellant.

D068227

(Super. Ct. No. 37-2012-00096309-  
CU-OE-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joan M. Lewis, Judge. Reversed.

Arena Hoffman, Ronald Arena and Michael Hoffman for Defendant and Appellant.

Bohm Law Group, Lawrance A. Bohm, Kelsey K. Ciarimboli, Kate A. Langmore and Zane E. Hilton; Charles E. Moore for Plaintiff and Respondent.

A jury found AutoZone, Inc. wrongfully terminated employee Luis Sandoval for complaining about unlawful harassment, and awarded Sandoval damages of \$20,640.

AutoZone contends the judgment must be reversed because the court failed to properly

respond to a jury question to clarify that the "unlawful harassment" complaint must have been about Sandoval's reasonable belief that he had been sexually harassed. We determine the court erred by failing to provide this clarification and the error was prejudicial. We thus reverse the judgment.

## OVERVIEW

Sandoval originally sued Autozone for supervisor sexual harassment, retaliation for complaining about the sexual harassment, and wrongful termination in violation of public policy. Before trial, the court granted AutoZone's summary adjudication motion on Sandoval's sexual harassment cause of action, finding the claimed sexual harassment was not sufficiently severe or pervasive. But the court found triable factual issues on Sandoval's statutory and common law claims alleging he was terminated for *complaining* about the claimed sexual harassment.

During the trial on these latter claims, Sandoval presented evidence that he was fired shortly after he reported his supervisor had harassed him in several different ways: grabbing Sandoval's buttocks, snapping his fingers at Sandoval in a derogatory manner, and wrongfully accusing Sandoval of not properly performing his job.

At the conclusion of the evidence, the court instructed the jury (without objection) that to recover on his claims Sandoval must prove he was fired for complaining about conduct he reasonably believed to be "unlawful harassment." Although the court and the parties understood that the unlawful harassment was limited to the complaint about the buttocks-grabbing incident, the jury was not specifically instructed on this concept.

During jury deliberations, the jury asked for a definition of "unlawful harassment." After conducting two hearings during which both parties' counsel requested supplemental instructions, the court declined to provide any additional guidance. The jury then returned a special verdict finding AutoZone retaliated against Sandoval for complaining about conduct he "reasonably believed was unlawful harassment" and the termination was a "substantial factor" in causing harm to Sandoval. The jury awarded Sandoval \$20,640 in past economic loss, but found he did not prove entitlement to emotional distress damages or punitive damages. The court later awarded attorney fees of \$342,946 (subject to a separate appeal).

On appeal, AutoZone contends the court erred in refusing to define "unlawful harassment" in response to the jury's specific question during deliberations. We determine the court's refusal to provide a supplemental instruction on this issue constituted prejudicial error. The jury's understanding of the meaning of "unlawful harassment" was critical to its evaluation whether AutoZone's termination was legally actionable. If the jury had been properly instructed, it is reasonably probable it would have reached a different result. Accordingly, we reverse the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

Because the appellate issue concerns claimed instructional error, we summarize both the plaintiff's case and the defense case in the factual section. We describe the relevant evidence and arguments in some detail (including the strengths and weaknesses of each party's case) because of the necessity that we make determinations on whether the asserted instructional error was prejudicial.

### *Sandoval's Case*

In about April 2010, Sandoval began working as a part-time sales associate in a Chula Vista AutoZone store, an auto parts retailer. During the next three months, Sandoval's work met company standards. AutoZone nonetheless terminated his employment on July 29, two weeks after Sandoval complained (orally and in writing) about the behavior of his supervisor, Daniel Borquez.

Borquez's conduct that was the subject of Sandoval's complaint occurred on the evening of July 16. On that date, Sandoval arrived at the store at about 5:00 p.m. to work his scheduled closing shift. Two other AutoZone employees were working that evening: Borquez (the assistant store manager) and Mario Gonzalez (the auto parts sales manager).

According to Sandoval's trial testimony, Borquez engaged in several different acts of "harassment" that evening. First, Borquez was "hovering" over him, snapped his fingers at Sandoval, and repeatedly told him in Spanish to hurry up ("piguale, piguale"). Second, Borquez wrongly accused him of putting an automobile part in the wrong bin, and the two began yelling at each other. Third, Borquez grabbed Sandoval's buttocks while Sandoval was waiting on a customer. In response to this last incident, Sandoval said " 'What the hell?' " and that he could not continue working under those conditions. Borquez then continued snapping his fingers at Sandoval, telling him (in Spanish) to hurry up. Borquez and Gonzales were both laughing at Sandoval. Sandoval felt they were making fun of him.

Sandoval testified that based on the buttocks-grabbing incident, he left the store in anger before his shift was over, and on his way out he took a poster with the phone

numbers of the store manager, district manager, and regional manager. He felt humiliated, angry, disappointed, and ridiculed. Sandoval believed Borquez's grabbing his buttocks constituted sexual harassment. He then called the store manager and district manager and left voice mails regarding the claimed harassment, including the buttocks-grabbing incident. The district manager wrote a memorandum stating that on the voice mail message, Sandoval said "that for [a] day or 2 [he has] been harass[ed] by Danny Borquez . . . [who had] been grabbing his behind."

Later that evening, Sandoval went to his father's house, and his father helped him by writing a letter to management about the incident. The letter stated:

"This is to let you know that this day July 16, 2010 I arrived to start my shift and worked from 5:00 PM until 8:40 PM after finishing ringing up a customer. The reason for this interruption is due to an unfortunate incident involved by the assistant manager by the name of Daniel Borquez when he abruptly asked me if I had put away a fuel filter the night before and I answered that I had not put that part away.

"Daniel Borquez proceed it to follow me around the store emphasizing the fact that he did not believe me what I just said and kept pressing me that I had intentionally put the merchandise in the wrong bin. [¶] . . . Mario Gonzalez was present at the time.

"I proceed it to explain to Daniel that his allegations were inapropriate and that it is not my style to wrongfully put the merchandise on another bin. I asked [him] to tell me what auto parts I did wrong so that I could put them in the right location and at this time he ignored that and stated that every time when we close the store there is always a problem.

"He immediately wanted me to go to the manager office and I objected because I read him to be against all reason and clearly told him that I can no longer work under this type of harassment.

"This is the reason that I am bringing this matter to your attention.

"In addition for the last four weeks [Borquez] is in the habit of grabbing my buttocks and snapping his fingers for me to speed up, pressing the fact that the sale was more important than the customers all this in front of the customers as if he had some type of jealousy towards me and resenting the fact that customers ask for my name to help them.

"Tonight incident was the tip of the iceberg and I can no longer work under this condition of harassment and will proceed to take legal action. [¶] On the other hand I liked this job helping customers and could one day go in the direction of management. [¶] I am the sole provider of my family and enjoyed working for the Auto Zone." (Spelling and grammar as in original.)

At trial, Sandoval said his father typed this letter and had mistakenly written that Borquez had grabbed his buttocks for the past four weeks. Sandoval said the true facts were that the July 16 incident was the only time Borquez had grabbed his buttocks. Sandoval also clarified that Borquez's snapping of his fingers had occurred several times in front of customers during the previous week.

The next day, store manager Fernando Fisher discussed the incident with Borquez, but Borquez did not prepare a written report of any alleged misconduct, as is required by AutoZone policies. Borquez said he did not prepare the report because there was not enough time and because Sandoval left the store before he could do so. Borquez was later demoted from his assistant manager position.

Several days after the incident, AutoZone district manager Kenneth McFall told Sandoval to meet him at the San Ysidro AutoZone store. When Sandoval arrived at the store, McFall gave Sandoval the phone to speak with AutoZone's human resources manager, Staci Saucier. Saucier asked Sandoval several times whether the buttocks

touching was only a "love tap." When Sandoval denied this, Saucier said she did not want to talk about the touching, but she wanted to talk about the incident regarding Sandoval's placing the auto part in the wrong bin.

Saucier then asked Sandoval to write responses to her questions, which he did.

Saucier first asked Sandoval to discuss the "incident that occurred the week of July 4th?"

In response, Sandoval wrote:

"Borquez has been harassing me by snapping his fingers in front of customers, telling me to hurry up. . . . Always following me around and telling me to hurry up that I am to[o] slow. [¶] When I was . . . helping a customer in the parts counter[,] Danny Borquez came behind me and grabbed my buttocks and kept walking away. I turned around and told him why he did that and that I didn't appreciate what he had done. The customer that I was helping even witnessed the incident and [the customer] told him that those were games for gays."

When asked to describe "the incident . . . between you & [Borquez]," Sandoval wrote:

"Around 8:40 p.m. I was helping a customer. When I finished ringing up that customer[,] Danny came up to me [w]hile Mario Gonzales . . . was next to me and asked me if I had put away the night before a fuel filter. And I told Danny 'No!' That's when Danny said that he did not believe me and that he wanted me to go to the office and [I] told him no because . . . all he wanted was to keep harassing me and calling me a liar. He also added that ever since he has closed with me that there is always problems. And that [I] always cause problems. . . . [¶] . . . [¶] [Borquez] snapped his fingers at me and told me that if I was leaving to hurry up and saying 'piquale, piquale' [Hurry up! Hurry up]!"

When asked to describe his conversation with coworker Gonzales "during this incident,"

Sandoval wrote:

"When Danny was telling me he did not believe me about me putting the fuel filter away I turned to . . . Gonzales and told him "Can you believe this?!! And then told him that I can no longer finish my shift. I cannot work under these harassing conditions. [¶] . . . [¶] . . . I said . . . I cannot work at a place [where] I'm being called a liar! [and] being harassed, pushed and physically assaulted."

When asked whether Borquez "physically push[ed] you," Sandoval wrote: "The pushing is snapping his fingers constantly and telling me in front of customers to hurry up that I'm too slow." Sandoval also said that both he and Borquez yelled at each other in front of customers.

At trial, Sandoval acknowledged that in responding to these questions he did not clearly state that the buttocks-grabbing incident had occurred on July 16. He testified he was confused when he was writing these answers because Saucier did not want him to discuss the buttocks-grabbing incident and wanted him to instead focus on the incident regarding the auto parts. He also pointed to a portion of a sentence that he crossed out as reflecting his intent to describe this incident as occurring on July 16. He testified that he intended to write that Borquez had grabbed his buttocks on July 16, and that he left the store because of this incident. But he said he was nervous and uncomfortable and he had no privacy during the meeting. Sandoval testified: "[F]irst they tell me to write about one date and one incident and then I was confused. My whole story was the harassment, the grabbing and everything together. It happened at the same time. So at the time, I must have been confused and angry."

About one week after the interview, on July 29, Sandoval received a call from AutoZone telling him to go to the Chula Vista store. When he arrived at the store, district

manager McFall and store manager Fisher told him he was fired "due to the . . . outcome of their investigation." He was given a form that stated he was being fired for "insubordination, conduct detrimental to AutoZone . . . and loss of confidence." He was not told the factual grounds for these conclusions.

At trial, Sandoval presented evidence that the Autozone store has video cameras that would have recorded the claimed buttocks-grabbing incident, but AutoZone made no effort to preserve or view the tapes.

During trial, AutoZone regional manager Daniel Merchant testified he made the final decision to terminate Sandoval based on Saucier's recommendation. He gave conflicting testimony on the reason for the termination. At one point, he agreed with Sandoval's counsel that "as far as [he] knew, if Mr. Sandoval had not made the complaint [referring to the buttocks grabbing], he would not have been fired." He also testified that he always viewed Sandoval's July 16 letter as a good faith complaint, and was never told that the complaint was made in bad faith. But he later testified on direct examination that no part of his decision to discharge Sandoval was based on the fact that Sandoval complained about harassment. When Sandoval's counsel later asked: "So, in essence, Mr. Sandoval was terminated because he submitted his complaint, as far as you knew?," Merchant responded, "Based on the first part of [his July 16] letter, the situation. [¶] . . . [¶] . . . Yes." Merchant also agreed that a failure to follow company policies and procedures may be a factor showing retaliation and agreed that Sandoval should have been told the specific reasons underlying his termination.

## *Defense Case*

AutoZone's defense theory was that it terminated Sandoval for valid business reasons because Sandoval engaged in a loud argument with Borquez while at work on July 16, and then refused Borquez's direction to discuss the matter in private in the back of the store. AutoZone claimed that Sandoval "made up" the buttocks-grabbing and finger-snapping incidents to protect himself from termination after he refused to follow his supervisor's directions and left the store in anger.

Borquez's testimony supported this defense. Borquez testified that on the night of July 16, he noticed an auto part that had been placed in the wrong bin. When Borquez asked Sandoval why that part was out of place, Sandoval "snapped"; "started yelling . . . and saying bad words . . ."; said he was not responsible for the misplaced part; and said he would leave if Borquez did not believe him. When Borquez tried to calm him down, Sandoval continued yelling in front of customers and used an " 'F' " word in Spanish. Borquez then raised his voice and asked Sandoval to go back to the manager's office to calm down, but Sandoval refused. In Spanish, Sandoval said "oh, fuck this, man. It wasn't me. I'm leaving . . . I'm fucking out of here." Sandoval then clocked out and left the store after taking the poster with the management contact information.

Borquez denied that on July 16 he snapped his fingers at Sandoval; said "piguale, piguale" to Sandoval; or that he had grabbed Sandoval's buttocks. Borquez also denied ever engaging in these behaviors. When asked whether he had ever touched Sandoval "[o]n [h]is [b]ehind," Borquez responded "Behind like shoulders . . . telling him good job one time . . ."

Gonzales (the coworker who witnessed the events) corroborated some of Borquez's testimony. Gonzales (who was a management employee at the time of trial) testified that Sandoval was angry and upset when he arrived at work. After Borquez asked Sandoval why he put the auto part in the wrong spot, Sandoval "snapped" and "starting cursing." Gonzales said at that point, Borquez "tried to convince" Sandoval to go into the back of the store to see if they could talk away from the customers, but Sandoval refused to agree to this request. Gonzales denied that Borquez yelled, grabbed Sandoval's buttocks, snapped his fingers, or said "piguale, piguale." But Gonzales acknowledged he was not standing in a position where he could see both of the men and may not have seen if the buttocks-grabbing incident had occurred. Gonzales also acknowledged that Borquez would sometimes touch employees on the back.

The centerpiece of AutoZone's defense at trial was to focus on the numerous inconsistencies in Sandoval's description of the relevant events over time. For example, in his initial July 16 letter, Sandoval did not state that Borquez had touched his buttocks earlier that evening, and instead claimed that Borquez had done so "for the last four weeks." Similarly, in his written responses to Saucier's questions, Sandoval did not state Borquez had touched his buttocks on July 16, and instead identified this conduct when discussing events that had occurred two weeks earlier. Additionally, at his deposition, Sandoval's description of the timing of the events was different from his trial testimony. For example, Sandoval testified at his deposition that: (1) on July 16, Borquez snapped his fingers only *after* Borquez grabbed his buttocks; (2) July 16 was the first time Borquez had snapped his fingers at him; and (3) Borquez accused him of putting the part

in the wrong place *after* the buttocks-grabbing incident.<sup>1</sup> Sandoval also indicated at his deposition that Borquez had grabbed his penis in addition to his buttocks. At trial, he denied that Borquez had ever touched his penis.

AutoZone district manager McFall (who reported to regional manager Merchant) said he was the one who made the decision to terminate Sandoval based on Saucier's recommendation. He said Sandoval was terminated because he yelled in front of customers and then refused to discuss the matter in a private setting. McFall testified he understood Sandoval was making a claim of sexual harassment and that sexual harassment is a serious issue in the workplace. McFall said he considered Sandoval's complaint to be made from a good faith belief that he had been the victim of unlawful harassment. He said AutoZone could not determine with "certainty" the validity of Sandoval's harassment complaint, and therefore AutoZone did not "write him up" for making a false complaint. However, McFall testified that he ultimately concluded Sandoval's sexual harassment claim may have been false, citing "Lack of witnesses. Inconsistency towards the store as well. It was only brought up after the event of July 16th. . . . And no other complaints against . . . Borquez."

#### *Jury Instructions and Verdict Forms*

At the outset of the trial, the court gave several preliminary instructions, one of which stated in relevant part:

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<sup>1</sup> At trial, Sandoval said that his trial testimony was the truth and he was confused when he gave his deposition testimony. Sandoval testified he was able to give better answers at trial because he understood and learned "a lot more" while preparing for trial.

"To assist you in your tasks as jurors, I will now explain how the trial will proceed. . . . [¶] Plaintiff alleges that Defendant terminated him in retaliation for accusing another male manager of sexually harassing him. Defendant contends that Plaintiff was terminated for reasons having nothing to do with a complaint of sexual harassment. [¶] First, each side may make an opening statement . . . . [¶] Next, the jury will hear the evidence. [¶] . . . [¶] *After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments. . . .*" (Italics added.)

At the conclusion of the evidence, the parties agreed on the instructions regarding the elements of the retaliation and wrongful termination claims. On the retaliation claim, the court instructed the jury:

"Mr. Sandoval claims that AutoZone retaliated against him for complaining to AutoZone about conduct Mr. Sandoval reasonably believed constituted unlawful harassment. To establish this claim, Mr. Sandoval must prove all of the following:

"1. That Mr. Sandoval reported to AutoZone conduct Mr. Sandoval reasonably believed constituted unlawful harassment;

"2. That AutoZone discharged Mr. Sandoval;

"3. That Mr. Sandoval's report of his opposition to unlawful harassment to a supervisor was a substantial motivating reason for AutoZone's decision to discharge Mr. Sandoval;

"4. That Mr. Sandoval was harmed; and

"5. That AutoZone's conduct was a substantial factor in causing Mr. Sandoval's harm."

On the wrongful termination in violation of public policy claim, the court instructed the jury:

"Luis Sandoval claims he was discharged from employment for reasons that violate a public policy. It is a violation of public policy for AutoZone to discharge Luis Sandoval because he complained to

his employer about conduct Luis Sandoval reasonably believed constituted unlawful harassment. To establish this claim, Luis Sandoval must prove all of the following:

- "1. That Luis Sandoval was employed by AutoZone;
- "2. That AutoZone discharged Luis Sandoval;
- "3. That Luis Sandoval notifying his employer that he reasonably believed he was unlawfully harassed by Daniel Borquez was a substantial motivating reason for Luis Sandoval's discharge; and
- "4. That the discharge was a substantial factor in causing Luis Sandoval harm."

These instructions were similar to the CACI retaliation instruction (CACI No. 2505) and the CACI wrongful termination in violation of public policy instruction (CACI No. 2430), except the CACI instructions provide brackets with directions to include a description of the particular "*protected activity*" (CACI No. 2505) or "*violation of public policy*" (CACI No. 2430). In the bracketed spaces, the given instructions referred to Sandoval's complaint about "unlawful harassment" without more specifically identifying the claimed *sexual harassment*.

The special verdict form also identified only "unlawful harassment," rather than "sexual harassment." For example, on the retaliation cause of action, the first question asked: "Did [Sandoval] engage in *protected activity* by complaining to defendant AutoZone about what he reasonably believed was *unlawful harassment*?" (Italics added.) The third question on the retaliation claim similarly asked: "Was Luis Sandoval's *opposition to unlawful harassment* a substantial motivating reason for AutoZone's decision to discharge Luis Sandoval?" (Italics added.) Likewise, on the wrongful

termination in violation of public policy claim, the verdict form asked whether "Sandoval *engage[d] in protected activity* by complaining to defendant AutoZone about what he reasonably believed was *unlawful harassment*?" and "Was Luis Sandoval's opposition to conduct he *reasonably believed was unlawful harassment* a substantial motivating reason for AutoZone's decision to discharge Luis Sandoval?" (Italics added.)

### *Closing Arguments*

In his closing argument, Sandoval's counsel urged the jury to find Sandoval proved his claims based on the evidence (Sandoval's testimony, the timing of the discharge, inconsistencies and bias in Borquez's testimony) showing AutoZone fired Sandoval for his complaints about "unlawful harassment" (without specifically identifying the nature of the unlawful harassment). In discussing the first verdict form question on the wrongful discharge claim ("Did Sandoval engage in protected activity by complaining to defendant AutoZone about what he reasonably believed to be unlawful harassment?"), counsel said the analysis is "easy" because "every single witness who took the stand acknowledged the fact that [Sandoval] complained about unlawful harassment."

Sandoval's counsel also argued that AutoZone's investigation of Sandoval's alleged misconduct was on its face incomplete and unfair (e.g., failure to notify Sandoval of the specific charges against him before the termination; failure to view the videotapes; requiring written answers to confusing questions), and argued the jury could infer from these facts that AutoZone had a retaliatory motive for Sandoval's complaints. Counsel also briefly noted the portion of the regional manager's testimony stating that Sandoval was terminated because he complained about his supervisor's harassment.

In his closing argument, defense counsel argued that Sandoval engaged in substantial misconduct by becoming angry and refusing to follow his supervisor's directions on July 16 and then "made up" the harassment story to protect his job and "bring down" Borquez. Defense counsel argued that AutoZone terminated Sandoval not because of the "alleged harassment," but because "of what [he] admit[s] [he] really did on July 16." Defense counsel also focused on Sandoval's numerous inconsistent statements about the relevant events.

When discussing the alleged wrongful harassment, defense counsel identified both the snapping of fingers and the buttocks-grabbing incident. Counsel denied any harassment had occurred, and argued that Sandoval "never had any reasonable belief that he was harassed." Regarding the special verdict question as to whether "Sandoval engage[d] in protected activity by complaining to [AutoZone] about what he reasonably believed was unlawful harassment," defense counsel stated: "If you find that Mr. Sandoval lied about being grabbed, lied about snapping fingers, you answer, no . . . ." Counsel also urged the jury to view regional manager Merchant's testimony in proper context and denied that Merchant admitted AutoZone terminated Sandoval for his harassment complaints. AutoZone's counsel additionally argued that AutoZone did not view or preserve the videotapes because Sandoval did not initially say the buttocks-grabbing incident had occurred on July 16 and was vague as to when it had occurred.

#### *Jury Questions*

On the afternoon of the first day of deliberations, the jury asked the following question: "We would like the transcripts of testimony from Sandoval, Gonzalez and

Borquez that relates to their recollection of events that took place on July 16th, 2010 [¶] - specific to part misplacement." (Capitalization omitted.) Pursuant to the court's direction, (and counsel's concurrence), the reporter then read the relevant portions of the transcripts.

The next morning, the jury sent a second note to the court stating: "We would like the legal definition of the below language. Definition: 'Unlawful harassment[.]' " At a hearing, the court asked whether either counsel had any comment on the note. Defense counsel requested the court answer the question by giving the jury three additional CACI instructions that define *actionable* sexual harassment: CACI Nos. 2522A, 2523, and 2524.<sup>2</sup>

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<sup>2</sup> CACI No. 2522A (entitled "Hostile Work Environment Harassment . . . Essential Factual Elements . . .") states: "[*Name of plaintiff*] claims that [*name of defendant*] subjected [him/her] to harassment based on [*describe protected status, e.g., race, gender, or age*], causing a hostile or abusive work environment. To establish this claim, [*name of plaintiff*] must prove all of the following: [¶] 1. That [*name of plaintiff*] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of employer*]; [¶] 2. That [*name of plaintiff*] was subjected to unwanted harassing conduct because [he/she] was [*protected status, e.g., a woman*]; [¶] 3. That the harassing conduct was severe or pervasive; [¶] 4. That a reasonable [*e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive; [¶] 5. That [*name of plaintiff*] considered the work environment to be hostile or abusive; [¶] 6. That [*name of defendant*] [participated in/assisted/ [or] encouraged] the harassing conduct; [¶] 7. That [*name of plaintiff*] was harmed; and [¶] 8. That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm." (Boldface font omitted.)

CACI No. 2523 (entitled " 'Harassing Conduct' Explained") states: "Harassing conduct may include, but is not limited to, [any of the following:] [¶] [a. Verbal harassment, such as obscene language, demeaning comments, slurs, [or] threats [or] [*describe other form of verbal harassment*];] [or] [¶] [b. Physical harassment, such as unwanted touching, assault, or physical interference with normal work or movement;] [or] [¶] [c. Visual harassment, such as offensive posters, objects, cartoons, or drawings;]

After the court and parties had a discussion off the record, the court stated: "We're back on the record. . . . [¶] [Defense counsel] referred me to three jury instructions that were not part of the jury instructions in this case. As I've informed both attorneys off the record and now on the record, the law does not allow for me to give post jury instructions in a case. So I will not refer them to those jury instructions. [¶] Additionally, as I've indicated to the attorneys, the . . . case law also does not allow the Court to define terms for the jury, even based on stipulations of the parties. So my recommendation . . . to respond to this note would be to refer them back to the jury instructions. And that's the best I can do." When asked for comments, neither counsel provided any response.

The bailiff then read the following response to the jury: " 'The Court, having received and reviewed Jury Note 2 and having conferred with counsel, now respon[ds] as follows: Please refer to the jury instructions.' " (Boldface font omitted.)

One hour later, the court held a second hearing at defense counsel's request. At the hearing, defense counsel stated he has "come up with some authority" supporting the "proposition that not only does the court have the power . . . to issue new instructions while the jury is deliberating [but] if the jury indicates confusion of the law, the court

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[or] [¶] [d. Unwanted sexual advances;] [or] [¶] [e. [*Describe other form of harassment if appropriate, e.g., derogatory, unwanted, or offensive photographs, text messages, Internet postings.*].]"

CACI No. 2524 (entitled " 'Severe or Pervasive' Explained") states: " 'Severe or pervasive' means conduct that alters the conditions of employment and creates a hostile or abusive work environment. [¶] In determining whether the conduct was severe or pervasive, you should consider all the circumstances. You may consider any or all of the following: [¶] (a) The nature of the conduct; [¶] (b) How often, and over what period of time, the conduct occurred; [¶] (c) The circumstances under which the conduct occurred; [¶] (d) Whether the conduct was physically threatening or humiliating; [¶] (e) The extent to which the conduct unreasonably interfered with an employee's work performance."

must provide additional guidance." The court replied that supplemental instructions would be proper only if there is "some confusion on the law" and there did not appear to be any jury confusion. The court then asked for Sandoval's counsel's view. Sandoval's counsel responded: "[T]o the extent that the court is saying that, as a matter of law, you are precluded [from giving an additional instruction], that is not correct. However, [the proper response to the jury's question about] unlawful harassment would be [CACI No.] 2523." Sandoval's counsel said defense counsel's proposed instruction concerns proof of harassment, which is not an issue in the case: "So it would be actually more correct to put it in instructions defining a protected activity or an instruction indicating that the harassment complaint, if believed, would be protected activity or, as I indicated, just defining the [CACI No.] 2523 harassing conduct."

The court replied: "There has not been an instruction in this case that was inadvertently omitted. We went through the instructions twice, not once, and you did not ask for that instruction. That instruction was never brought up in one fashion or another. [¶] And as far as defining any further instruction information, I don't find, at this juncture, there is any need to do that, so I'm declining to do anything further."

Sandoval's counsel said: "I wanted to note, for the record, to the extent it matters at any point later, at least there was congruence between the plaintiff and defendant with regard to [the CACI No.] 2523 instruction, but no other agreement as to the other instructions identified by defendant." AutoZone's counsel then added: "Your Honor, because you have just touched on the reasons why the instructions were not given initially, the reason was—is that there is no claim for sexual harassment and it would be

inappropriate, under normal circumstances, to include those jury instructions. But now the jury wants to know . . . ." The court then interrupted and said: "I have already made my ruling and you both argued. [¶] . . . [¶] . . . That's all I can do at this point."

Several hours later, the jury returned a special verdict in Sandoval's favor on the retaliation and violation of public policy claims. Of relevance here, on both claims the jury answered "Yes" to the following questions: (1) "Did [Sandoval] engage in protected activity by complaining to defendant AutoZone about what he *reasonably believed was unlawful harassment*?"; and (2) "Was Luis Sandoval's *opposition to unlawful harassment* a substantial motivating reason for AutoZone's decision to discharge [Sandoval]?" (Italics added.) The jury awarded Sandoval \$20,640 for "[l]ost earnings," but awarded no damages for claimed emotional distress. The jury also found Sandoval did not prove a basis for punitive damages.

AutoZone moved for a judgment notwithstanding the verdict and for a new trial. On the new trial motion, AutoZone requested the court to exercise its authority as a " 'thirteenth juror' " to enter a defense judgment based on Sandoval's lack of credibility. AutoZone additionally raised a multitude of claimed legal errors, including that the court erred in failing to provide a supplemental instruction in response to the jury question. The court denied the motions, noting only that it found Sandoval basically credible despite that he was impeached on various matters.

## DISCUSSION

AutoZone contends the court erred by failing to instruct the jury on the meaning of "unlawful harassment" in response to the jury question. We agree and determine the error was prejudicial.

### I. *Court Erred by Failing to Provide Guidance to Jury in Response to Jury Question*

In a civil case, it is counsel's duty to propose reasonable and proper jury instructions on all legal theories advanced in the case. The court's instructional duties are generally discharged if the jury has been instructed on all elements of the parties' claims and the court has ruled on the parties' requested instructions. (See Code Civ. Proc., § 607a; *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 553; *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686; *Roberts v. City of Los Angeles* (1980) 109 Cal.App.3d 625, 630.)

But if the jury asks a question during deliberations reflecting confusion or misinterpretation, a trial court may have additional obligations to ensure proper instruction. Specifically, if the jury's question indicates the original instructions were inadequate regarding the essential elements of a claim, it is " 'incumbent on the trial court to give [supplemental] instructions . . . so that the jury w[ill] have a full and complete understanding of the law applicable to the facts.' [Citation.] 'The responsibility for adequate instruction becomes particularly acute when the jury asks [for] specific guidance.' [Citation.]" (*Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 387; accord, *Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 498; see *Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 226-227.)

Sandoval brought his Fair Employment and Housing Act (FEHA) retaliation claim (Gov. Code, § 12940, subd. (h)) and his common law wrongful discharge in violation of public policy claim based on a single factual theory: AutoZone terminated his employment based on his complaint about conduct he reasonably believed to be sexual harassment (the July 16 buttocks-grabbing incident).

A reasonable belief that Sandoval had been *sexually harassed* was a necessary element of this claim because an employee must establish a connection between the claimed FEHA *protected activity* and the adverse action. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) Specifically, to be actionable, the employee's complaint must have been about an employment practice made unlawful by the FEHA. (Gov. Code, § 12940, subd. (h) [discharge must be because employee "opposed . . . practices forbidden *under this part . . .*," italics added ]; *Yanowitz, supra*, at p. 1042; see Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2015) ¶ 5:1506, p. 5(II)-8.) Although the employee need not prove the matter complained about was in fact unlawful under the FEHA, the employee must show a reasonable and good faith belief the matter constituted unlawful conduct under the FEHA (here, unlawful sexual harassment). (*Yanowitz, supra*, 36 Cal.4th at p. 1043; *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 209; see *Trent v. Valley Elec. Assn. Inc.* (9th Cir. 1994) 41 F.3d 524, 526-527.)<sup>3</sup>

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<sup>3</sup> These same rules apply to Sandoval's wrongful termination in violation of public policy claim. As Sandoval's counsel acknowledged at trial, these claims were essentially identical. Generally, if a termination would not be unlawful under the FEHA, the

In this case, the jury was not told that the "unlawful harassment" must be unlawful conduct under the FEHA (i.e., the sexual harassment). A more specific instruction was critical because Sandoval complained about several different "harassment" actions by his supervisor: (1) Borquez snapped his fingers at him and said "piguale" in a derogatory manner; (2) Borquez wrongfully accused him of putting an auto part in the wrong bin; and (3) Borquez once grabbed his buttocks.

Only a termination for the third complaint is cognizable under the FEHA. If an employee is fired for complaining about personnel rules or unfair treatment unconnected to conduct made unlawful by the FEHA, the claim is not actionable. (*Lewis v. City of Fresno* (E.D.Cal. 2011) 834 F.Supp.2d 990, 1002-1003; *Pieszak v. Glendale Adventist Medical Center* (C.D.Cal. 2000) 112 F.Supp.2d 970, 993-994; see *Jurado v. Eleven-Fifty Corp.* (9th Cir. 1987) 813 F.2d 1406, 1412; see also *Barber v. CSX Distrib. Servs.* (3d Cir. 1995) 68 F.3d 694, 701-702; *Lanagan v. Santa Cruz County Metro Transit Dist.* (N.D.Cal., May 4, 2010, No. C09-01835 HRL) 2010 WL 1838984, at \*5-\*6.)

Because the jury was not instructed on an essential element of Sandoval's claim—that the wrongful termination must have been triggered by a complaint about activity made unlawful by the FEHA (in this case, a complaint about sexual harassment)—and the jury specifically asked for a definition on this issue, the court erred in failing to clarify this issue for the jury. A correct response to this question was simple. The court needed only to tell the jury that "unlawful harassment" refers to the alleged buttocks-

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termination does not offend fundamental public policy. (See *Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1323; see also *Silo v. CHW Medical Foundation* (2002) 27 Cal.4th 1097, 1108-1109.)

grabbing incident, and not to any other form of claimed harassment. Alternatively, the court could have instructed the jury that to establish the retaliation and wrongful discharge claims, Sandoval was required to prove he complained about conduct that he reasonably believed to be sexual harassment, and that he was terminated for complaining about *this* behavior.

## II. *AutoZone Did Not Forfeit Its Right to Raise Error on Appeal*

Sandoval contends AutoZone "waived its right to appeal the issue of instructional error" because it failed to proffer a correct clarifying instruction.

We agree with Sandoval that AutoZone's proposed clarifying instructions would not have provided appropriate guidance. The proposed CACI instructions (CACI Nos. 2522A, 2523, 2524) pertained to *actionable* sexual harassment, i.e., the necessary elements to *recover* on a sexual harassment claim. These instructions were not given in the initial instructional phase, and to read these instructions in response to the jury's narrow question would have muddled the issues and created further jury confusion and uncertainty. The focus of the jury's attention needed to be on whether Sandoval had a *reasonable belief* he had been *sexually harassed* and was fired for complaining about that conduct, not on whether the technical elements of sexual harassment under the FEHA were satisfied. (See *Kelley v. The Conco Companies, supra*, 196 Cal.App.4th at p. 209; *Trent v. Valley Elec. Assn. Inc., supra*, 41 F.3d at pp. 526-527.)

Although a court in a civil case generally has no duty to modify a proposed incorrect instruction (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 684-685 (*Bullock*)), a court has greater duties when responding to a jury's specific request

for guidance. If the "trial court has given instructions which are inadequate" or are missing information that leaves "the jury without a full understanding of the law applicable to the case, and this lack of understanding is brought to the attention of the court by the jury's request for further guidance . . . 'the court [is] not relieved of the responsibility to properly instruct the jury on the controlling legal principles' " merely because the instructions proffered by the parties " 'were either faulty or inadequate.' " (*Bartosh v. Banning, supra*, 251 Cal.App.2d at p. 387.)

These principles apply here. Because the jury expressed a lack of understanding on an essential element of a claim, the court was required to provide a clarifying instruction. Defense counsel preserved the issue by making clear his position that the jury needed instruction on the meaning of "unlawful harassment," and Sandoval's counsel agreed that at least some additional instruction was necessary. The court erred by refusing to reasonably consider these arguments, and instead prematurely curtailed the discussion by stating it had already made the decision to refer the jury to the previously given instructions. By specifically asking for a clarifying instruction, AutoZone did not forfeit its right to assert the error on appeal.

These circumstances distinguish this case from the cases relied upon by Sandoval on the forfeiture issue. (*Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62 (*Cox*); *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108 (*Bayerische*)). *Cox* is inapposite because it did not concern the need to respond to a specific jury question showing confusion on an essential element of the plaintiff's claim. (*Cox*, at pp. 70-83.) *Bayerische* is factually distinguishable because the reviewing court

found the trial court improperly relied on juror declarations in finding juror confusion. (*Bayerische*, at p. 1126.) The *Bayerische* court also found the jury was properly instructed and the special verdict form was not confusing or unclear, and therefore "the failure to clarify the special verdict question cannot justify a new trial." (*Ibid.*)

### III. *AutoZone Met its Burden to Establish Prejudicial Error*

A reviewing court may not reverse a judgment for instructional error unless there is a reasonable probability the error prejudicially affected the verdict. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 (*Soule*); *Morales v. 22nd District Agricultural Assn.* (2016) 1 Cal.App.5th 504, 525; *Bullock, supra*, 159 Cal.App.4th at p. 685.) "A 'reasonable probability' in this context 'does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.' [Citation.]" (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682, italics omitted.)

The appellant has the burden to show prejudicial error. (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 347-348.) Because the "determination depends heavily on the particular nature of the error, . . . [a]ctual prejudice must be assessed in the context of the [entire] trial record." (*Daum v. Spinecare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1313.) Relevant factors include: "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule, supra*, 8 Cal.4th at pp. 580-581.)

Although the question is a close one, on our careful examination of the entire record, we conclude there is a reasonable probability the jury would have reached a

different conclusion on Sandoval's retaliation-based claims if the jury knew the only protected conduct was Sandoval's complaint he had been sexually harassed.

The undisputed evidence showed that Borquez and Sandoval had a conflict on the evening of July 16; Sandoval immediately complained to his supervisors about Borquez's behavior; and Sandoval was terminated soon after his complaint. According to Sandoval's evidence, his complaint concerned three distinct types of "harassment": (1) Borquez's wrongfully accusing him of misplacing the auto part; (2) Borquez's snapping his fingers at Sandoval; and (3) Borquez grabbing Sandoval's buttocks.

Although the evidence was stronger on the first two incidents, the issues whether Borquez had ever grabbed Sandoval's buttocks and whether Sandoval reasonably believed he had been the victim of *sexual harassment* were sharply disputed. Unlike the other types of claimed harassment, Sandoval was impeached multiple times on the issue whether the buttocks-grabbing had ever occurred, and there was convincing evidence for a factfinder to conclude Sandoval had not proved *this* claim and instead had manufactured the buttocks-grabbing incident to protect himself from termination. On this record, it is reasonably likely the jury found Borquez treated Sandoval unfairly only by snapping his fingers in a derogatory manner and/or falsely accused him of misplacing an automobile part, and that Sandoval was fired for complaining about *these* actions. These latter findings alone would not legally support Sandoval's causes of action.

The jury's direct question seeking a definition of "unlawful harassment" additionally makes clear the jury was grappling with the issue of identifying the particular conduct that appropriately responded to the special verdict questions. Reading

this jury question together with the jury's request for a rereading of the misplaced-automobile-part testimony, the most reasonable conclusion is that the jurors were distinguishing among Sandoval's behaviors and wanted to understand which of the behaviors could legally constitute "unlawful harassment." Significantly there were no other jury instructions or statements made during closing arguments that would have clarified the issue for the jury. Although the court initially told the jury in the preliminary instructions that the case concerned sexual harassment, this instruction also contained a statement that the jury would be instructed on the law "*after*" the evidence has been presented. (Italics added.) We thus cannot reasonably conclude the jury would have understood the legal concept based on this preliminary instruction.

From the outset of the trial, the court and counsel expressed an understanding of the critical factual issue to be litigated at trial (whether Sandoval was fired for making a complaint about his reasonable belief he had been sexually harassed). However, this understanding was never communicated to the jury. When the jury raised the issue by seeking a definition necessary to understand the factual question before it, the court needed to provide further instruction. Without this additional instruction, we have no confidence the jury answered the correct question in the special verdict form. Given the sharply conflicting evidence at trial regarding whether Sandoval had a reasonable belief the sexual harassment occurred, it is reasonably likely the jury would have reached a different outcome if it had received a proper supplemental instruction.

DISPOSITION

Judgment reversed. The parties to bear their own costs on appeal.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.